Anatomy of treaty-based regimes

Anatomía de los regímenes basados en tratados

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Abstract: Treaty-based regimes, as the principal institutionalized form of inter-state cooperation, constitute the primary sources of authority in international law, yet they fundamentally reflect the paradigm of intergovernmental functionalism. Examination of their secondary rules, together with the observation of functionalist practice, shows that special regimes are inherently constrained by internal (or contextual) primacies—limitations that persist despite attempts to incorporate broader public rationalities. Whether operating individually or collectively, they remain structurally ill-suited to effectively ensure the consistency of international rules and decisions. Far from marginal, this issue has constitutional significance, as treaty-based regimes constitute the principal form of international authority today.

Keywords: treaty-based regimes; international authority; global public goods and values; intergovernmentalism; functionalism; secondary rules.

Resumen: Los regímenes basados en tratados, como principal forma institucionalizada de cooperación interestatal, constituyen las fuentes primarias de autoridad en el derecho internacional, aunque reflejan fundamentalmente el paradigma del funcionalismo intergubernamental. El examen de sus normas secundarias, junto con la observación de la práctica funcionalista, muestra que estos regímenes están intrínsecamente limitados por primacías internas (o contextuales); restricciones que persisten a pesar de los intentos de incorporar racionalidades públicas más amplias. Ya se consideren de forma individual o colectiva, estos regímenes siguen estando estructuralmente mal equipados para asegurar de manera efectiva la coherencia de las normas y decisiones internacionales. Lejos de ser una cuestión menor, este problema tiene relevancia constitucional, dado que los regímenes basados en tratados constituyen hoy la principal forma de autoridad internacional.

Palabras clave: regímenes basados en tratados; autoridad internacional; bienes y valores públicos globales; intergubernamentalismo; funcionalismo; normas secundarias.

I. Do governments misrepresent states?

1. While international law is conventionally described as a unitary and internally coherent normative system, it is more accurately understood as a loose constellation of regimes—most notably, a

[1] This paper is dedicated to Professor Calvo Caravaca, exemplary in scholarship and mentorship.

general, custom-based regime (general international law) alongside a range of specialized regimes: the general regime of international law) and a variety of special treaty-based regimes (special international law). At their current stage of development, the special regimes of international law maintain an uneasy relationship —both with one another and with the general regime— due to the absence of comprehensive general procedural integration. There are no general international organs and procedures to formally and authoritatively administer the relationships between the general regime of international law and special regimes as well as between special regimes themselves. That is, the general regime of international law is not procedurally integrated with the multiplicity of special treaty-based regimes, nor the latter are procedurally integrated with each other (general procedural integration). Unsurprisingly, questions of international legal consistency together with standard rule of law considerations thus arise with the emergence of so-called treaty-based regimes.

2. To better understand this situation, it is helpful to first consider what these specialized regimes are, what they do, and how they function. The following pages explore these questions by drawing on insights from analytical legal theory. Before delving into the specifics, it is important to recognize that modern states are far from monolithic; besides constitutional organs traditionally associated with the separation of powers —such as the government, legislature, and tribunals— public authority is increasingly exercised through a variety of disaggregated sub-state, intra-governmental, and independent regulatory entities. This disaggregation mainly results from the specialization of public law and policy, in which authority is distributed across multiple specialized bodies rather than concentrated solely within traditional constitutional branches.

3. Beginning in the last quarter of the nineteenth century and continuing into the early twentieth century, states faced mounting pressure to disaggregate and specialize public authority in response to growing social and economic complexity. The emergence of administrative agencies epitomizes this broader transformation in the architecture of state power. These entities were deliberately established to facilitate the granular formulation and implementation of public policy by disaggregating traditional governmental departments and were granted both rulemaking and adjudicative functions.[2] These agencies operate not only as instruments of specialized administration but also as bodies empowered to promulgate regulations and adjudicate disputes, thus blurring, to some extent, the conventional boundaries of the separation of powers and the system of checks and balances.[3]

4. With the advent of the so-called *regulatory state*, administrative agencies received parliamentary authority to advance policy objectives within the four corners of their specialized legislation.[4] In analytical legal terms, administrative agencies were originally established to reinforce selected primary

[2] The diffusion and adaptation of regulatory models, as well as the emergence of 'regulatory capitalism,' are discussed in J. Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008); D. Levi-Faur, 'The Global Diffusion of Regulatory Capitalism,' 598 *Annals of the American Academy of Political and Social Science* (2005): 12–32; and J. Jordana, D. Levi-Faur, and X. Marín, 'The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion,' 44 *Comparative Political Studies* (2011): 1343–69. For foundational studies of global regulatory networks and the regulation of corporate capitalism, see J. Braithwaite /P. Drahos, *Global Business Regulation* (Cambridge University Press, 2000) and, particularly, S. Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2011).

[3] Bureaucratic specialization and legal-rational authority constitute foundational features of modern states, as set forth by M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, 1922). For the challenges posed by the hybrid functions of administrative agencies to the classical separation of powers, and the adaptation of accountability mechanisms, see S. Cassese, "Administrative Law without the State? The Challenge of Global Regulation," 37 *New York University Journal of International Law and Politics* (2005): 663–694. A flexible and functional understanding of the separation of powers in the context of administrative agencies is discussed in C.R. Sunstein, 'Separation of Powers Is a They, Not an It,' *Harvard Public Law Working Paper* No. 24-15, 2024.

[4] See G. Majone, (ed) *Deregulation or Re-regulation?* (Pinter Publishers, 1990), pp. 1–6 (introduction) and G. Majone. 'The Rise of the Regulatory State in Europe.' 17 *West European Politics* (1994): 77–101. On the concept of the 'regulatory state' —characterized not only by the delegation of authority to administrative agencies, but also by the diffusion of regulatory capacity across networks involving state, market, and civil society actors —see Colin Scott, 'The Regulatory State and Beyond,' *Regulatory Theory: Foundations and Applications*, ed. P.Drahos (ANU Press, 2017), pp.265–280.

rules of the domestic legal system —and, by extension, the public goods and values those rules regulate— through the application of special secondary rules within defined subject-matter domains.[5] In this sense, these agencies were typically endowed with a measure of autonomy from other public authorities, achieved by conferring upon them their own special secondary rules of change (S2RCs) and adjudication (S2RAs): these rules operate alongside, and thereby complement, the general rules of change (G2RCs) and adjudication (G2RAs) vested in legislatures and courts. That is, although administrative agencies create rules and adopt decisions, these remain subject to the overarching rulemaking authority of the legislature and the adjudicative authority of the courts, respectively.

5. This domestic institutional pattern—typically affording agencies a degree of *relative autonomy* vis-à-vis other public authorities—has been, in part, replicated and transposed to the international sphere within selected subject-matter domains such as trade, health, culture, security, and the environment, among others, through the establishment of *special* treaty-based regimes. The practice of establishing administrative agencies to govern selected public goods and values is therefore not fundamentally different from the creation of treaty-based regimes in specific subject-matter domains. That is, there is a reasonable correlation between the rationale for establishing domestic governmental agencies and that underpinning *intergovernmental* functionalism in the institutionalization of international law.[6] This parallel suggests that the functionalist approach to institution-building within international law finds its analogue in the rationale guiding the creation of domestic agencies.

6. In essence, and regardless of whether they constitute formal international organizations, special treaty-based regimes are treaties with an institutional dimension that enables them to administer specific subject-matter domains dynamically through their treaty bodies and the international rules and decisions they adopt. In order to advance the international dimension of governmental functions, states —acting through their governmental departments, ministries, and agencies, as appropriate within their respective systems of public administration— have incorporated into treaty-based regimes a regulatory toolkit that includes rulemaking, authorization, monitoring, inspection, enforcement, sanctioning, compliance promotion, adjudication, mechanisms for review and appeal, regulatory impact assessment, and avenues for public participation. Many of these standards and practices were significantly developed within states from the 1980s onward and have subsequently influenced the design and operation of treaty-based regimes.[7]

7. In accordance with prevailing doctrine and consistent state practice, the executive branch is generally recognized as bearing primary responsibility for conducting international relations and implementing international obligations on behalf of the state. Accordingly, while the establishment of a treaty-based regime is a matter of *formal* state consent —typically requiring parliamentary approval— its subsequent administration and day-to-day operation are primarily undertaken by governmental departments or administrative agencies actively engaged in the relevant policy domain. In this sense, the policy intermediation carried out by governmental departments and agencies within treaty-based

[5] The terminology of primary and secondary rules, drawn from H.L.A. Hart's *The Concept of Law* (1961), is further developed in Sections 3 to 5, where it is applied both to the functioning of the general and special regimes, as well as to their relation.

[6] On functionalism, see especially J. Klabbers, 'The Transformation of International Organizations Law,' 26 European Journal of International Law (2015): 9–82, which both sets out the foundations of functionalism and offers Klabbers's most systematic critique of its role as the dominant theory in international organizations law. See also Jan Klabbers, 'The Transformation of International Organizations Law: A Rejoinder,' 27 European Journal of International Law (2016): 549–562, responding to subsequent commentary; and Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism,' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar, 2011), 3–30, comparing functionalism and constitutionalism as competing theoretical approaches.

[7] The foundational work in regulatory theory is I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). For a comprehensive account of regulatory evolution, diversification of actors, and contemporary regulatory architectures, see P. Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press 2017).

regimes exerts a significant influence on their *functionalist* operations and outcomes, as reflected in the international rules and decisions they adopt.[8]

8. In the absence of overarching international bodies or procedures grounded in a general authority rationale, state consent undergoes a functional deconstruction through the routine operations of these specialized *international authorities*. By definition, formal international organizations and other treaty-based regimes, as Brölmann observes, disaggregate state consent.[9] Through specialized secondary rules of international law, a plurality of regimes has fostered the global disaggregation of the regulatory state. As a result, the practice of state consent has become dispersed across a multitude of treaty bodies, where the most active role in its ongoing articulation is typically assumed by specialized departmental representatives and officials, or by individuals designated by them.

9. Today, state consent in the international legal sphere derives not only from the formal acts of parliaments, heads of state, and foreign ministries, but also from a wide range of governmental bodies engaged across a multiplicity of special treaty-based regimes. Through their intermediation, numerous international rules and decisions —both binding and non-binding— are produced and subsequently reintegrated into the domestic legal sphere, often with the proactive involvement of the very governmental bodies that played a central role in their adoption.

10. Paradoxically, while operating primarily as institutional proxies for domestic bodies grounded in a specialized authority rationale, special treaty-based regimes often emulate the broader institutional legitimacy associated with (1) *parliamentarism* —manifested, for example, in plenary treaty bodies such as General Councils, Conferences of the Parties, or Meetings of the Parties[10]— and (2) *judicialization*, through the establishment of specialized adjudicative bodies within their treaty structures. In other words, although their institutional design and operation remain fundamentally rooted in the restricted authority rationales of governmental departments or administrative agencies, these regimes nevertheless emulate features characteristic of domestic organs founded on a general authority rationale, notably parliaments and tribunals.

11. Over the past century, extensive international cooperation has taken place within the four corners of a vast and multifaceted corpus of *special* secondary rules of international law. By contrast, efforts to progressively develop general secondary rules of international law have not produced general international legislation aimed at achieving the comprehensive procedural integration of special regimes. Within this prevailing general authority default, the United Nations General Assembly —a *general international organ* embodying a general authority rationale loosely analogous to legislation (i.e., general prescriptive jurisdiction), though its resolutions are in principle non-binding— and the International Court of Justice

[8] In treaty-based regimes, governmental departments and agencies retain a privileged status as primary actors, while other domestic public authorities are generally excluded from direct procedural involvement, with their interests channelled through domestic decision-making processes. Paradoxically, some regimes grant limited procedural standing to individuals or non-state actors, illustrating the distinct treatment afforded to public authorities versus private or civil society actors within intergovernmental practice. Non-state actors typically seek to influence these regimes indirectly—by lobbying responsible governmental bodies—or directly, where treaty provisions permit. Even when formal participation is allowed, however, processes often prioritize technical expertise and administrative considerations over broader forms of democratic deliberation. See R. Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading System,' 96 *American Journal of International Law* (2002): 94–117 (highlighting the legitimacy challenges posed by privileging technocratic decision-making over broader deliberation); and K. Raustiala, 'NGOs in International Treaty-Making,' in D. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2012), 150–174.

[9] The concept of 'disaggregation of consent' refers to the way in which international organizations move beyond the traditional model of unitary state consent by separating its various components and enabling institutions to operate and create legal obligations through mechanisms that do not depend exclusively on direct and explicit state approval. For a comprehensive analysis, see C. Brölmann, 'International Organizations and the Disaggregation of Consent,' in S. Besson (ed.), *Consenting to International Law* (Cambridge University Press, 2023), 100–116.

[10] Consistent with the logic of intergovernmental functionalism, these plenary treaty bodies can be seen, in some respects, as 'ministerial parliaments,' being composed chiefly of representatives from the same governmental department or policy sector.

—a *general international organ* grounded in the general authority rationale of adjudication (i.e., general adjudicative jurisdiction)— are not procedurally integrated with these functional international entities. This stands in contrast to domestic legal systems, where administrative agencies operate within integrated procedures and are subject to the authority and oversight of legislatures and courts. Consequently, these general international organs do not exercise direct authority over functional entities in the sense of adopting general international rules or decisions specifically directed at, and binding on, them.

12. Consequently, in the absence of general international organs endowed with prescriptive and adjudicative jurisdiction over specialized treaty-based regimes, the general authority default has inevitably favoured the accretion of a multiplicity of procedurally unintegrated regimes across diverse issue areas, each tending to assert centrality —and thus normative primacy— within its respective subject-matter domain.[11] This default model of global decision-making, characterized by the accumulation of layered special treaty-based regimes without higher integrating organs or procedures, constrains the prospects for new multilateral treaty-making through regulatory entrenchment, and may partly account for recent debates over the so-called 'stagnation' of multilateralism.[12]

13. In this sense, the advancement of intergovernmental functionalism—manifested in the proliferation of successive layers of special treaty-based regimes—has arguably undermined the effectiveness of multilateralism. Specifically, it has inhibited the integrated development of its two necessarily interdependent dimensions: the general regime of international law and the special regimes of international law (i.e., special treaty-based regimes). Put simply, while the general regime has not produced *constitutional* treaty law and organs, special regimes have generated, at best, a form of *administrative* treaty law and organs—functioning as quasi-global agencies within a general authority void. As a result, multilateralism has become increasingly marked by inter-regime divergences and inconsistencies, which may further erode its effectiveness and, ultimately, its capacity to operate and sustain itself under such conditions.

14. In this state of affairs, although multilateral treaty-making remains the most legitimate form of public international authority, it now stands at its lowest ebb in decades. Yet, somewhat paradoxically, rather than embarking on substantive efforts at general multilateral regime-building, some governments —particularly those with significant geopolitical leverage— appear instead to pursue a compensatory strategy for the relative stagnation of multilateral treaty-making —a strategy that cannot, by its very nature, succeed— by resorting to contractualized treaties, as well as by more actively participating in so-called global regulatory networks.

15. Irrespective of the challenges and dilemmas associated with these managerial practices of public authority, it is arguably the very foundation of intergovernmental functionalism that restricts the collective capacity to deliberatively govern world affairs in the general interest of the international community. By its own logic, functionalism resists the consolidation of general international law, organs, and procedures, and in doing so limits the scope for advancing general authority rationales. This outcome is scarcely surprising, given that, across both modern and contemporary history, the executive branch has seldom been either the architect or the principal advocate of the separation of powers and checks and balances. Accordingly, a global order grounded in intergovernmental functionalism —such as the current one— can reasonably be understood as structurally resistant to the development of comprehen-

[11] From an organizational perspective, the problem has long-standing roots. Even at the height of international administration, its 'coordination machinery' —to use Luard's term— was beset by conflicts and coordination problems among UN agencies and international organizations more broadly, including duplication and overlapping of functions and programs. See E. Luard, *International Agencies: The Emerging Framework of Interdependence* (MacMillan Press / Royal Institute of International Affairs, 1977), pp. 264–287. For a concise overview, see P. Zapatero, 'Little Islands: Limits and Prospects of the United Nations Chief Executives Board,' 7 *Cuadernos de Derecho Transnacional* (2015): 369–380.

[12] See, in particular, Pauwelyn, J., Wessel, R. A., & Wouters, J., 'When structures become shackles: Stagnation and dynamics in international lawmaking' 25 *European Journal of International Law* ((2014): 733–763.

sive general authority structures within the international sphere, since such structures would inevitably recalibrate, and perhaps diminish, the centrality of governments (as distinct from states and their other constitutional organs) in the decision-making processes of the international community.

16. Over time, special regimes have evolved along their respective paths, each promoting particular global public goods and values, yet without the proper infrastructures to balance them against one another and integrate them into a consistent whole. As a result, these goods and values are increasingly perceived not only as unevenly distributed but also as insufficiently balanced. Such asymmetries —consolidated over decades of advancing intergovernmental functionalism within a general authority void— may raise the transaction costs of developing new multilateral rules, as each regime entrenches itself around the global public goods and values it regulates, and may also erode trust in international institutional law and its dispersed legal architectures.

II. Treaty-based regimes as the elemental form of *international authority*

17. Special treaty-based regimes are the primary institutional and legal embodiments of intergovernmental functionalism and can be regarded as the predominant institutional form of international law in contemporary practice. From the standpoint of general legal theory, examining these regimes makes it possible to assess critically how their institutional design and normative foundations can, on the one hand, foster international legality within specific subject-matter areas, while, on the other, constrain the broader advancement of the rule of law across international law as a whole.

18. Since the first quarter of the twentieth century, inter-state policy coordination through special treaty-based regimes has become increasingly pervasive.[13] The remarkable proliferation of such regimes in the post-World War II period reflects the rapid expansion of intergovernmental cooperation, as governments progressively embraced international functionalism—understood as institutionalized collaboration in discrete policy areas such as trade, human rights, and the environment, among others. This development stems from the disaggregation of the regulatory state into treaty-based entities that incorporate elaborated secondary rules of adjudication and change within selected domains.[14]

19. These functional entities, constructed through international law and operating as coordinating proxies of states, represent a major and sustained trend in the institutionalization of the international community.[15] Their emergence reflects a compromise born of states' inability to merge their sovereignties into a common political order capable of delivering the 'cooperative functions in modern international life'.[16]

20. A common feature of treaty-based regimes is that participants define performance expectations in accordance with a ruleset.[17] In the canonical definition from political science, regimes are 'sets of implicit principles, norms, rules, and decision-making procedures around which actors' expectations

[13] Friedmann made the classic doctrinal distinction between the 'international law of coexistence' and the 'international law of cooperation' in *The Changing Structure of International Law* (1964). He emphasised the transformation that took place from the second half of the 20th century onwards: the shift from an international society of coexistence to one of cooperation. The growth of international institutions reflects a compromise between the inability of nation states to coalesce their sovereignties into a common political order and the increasing recognition of cooperative functions as intrinsic to modern international life. See W. Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964).

[14] See sections 3 to 6 below.

[15] See for example T. Franck, 'Three Major Innovations of International Law in the Twentieth Century', *Quinniapac Law Review* (1997):139-156.

[16] W. Friedmann, 'The Changing Dimensions of International Law', *Essays on International Law from the Columbia Law Review* (Columbia University Press, 1965), p.104 and 110.

[17] See e.g. A. Stone Sweet, 'What is a Supranational Constitution?', 56 *The Review of Politics* (1994): 448.

converge in a given area of international relations.'[18] Entities established around the treaty form have also been described, alternatively, as 'autonomous legal orders,'[19] 'autonomous institutional arrangements,'[20] or 'continuing treaties,'[21] among other depictions. Regardless of nomenclature, and whether or not they take the form of formal international organizations, their common denominator is the exercise of public authority through treaty bodies, with a degree of *relative autonomy*.

21. Interestingly, the case law of both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) has addressed the position of treaty-based regimes within international law. The PCIJ referred to regimes in its very first judicial decision in 1923, the *SS Wimbledon* case.[22] Decades later, in 1997, the ICJ elaborated further on this notion in the *Gabčíkovo-Nagymaros* case, holding that the relationships between the parties in a regime are 'above all' regulated by the treaty operating as *lex specialis*.[23] As Casanova y la Rosa explains with regard to this judgment, a regime is created when the basic treaty establishes a set of rules designed to be progressively supplemented by subsequent treaties and internal acts, which are to be applied jointly, as a unit.[24]

22. The main objective of a treaty-based regime is to advance the *selected* global public goods and values contained in its set of rules, which gravitate around the *object and purpose* of the treaty text. Thus, these entities primarily operate and evolve to follow function on the base of their own rules, decisions and practices.[25]

23. The *special secondary* rules of treaty-based regimes predefine the types of legal solutions expected to emerge from their procedures. Regime bodies are primarily designed to perform —and thus to follow— their functions. This has been the logic of intergovernmental functionalism in international law for decades, structurally embedded in the secondary rules of special treaty-based regimes. As Keohane and Nye observe, regimes were conceived as 'decomposable hierarchies' governing specific issue areas and designed to keep other branches of government out.[26] In other words, unless their provisions indicate otherwise, treaty-based regimes tend to construct their own hierarchies in a self-referential mode.[27]

24. Traditionally, when depicted through the Kelsenian pyramid, each special treaty-based regime would appear as a distinct triangle with its own internal normative hierarchy culminating in an apex. It is the secondary rules of these regimes —and thus their rulemaking and adjudicative procedures— that structure them as normative pyramids. Building on this conception, the multiplicity of special

[18] S. Krasner, 'Structural causes and regime consequences: regimes as intervening variables', *International Regimes* (Cornell University Press 1983), p.2.

[19] M. Sørensen. 'Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International Organisations in the World Legal Order', 32 *International and Comparative Law Quarterly* (1983): 559-576.

[20] R. Churchill and G. Ulfstein, 'Autonomous institutional arrangements in Multilateral Environmental Agreements: A little-noticed phenomenon in international law', 94 *American Journal of International Law* (2000): 647-655

[21] J. Pauwelyn, 'The Role of Public international law in the WTO: How far can we go?', 95 *American journal of international law* (1995): 546.

[22] The judgement analysed the regime governing the Kiel Canal under Articles 380–386 of the Treaty of Versailles, which internationalized the canal and mandated free passage for all nations, including during wartime. See S.S. Wimbledon (U.K., Fr., Italy, Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 23–24 (17 Aug. 1923).

[23] The regime was established by a bilateral treaty between Hungary and Slovakia for the regulation of a hydroelectric dam on the Danube River. See *Case concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, paras. 132, 144, 145, 147.

[24] O. Casanovas and la Rosa, 'Unidad y Pluralismo en el derecho internacional', op.cit.p.97

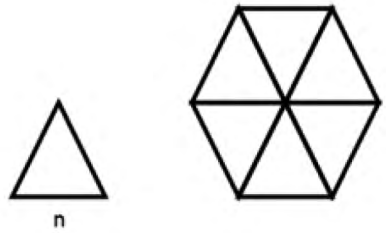
[25] See A. Chayes & A. Hadler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements* (Harvard University Press 1995).

[26] See Robert O. Keohane and Joseph S. Nye, 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy', *Efficiency, Equity, and Legitimacy. The Multilateral Trading System at the Millennium* (Brookings Institution Press 2001) at 264.

[27] For a broader discussion of self-reference in international law, see P. Zapatero, 'Self-reference in international law,' *Eunomia* (forthcoming).

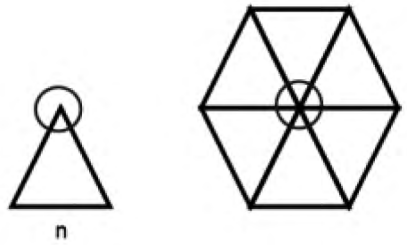
treaty-based regimes may be visualized as a set of adjacent triangles—each representing the normative pyramid of a separate regime, with their apexes touching:

Figure 1**. A polyarchy of n treaty-based regimes.**



25. In this representation, the global public goods and values projected by the objects and purposes of the regimes, together with their most significant primary rules, converge at the centre. This point of convergence may be seen as the current legal epicentre of the aggregate global public goods and values regulated by treaty-based regimes. Indeed, it is an important point of attention for public law:

Figure 2. **Current legal epicentre of global public goods and values.**



26. However, these special treaty-based regimes are not subject to any general procedural integration under international organs and procedures guided by a general authority rationale. Instead, they are shaped by the discretionary elaborations of states—particularly their governments—which tend to reflect prevailing priorities and circumstances rather than a systematic, general regime-building approach. As a result, there are evident and inevitable overlaps between subject-matter domains, and thus in the prescriptive and adjudicative jurisdictions established to administer them.

27. Therefore, at its most favourable, the conceptual systematization of the institutional construct of international law may be described as a plurality of treaty-based regimes, each establishing its own internal hierarchy through its institutional practices and respective rulebook, while simultaneously overlapping with one another in the exercise of international authority.

28. Although Article 103 of the UN Charter — commonly referred to as the supremacy clause — and some other treaty conflict clauses have been formally established, institutional practice nonetheless reveals an overlapping polyarchy of treaty-based regimes. Alignment among these regimes remains problematic, as each regime's organs, applying their own ruleset, tend to treat the rules of other regimes as hierarchically subordinate in their operations of legal application and interpretation (*internal primacies*).[28]

29. The implications of this situation should not be overlooked. Under such conditions, the technocratic coordination of regimes and the exercise of aggregate international authority remains problematic and may raise legitimacy concerns, particularly in balancing global public goods and values.

[28] See more specifically, section 9.

Building on the earlier discussion, the primary challenge stems from the composite character of special regimes: they constitute not only specialized normative systems of treaty law but also institutional structures whose treaty organs exercise authority over their rules. By adopting subsequent rules and decisions, these organs assume a central role in shaping the implementation and further development of their respective regimes.

30. Treaty-based regimes constitute relatively autonomous normative systems of international law that operate not only as (a) sets of rules but also as (b) entities and (c) fora. Accordingly, the ways in which regimes interact —normatively (rule), institutionally (entity), and jurisdictionally (forum)— have significant implications for the coherence of international law and for the exercise of international authority:

Table 1. **Categories of regime interaction.**

Issue A: rules	Issue B: entities	Issue C: *fora*
normative interaction	Institutional interaction	Jurisdictional interaction
(normative relations)	(institutional relations)	(jurisdictional relations)

31. In rule-of-law terms, three closely interrelated questions emerge as a logical consequence of the differing and, at times, diverging perspectives that treaty-based regimes may adopt regarding the issues they collectively regulate and administer:

1) What *general* rules govern the resolution of formal conflicts between their rules (regimes as sets of rules)?
2) Where lies the *general* authority to address institutional conflicts (regimes as entities)?
3) Where lies the *general* authority to adjudicate conflicts of prescriptive and adjudicative jurisdiction among them (regimes as fora)?

32. In principle, conflicts between regimes can be understood in three dimensions: as an antinomy, as institutional tension, and as jurisdictional conflict. These interactions are central to the consistency of international law and to the exercise of international authority. Established by means of special secondary rules of international law, the consistency of the multiplicity of existing treaty-based regimes —as rules, entities, and fora— remains a central and unresolved question for the international community:

Table 2. **Three basic dimensions of conflict in treaty-based regimes.**

Antinomy	Institutional conflict	Conflict of fora
Normative dimension	Institutional dimension	Jurisdiccional dimension

33. Since special regimes are neither procedurally integrated with one another nor with international bodies embodying a general authority rationale —such as the United Nations General Assembly or the International Court of Justice— the practice of intergovernmental functionalism through special treaty-based regimes raises challenging questions. These regimes are not collectively integrated into any consistent procedural construct that could meaningfully contribute to advancing the rule-of-law standard within the international community. In the current interdependent world, the absence of such general procedural integration has implications for the consistency of international law and authority, and thus for the long-term sustainability of the rule of law.

III. Applying analytical legal theory to treaty-based regimes

34. The plurality of existing treaty-based regimes underscores the relevance of comparative

international law[29] and points to the need to analyze treaty design through shared analytical categories. Using Hart's conception of a legal system as a union of primary and secondary rules, as developed in *The Concept of Law* (1961),[30] provides an analytical framework of particular relevance for examining the impact of treaty-based regimes on the structure and functioning of international law, in continuity with previous analyses.[31]

35. Hart's distinction between primary and secondary rules is especially useful for examining the emergence of secondary rules within international law.[32] From a Hartian perspective, a legal system is best conceived as a union of primary rules—which prescribe, prohibit, or permit certain conduct—and secondary rules, which confer authority to identify, modify, and enforce those primary rules. Specifically, secondary rules—namely rules of recognition, change, and adjudication—govern the establishment, modification, and application of primary rules. In essence, they are 'rules about rules,' or power-conferring rules, that regulate the operation and evolution of primary rules. As Hart observed, the development of secondary rules represents a step forward 'as important to society as the invention of the wheel.' [33]

36. The Hartian distinction between primary and secondary rules is particularly valuable for understanding international legal processes. This framework enables a nuanced analysis of treaty-based regimes in relation both to the general regime of international law and to other special regimes. Each of these regimes—whether general or treaty-based—comprises its own set of primary and secondary rules. The *general* regime of international law is characterized by general primary and secondary rules, whereas each treaty-based regime establishes its own specific primary and secondary rules. As a result, the international legal order may be understood as comprising a general regime of international law alongside a multiplicity of special regimes, each of which, in principle, operates autonomously (relative autonomy) while maintaining a certain functional articulation with the general regime. In analytical le-

[29] For early contributions to the conceptualization of comparative international law, see M. Koskenniemi. 'The Case for Comparative International Law,' 20 *Finnish Yearbook of International Law* (2009): 1-32, B. Mamlyuk and Mattei, U. 'Comparative International Law. 36 *Brooklyn Journal of International Law* (2011): 385-452 and A. Roberts and Stephan, P. B., Verdier, P.-H., and Versteeg, M. 'Comparative International Law: Framing the Field', 109 *American Journal of International Law* (2015): 467-474 as well as A. Roberts, Paul B. Stephan, Pierre-Hugues Verdier and Emilia Versteeg, eds. *Comparative International Law* (Oxford University Press 2017).

[30] H. L. A. Hart, *The Concept of Law* (Oxford University Press 2012) first published 1961 (Chapter 5). Jeremy Waldron arguably contended that public international law remained the sole significant legal domain that has not been thoroughly investigated and elucidated by scholars working within the Hartian analytical legal philosophy. See J. Waldron, 'Hart and the Principles of Legality', in M.H. Kramer *et al.* (eds), *The Legacy of H.L.A. Hart* (Oxford University Press 2008), at 67 and J. Waldron, 'International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?', *Reading H.L.A. Hart's "The Concept of Law",* (Oxford University Press 2013), pp.209–227.

[31] A decisive moment came with the International Law Commission's 2006 Report on the fragmentation of international law (finalized by Martti Koskenniemi and the ILC Study Group). The Report clarified that special regimes are not strictly self-contained and provided a doctrinal framework to integrate them into the general regime, thereby situating the debate within the argumentative practice of international law. At the same time, the ILC expressly decided not to address institutional questions, including special secondary rules of adjudication: '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' (Fragmentation Report, para. 245, p. 177). See ILC, Report of the International Law Commission, 58th sess., UN Doc. A/CN.4/L.682 (2006), reprinted in *YBILC* 2006, vol. II(2), 1–479. For a classic account of international law as an argumentative practice, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005; first published 1989).

[32] In a different vein, for a critical analysis of Hart's approach to international law, see I. Brownlie, 'The Rule of Law in International Affairs'*, International Law at the Fiftieth Anniversary of the United Nations. The Hague Academy of International Law* (Martinus Nijhoff 1998), pp.3-8, G. Abi Saab, 'Cours général de Droit international public', 207 *RCADI (*1987) VII, pp.119-126, and G. Gottlieb, 'The Nature of International Law: Toward a Second Concept of Law', *The Future of the International Legal Order,* vol IV, *The Structure of the International Environment* (Princeton University Press 1972), pp.331-383. More recently, in particular, see Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart,' 21 *European Journal of International Law* (2011): 967–995; and Carmen E. Pavel, 'Is International Law a Hartian Legal System?' 31 *Ratio Juris* (2018): 307–325.

[33] H. Hart, *The Concept of Law,* op.cit. p.43.

gal terms, the taxonomy of primary and secondary rules that results from this configuration may be set out as follows:

Table 3.0**. A taxonomy of international primary and secondary rules.**

***General* rules of international law** (1 General regime of international law)
G1R (rights and obligations)
G2R*r* (recognition)
G2R*a* (adjudication)
G2R*c* (change)
***Special* rules of international law** (*n* Special regimes of international law)
S1R (rights and obligations)
S2R*r* (recognition)*
S2R*c* (adjudication)
S2R*s* (change)

37. Building on these general observations regarding the significance of secondary rules within treaty-based regimes, and given their centrality to the overall structure of international law, it is now appropriate to turn to each of the main types of secondary rules identified by Hart, drawing on his analytical framework to examine those aspects of special regimes where it offers valuable insights. The analysis begins with the rule of recognition, which serves as the foundational criterion for the identification and validation of legal norms, and then proceeds, in subsequent sections, to the rules of adjudication and change.

IV. When special regimes proceed *as if* under a distinct rule of recognition

38. The precise locus of the rule of recognition in international law has long been a subject of sustained scholarly inquiry. Over the decades, various candidates have been proposed—among them customary international law,[34] the principle of *pacta sunt servanda*, and the status of states as members of the international community.[35]

39. For the purposes of this study, the precise definition of the rule of recognition in international law is not the central concern.[36] Rather, the focus is on the fact that special regimes of international law

[34] See, for example, *First Report on the Law of Treaties* (March 24, 1953) in Documents of the 5th Session [1953] 2 Y.B. Int'l L. Comm'n 90, 155-56, UN Doc. A/CN.4/63 at 106: ('The binding force of treaties is independent of the will of the State which conclude them in the exercise of their sovereignty. Their binding force and other basic conditions of their operation are grounded in customary international law') or H. Kelsen, *Pure Theory of Law* (University of California Press, 1967), p.216 ('The basic norm of international law, therefore, must be a norm which countenances custom as a norm-creating fact, and might be formulated as follows: The states ought to behave as they have customarily behaved.').

[35] See, for example, T. Franck, *The power of legitimacy among nations* (Oxford University Press 1990) at 190 ('obligation derives not from nations' consent but from their status as members of a community of rules') and Franck, T. 'Legitimacy in the International System?', 82 *American Journal of International Law* (1988) at 753 ('obligation is perceived to be owed to a community of states as a necessary reciprocal incident of membership in the community.')

[36] Hart originally appears to question a rule of recognition in international law (*The Concept of Law,* 1961) but, in 1968, hesitantly concedes that the notion of recognition could be placed in the test of membership of the community of states. See H. Hart, 'Kelsen's Doctrine of the Unity of Law', *Essays on Jurisprudence and Philosophy,* 1983, 340 (originally published in *Ethics and Social Justice*, SUNY Press,1968): ('But we cannot leave out of sight more primitive arrangements: there may be no courts and no specialized enforcement agencies, and the application of sanctions for breach of the rules may be left to injured parties or their relatives, or to *the community at large*. International law, at least according to Kelsen, is itself such a decentralized system. Presumably, in such cases we shall have to use as our *test of membership the notion of recognition by the society or the community*, and certain problems in defining what constitutes sufficient recognition will have to be faced.')

tend to display convergent practices among their practitioners, reflecting a shared understanding of what constitutes valid law within those regimes. In practice, treaty-based regimes often operate *as if* endowed with their own rules of recognition—understood in Hartian terms as conventions among officials who accept certain criteria as authoritative standards for identifying binding norms and conferring powers. In this way, legal uncertainties are resolved through a common acknowledgment of legitimate sources.[37]

40. Representatives of governmental departments and international civil servants within treaty-based regimes may serve as Hartian 'officials' by collectively engaging in practices that establish criteria for identifying valid rules,[38] thereby giving rise to the rule through their acceptance of these standards as binding (i.e. Hart's internal point of view). Their adherence in practice to treaty provisions and institutional procedures exemplifies this Hartian concept.[39] Accordingly, it may be contended that special treaty-based regimes informally presuppose their own rule of recognition in practice: both individual and collective behaviour within these regimes is expected to conform to ascertainable standards of normative validity. It is the shared functional expectations and practices of the community of state representatives and international officials involved in the regime's administration that give rise to something akin to such a rule (as if a rule of recognition existed within the regime), as they collectively accept and apply these standards as authoritative criteria for identifying valid rules.

41. A treaty-based regime could not effectively exercise the functions attributed to it by states if the expert communities within its treaty bodies did not operate under such an informal assumption. Otherwise, it would be difficult for state representatives and international officials participating in the regime to adhere to the necessarily limited set of rules against which state conduct is to be assessed in light of the regime's *agreed functions*. In other words, it would likewise be challenging for the regime's bodies to adopt rules and decisions consistent with the shared expectations of practitioners and constituencies—expectations that, when collectively accepted and acted upon, give rise in practice, as noted, to something akin to a rule of recognition within the regime.

42. Were regime bodies to apply all international law in force —including both general international law and the rules or decisions of other special regimes— on an equal footing within their procedures, this would likely generate controversial legal outcomes within the regime. The reason is clear: such a practice would be inconsistent with the expectations within the regime regarding its *agreed functions*. These internal expectations—reflected in its object and purpose and articulated in its treaty provisions—logically foster a preference for the application of the regime's own rules within its procedures vis-à-vis those of general international law or other treaty-based regimes. That is, the application of such other international legal rules (and decisions) remains contingent upon a shared perception of alignment, and thus consistency, with the regime's rulebook. In sum, the expectations commonly held by a regime's practitioners and technocracies regarding its functions operate, in practice, as an informal rule of recognition for the regime. In this respect, drawing on Hart's concept of the rule of recognition helps illuminate both the internal logic and the limitations of treaty-based regimes—and, by extension, the broader dynamics of intergovernmental functionalism.

V. Special rules of adjudication as the driving force behind functionalism

43. Building on the informal and functional rule of recognition that underpins a regime, it is important to consider the mechanisms through which its primary rules are applied in practice. In Hartian

[37] H. Hart, *The Concept of Law*, op.cit. p.100 ('Its existence is a matter of fact; it is constituted by the actual practice of courts, officials, and others in identifying the criteria of legal validity.')

[38] Treaty-based regimes can be considered to form *meta-bureaucracies* since they are composed of their own bureaucracies and those of the bureaucracies of states in subject-matter domains. See H. Jacobson, *Networks of Interdependence. International Organizations and the Global Political System* (Alfred A.Knopf 1984), p.129.

[39] H. Hart, *The Concept of Law*, op.cit. p.57 and pp.89-91.

terms, the rules of adjudication in a legal system confer authority upon designated bodies to apply its primary rules by means of procedures of dispute settlement, administration, and enforcement. Although legal practitioners tend to conceptualize adjudication primarily in terms of courts, the secondary rules of adjudication encompass not only (1) dispute resolution, but also (2) the full range of public administrative functions and (3) law enforcement activities. All three mechanisms serve as channels through which the primary rules of a legal system are operationalized and given practical effect.

44. In other words, the secondary rules of adjudication within a legal system operationalize the primary rules through three interrelated functions: binding dispute settlement, administration, and enforcement. In this way, they establish and sustain the institutions that give effect to the primary rules. More generally, all bodies of public authority inherently embody secondary rules of adjudication (S2RA).[40] Therefore, the rules of adjudication within a special treaty-based regime are not limited to bodies where judges, arbitrators, panelists, lawyers, and other legal professionals traditionally perform their activities. Rather, they extend to the full spectrum of law-applying bodies operating within the regime, of which dispute settlement constitutes only one distinct aspect.

45. At the same time, these rules assume particular significance in the context of dispute settlement mechanisms, since such treaty bodies render final and authoritative determinations on the law governing their regimes. As a logical institutional consequence of functionalism, these qualified regime bodies preferentially refer to the regime's rules and decisions in their operations, often with the help — though not necessarily — of explicit *applicable rules*, inevitably 'managing' or limiting the degree of legal relevance accorded to external rules.[41] As Marschik notes, adjudicative bodies of special regimes may be inclined to assess infringement primarily within the confines of their own 'legal system,' without inquiring into whether a state measure was 'required under another subsystem.'[42] While this description captures a particular pattern, it underplays the fact that when external rules are invoked, they are typically accorded a subordinate position within the reasoning.

46. It is generally the case that dispute settlement mechanisms within treaty-based regimes refrain from applying the general rules of treaty conflict to their own treaty provisions in relation to the rules of other special regimes. This approach reflects a general reluctance to formally subordinate their internal rules to external sources of legal production unless expressly mandated in their rulebook (i.e. incorporation by reference), thereby preserving —if not maximizing— the relative autonomy of the regime's internal normative order. For that reason, special rules of adjudication (S2RA) within treaty-based regimes generally do not apply the general rules of treaty conflict to their own provisions. In other words, they typically do not apply general secondary rules of change (G2RC) to themselves but rather seek to avoid the emergence of antinomies and address such legal issues primarily by means of interpretation, as will be seen below.

47. This practice reflects a dual phenomenon common to law-applying bodies within treaty-based regimes: the granting of *preferential application* and *internal primacy* to their own regime's rules. Its clearest expression is found in the context of dispute settlement mechanisms, which, as the most authoritative sources of legal interpretation within treaty-based regimes, are expected to perform such outcomes as part of the regime's institutional practice. A synthesis of this development was provided by Charney at the conclusion of his general course at the Hague Academy of International Law in 1998:

[40] From an analytical legal perspective, all public institutions embody secondary rules of adjudication (S2RA). In this sense, whether situated within a state or a treaty-based regime, public bodies constitute forms of S2RA. This encompasses parliaments, governments (including administrative agencies and enforcement bodies), and judicial authorities, as well as the organs of treaty-based regimes—such as plenary bodies, commissions, dispute settlement bodies, and secretariats.

[41] See, below, Section 6.

[42] A. Marschik 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System' 9 *European Journal of International Law* (1998): 238.

> 'The various international tribunals examined do have their own agendas. They were formed to serve the interests of the States parties to the treaty regime that created them. Their allegiance to the treaty system may be greater than duties owed to the international legal system as a whole, even though the States that established the treaty regime may not have had that intention. These specialized tribunals present the risk that they will generate their own centrifugal forces that will drive them in directions away from the core of international law. As a result, they could develop greater variations in their determinations of general international law and damage the coherence of the international legal system.'[43]

48. Though open to debate in the context of the early 2000s discussions on the so-called fragmentation of international law,[44] Charney's assessment highlights an important issue: the influence of special secondary rules of adjudication on the consistency of each regime with both the general regime of international law and other special regimes is by no means a mere technicality. In this respect, the rules of adjudication within special treaty-based regimes shape the relative position of special and general primary rules of international law within the international community.

49. In this light, three questions are particularly relevant: (1) which international legal rules are expressly referenced among the so-called 'applicable rules' of these adjudicative bodies;[45] (2) what is the legal expertise of the individuals selected to apply these rules; and (3) how these professionals understand the public rationale underlying their role as adjudicators within the regime. As discussed above, the extent to which law-applying organs within special treaty-based regimes —including the most formal international adjudicative bodies— attribute legal relevance to the general regime of international law or to rules from other special regimes ultimately depends on the shared expectations regarding the regime's functions.

50. Therefore, the key point to underscore is that the applicability of rules not explicitly referred to in a regime's rulebook —whether originating from the general regime of international law or from other special regimes— is ultimately constructed through the regime's own secondary rules of adjudication and its institutional practices. The extent to which a regime defers to the general regime or to other special regimes is shaped not only by its formal rulebook, but also by the collective practices and shared expectations concerning its functions. As Sørensen explains, two basic types of references between regimes shape the legal outcome: (a) those embedded in the regime's own rules (strict incorporation by reference), and (b) those generated through adjudicative practices invoking the rules and decisions of other regimes.[46] The degree of openness of a regime to general or special international law is therefore defined by the interplay of these two factors—a dynamic that, especially in cases of perceived inconsistency, tends to favour the primacy of the regime's own rules.

VI.- Regulatory dynamism and special rules of change

51. Having examined adjudication and the role of secondary rules in shaping the functional boundaries of treaty-based regimes, it is now necessary to consider another dimension of their relative autonomy: the mechanisms through which these regimes adapt and evolve their rules over time. Rules of change within a legal system govern the procedures by which legal norms are amended, adopted, or repealed. Against this background, treaty-based regimes exhibit a considerable diversity of special rules of change (S2RC). While not all regimes display the same degree of dynamism in rulemaking, the

[43] J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', *Recueil des Cours. Collected Courses of the Hague Academie of International Law,* Tome 271, 1998, at 371 J. Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals', 31 *New York University Journal of International Law and Politics* (1999): 706.

[44] 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).

[45] See below, Section 7.

[46] M. Sørensen, 'Autonomous Legal Orders', op.cit.p.575.

existence of these rules introduces the possibility —whether actively exercised or merely latent— for adaptation and the development of new norms, beyond the adjudication of existing ones. In many cases, regimes include provisions for rulemaking procedures and may also serve as international fora for the negotiation and adoption of treaty law.

52. The potential for internal rule change, its uneven realization across regimes, and the capacity of some regimes to generate new legal norms through institutional bodies —without formally amending the treaty— all complicate the application of the general rules on treaty conflict to these regimes. This challenge of international law-making within regimes had already been noted by Morgenstern in the 1970s with respect to the so-called law-making treaties:

> '[The Vienna Convention on the Law of the Treaties (VCLT)] does not deal in any detail with the particular aspects of the 'law making treaties'; its approach is primarily based on the treaty as a contract between States. Article 5 safeguards the procedures and rules of different organizations regarding 'international legislation'; to the extent that what had been achieved under these procedures and rules was safeguarded. But, in a sense, *Article 5 is also abnegation; a multiplicity of legislatures was left, each to its own devices*.'[47]

53. Treaty-based regimes may include special rules of change that enable the adjustment and development of their primary and secondary rules. In some regimes, such changes occur with notable regularity —for example, at Conferences of the Parties— while in others they are less frequent or more constrained. In this context of relative normative dynamism, the application of the *lex posterior* maxim to favour later rules or decisions risks conferring structural predominance on the more dynamic regimes, to the detriment of less adaptive counterparts. This highlights a fundamental tension between the general rules on treaty conflict and the varied, and often dynamic, processes of rulemaking and decision-making within treaty-based regimes.[48] As Vierdag points out, the VCLT does not take sufficient account of the legal differences between treaty provisions and the rights and obligations that flow from them:

> 'Since the regulation of Article 30 is predominantly based on 'successive treaties', it does not solve questions of conflicts between earlier or later rights or obligations under different treaties… In so far as the rules contained in Article 30 approach the conflict as one between treaties, based on time of treaties, they cannot solve conflicts between concrete treaty rights and obligations. These have their own time which is not necessarily related to the times of the treaties involved'.[49]

54. This observation is particularly relevant, for example, with regard to the specification of rights and obligations through subsequent rules and decisions adopted within treaty-based regimes. In this context, the application of the general rules on treaty conflict to such subsequent rules and decisions is inherently problematic. Potential inconsistencies arising from these processes are difficult to resolve under the general rules on treaty conflict, since those rules were not designed to address the regulatory dynamism characteristic of treaty-based regimes.

55. Unsurprisingly, the difficulty of applying the general rules on treaty conflict to special regimes has been highlighted across various domains, including, to name traditional examples, multilateral trade law (on account of being subject to 'interrelated treaties'),[50] non-proliferation and arms control (due to the specificity of their amendment mechanisms),[51] and environmental protection (because of the dynamism of

[47] F. Morgenstern, 'International Legislation at the Crossroads', 49 *British Yearbook of International Law* (1978): 116.

[48] See, e.g., P. Zapatero, 'The Logic of Treaty Antinomy', in this issue.

[49] E. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty', 59 *British Yearbook of International Law* (1988): 105.

[50] H. Zheng, 'Defining Relationships and Resolving Conflicts between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT", 25 *Stanford Journal of International Law* (1988): 49.

[51] See E. Smith, 'Understanding Dynamic Obligations: Arms Control Agreements', *Southern California Law Review* 64 (1991): 1590 and 1575 and D. Koplow, 'When Is an Amendment Not an Amendment?: Modification of Arms Control Agreements Without the Senate', 59 *The University of Chicago Law Review* (1992): 981-1072.

their rules, acts, and the amendment of annexes),[52] among others. In sum, not only special rules of adjudication (S2RA), as explained in the previous section, but also special rules of change (S2RC) embedded within treaty-based regimes complicate the effective operation of the general rules on treaty conflict.

56. To complete this brief discussion on secondary rules of change, it is not only the regulatory dynamism of certain regimes that renders the application of the general rules on treaty conflict inherently problematic, but also the delegation of specific rulemaking functions within those regimes. Increasingly, the regulatory dynamism of regimes does not solely involve the direct production of rules by their own bodies, since their special rules of change (S2RC) may also delegate rulemaking to external rule-producers. This phenomenon may extend beyond the delegation of rulemaking among treaty-based regimes, resulting in the transfer of rulemaking authority to entities operating outside the treaty framework.

57. Therefore, the special rules of change in treaty-based regimes may allow the incorporation of *external* non-legal rules (i.e. standards) into hard law (i.e. treaty law) through the technique of *incorporation by reference*.[53] In other words, special rules of change may transform external soft rules —understood as non-binding rules— into rules *of* special international law. This is particularly evident where legal validity is conferred upon rules originating in non-legal normative systems, such as those administered by standard-setting organizations (SSOs). Such processes illustrate how treaty-based regimes, through their secondary rules of change, can affect the configuration of the sources of international law by incorporating alternative forms of rule production, as part of the phenomenon of meta-regulation.[54]

58. A significant normative transformation of international legal processes arises when the normative output of hybrid public–private entities, such as SSOs, obtains a measure of international legal validity under the terms and conditions prescribed in the provisions of special treaty-based regimes. An indirect reconfiguration of the formal sources of rule production in international law can increasingly be observed. By means of incorporation by reference into treaties, treaty drafters may effect a (re)delegation of special international lawmaking as they see fit. In this way, creative drafting in the rules of change of some treaty-based regimes can redefine the contours of international legal validity. Therefore, the exercise of international authority formally delegated by states to treaty-based regimes may be indirectly re-delegated or even de-delegated to non-public rule-making entities. Importantly, the *valid* sources of normative production prescribed by the rules of change in general international law come under strain, if not partial reconfiguration, by virtue of the special rules of change.

59. Under the principle of state consent, negotiating parties retain the discretion to delegate normative competence to non-state or non-public entities when drafting a treaty, provided that such delegation is confirmed (i.e., ratified) by parliament, as is generally required. This subsequently enables these actors to shape international legality within the prescriptive jurisdiction established by the treaty scheme.

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[52] For the early works see T. Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Systems', 1 *Yearbook of International Environmental Law* (1990): 56, R. Churchill and G. Ulfstein, 'Autonomous institutional arrangements', op.cit.pp.623-659 or C. Wold, 'Multilateral Environmental Agreements, op.cit.p.912.

[53] Conventionally referred to as the 'sources of international law,' the means by which international law is produced are typically associated with the applicable rules of the ICJ, codified in Article 38 of its Statute: (1) treaties, (2) customary international law, and (3) general principles of law as the principal sources, together with (4) judicial decisions and (5) scholarly writings as subsidiary means for the determination of rules of law. Notably, the practice of incorporation by reference, within the rules of change in special treaty-based regimes, can reconfigure the traditional sources of international law, insofar as treaty-making may, albeit indirectly, attribute international legal relevance to alternative forms of rule-production. These treaty-making patterns have their origins in domestic practices of the regulatory state and were subsequently adapted to the international level.

[54] For example, the incorporation by reference of SSO standards through the WTO TBT and SPS Agreements can be understood as a form of meta-regulation, whereby regulatory authority is delegated to private standard-setting bodies and subsequently monitored and enforced by public authorities. While Ayres and Braithwaite (1992) and Grabosky (2017) do not address treaties specifically, their conceptualization of meta-regulation provides a useful lens for analyzing this treaty-making pattern. See respectively: Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992), 4; Peter Grabosky, 'Meta-regulation', in *Regulatory Theory: Foundations and Applications*, ed. Peter Drahos (ANU Press 2017), 174–187.

In this context, when such rulemaking entities are formally recognized within the provisions of a treaty-based regime through incorporation by reference, their outputs become part of the regime's primary rules and thereby acquire the status of valid, and thus binding, international law for the states parties.

60. In light of the substantial challenges associated with treaty reform (i.e., formal amendment),[55] it is reasonable to expect that the design of special treaty-based regimes will increasingly incorporate more adaptable and flexible rules of change, thereby facilitating the integration of external non-legal normative systems into the sphere of international legal validity. This phenomenon is particularly evident, for example, in traditional trade treaty-making.[56]

61. The significance of these rulemaking practices for the evolution of public authority and ordinary legality—and, by extension, for the structure of the rule of law —should not be underestimated. Once a treaty is ratified by parliaments, the rule-making procedures —and thus the resulting normative outcomes— established by its special rules of change, particularly in relation to external rulemaking entities, operate beyond the reach of both parliamentary authorization and the regime's own bodies. Instead, they tend to fall under the managerial practices of external, non-state technocracies and experts.

62. In what is sometimes described as a 'late post-Westphalian' period,[57] international authority not only shifts from a system of highly autonomous states to one in which governments are embedded within treaty-based regimes, but also becomes entangled in complex regulatory networks that, rather than merely 'extending or dispersing authority,'[58] tend to blur—or even efface—authority, ordinary legality, and, by extension, the rule of law. The dynamics of this process are incisively articulated by Sol Picciotto, who shows how global regulatory networks fragment the traditional hierarchy of norms, intermix public and private regulation, and generate hybrid forms of governance that challenge established legal categories.[59]

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[55] That is, to paraphrase Hirschman, considering the growing possibility that some states may increasingly choose 'exit' over 'voice' or 'loyalty', reflecting a shift in the strategies nation-states employ in response to dissatisfaction with treaty-based regimes. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970) and Laurence R. Helfer, 'Exiting Treaties,' 91 *Virginia Law Review* (2005): 1579–1648, respectively.

[56] Particularly paradigmatic in this respect is WTO law. Through the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the WTO creates a regulatory safe harbour for Members that adopt recognized international standards, effectively shielding them from WTO challenges (SPS Article 3.1; TBT Article 2.5). Both Agreements require Members to base their domestic measures on relevant international standards, except where such standards would be ineffective or inappropriate for the protection of legitimate interests, or where a higher level of protection is scientifically justified (SPS Articles 3.1 and 3.3; TBT Article 2.4). Within this framework, the adoption of harmonized standards elaborated by international standard-setting bodies—such as food standards by the Codex Alimentarius Commission, animal health standards by the World Organization for Animal Health (OIE), and plant protection standards under the International Plant Protection Convention (IPPC)—is closely integrated into the WTO's rulemaking architecture. Through incorporation by reference, these standards acquire international legal relevance and operate as integral components of WTO law. See, generally, *Research Handbook on the WTO and Technical Barriers to Trade*, edited by Tracey Epps and Michael J. Trebilcock (Cambridge University Press 2013); and particularly G. Marceau and Joel P. Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods,' 36 *Journal of World Trade* 5 (2002): 811–881. For standardization, see Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2011); and for the Codex, in particular, M. Masson-Matthee, *The Codex Alimentarius Commission and its Standards* (TMC Asser Institute 2007).

[57] M. Zacher, 'The Decaying Pillars of the Westphalian Temple: Implications for International Order and Governance', *Governance without government: order and change in world politic*s (Cambridge University Press 1993), pp.98-99.

[58] H. Jacobson, *Networks of Interdependence,* op.cit.p.387.

[59] See especially: Sol Picciotto, 'The Regulatory Criss-Cross: Interaction between Jurisdictions and the Construction of Global Regulatory Networks' in W. Bratton, J. McCahery, S. Picciotto, and C. Scott (eds.), *International Regulatory Competition and Coordination* (Oxford University Press 1996), pp. 89–120 (explaining how global regulatory networks emerge from the complex interplay and overlap of national and international jurisdictions, leading to fragmented authority and hybrid forms of governance); Sol Picciotto, 'International Transformations of the Capitalist State,' 43 *Antipode* (2011): 87–107 (analyzing the fragmentation of state authority and the emergence of complex regulatory networks in the context of global capitalism);

63. Without entering into a detailed analysis of this phenomenon, even a cursory glance at the rapidly expanding 'population' of global regulatory entities and vehicles —identified, mapped, and conceptualized by political and social scientists in recent years— offers a vivid illustration of the profound challenges facing authority, ordinary legality, and the rule of law in our increasingly interdependent world.[60] It is nonetheless reasonable to suggest that multilateral legislation —and, by extension, treaty-based regimes— should, in certain respects, refine their approaches to exercising regulatory authority rather than merely delegate rulemaking functions. This is particularly salient given that public oversight of the legitimacy, accountability, and quality of standardization and other private regulatory initiatives is often less than optimal, leaving such processes vulnerable to deficits of transparency and integrity. From a public perspective, at least, this approach appears justified.

VII. The bottle neck of applicable rules

64. Having outlined the three categories of secondary rules within treaty-based regimes in general terms, and following the framework of analytical legal theory, it is now appropriate to turn to a more detailed consideration of the rules of adjudication. Building on the preceding discussion of rules of change and the dynamic character of treaties, the following section examines how rules of adjudication engage with—and help determine—the applicability of international law in force. As Ian McNair famously remarked, 'there is more international law than the world can dream of,'[61] a statement that acquires particular resonance in light of the current plurality of international adjudicative bodies.

65. Amid an international legal environment of growing complexity and density, the challenges posed by specialized international adjudication should not be underestimated, as the matters at stake may concern 'virtually every conceivable rule and concept of international law.'[62] In principle, as Casanovas y la Rosa observes, the application by adjudicative bodies of rules from the general regime as well as from special regimes would merely reflect the 'normative pluralism of a basically unitary international legal order,' provided it is pursued with sufficient expertise.[63] Yet the implications of specialized adjudication reach well beyond the availability of knowledgeable adjudicators capable of engaging with the vast and ever-expanding corpus of international law(s):

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and, more broadly, Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2011), a monumental and insightful analysis of the evolution of global regulatory networks and their impact on legal categories.

[60] Reflecting what could be described as a 'Cambrian explosion' of institutional forms, recent political and social science scholarship has proposed and elaborated a diverse array of analytic categories—including 'regime complexes' (Raustiala and Victor, 2004), 'transgovernmental networks' (Slaughter, 2004), 'transnational public–private partnerships' (Andonova, 2010, 2017), 'informal intergovernmental organizations' (Vabulas and Snidal, 2013, 2020), 'supercluster complexes' (Kim and Morin, 2021), 'hybrid institutional complexes' (Abbott and Faude, 2022), and the broader notion of international regime complexity (Alter and Raustiala, 2018; Alter & Nelson, 2024). See, respectively: K. Raustiala, and Victor, D. G., 'The Regime Complex for Plant Genetic Resources,' 58 *International Organization* (2004): 277–309; A. Slaughter, *A New World Order* (Princeton University Press, 2004); L.B. Andonova, 'Public-Private Partnerships for the Earth: Politics and Patterns of Hybrid Authority in the Multilateral System,' 10 *Global Environmental Politics* (2010): 25–53; L.B. Andonova, *Governance Entrepreneurs: International Organizations and the Rise of Global Public-Private Partnerships* (Cambridge University Press, 2017); F. Vabulas, and D. Snidal. 'Organization Without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements' 8 *The Review of International Organizations* (2013): 193–220; R. Kim and JF Morin 'Massive Institutional Structures in Global Governance: A Bird's-eye View of the Trade-Environment Supercluster Complex', 21 *Global Environmental Politics*, (2021): 26–48 and K. Abbott, and Faude, B., 'Hybrid Institutional Complexes in Global Governance,' 66 *International Studies Quarterly* (2022): 1–14; K. Alter, and Raustiala, K., 'The Rise of International Regime Complexity,' 14 *Annual Review of Law and Social Science* (2018): 329–349; K. Alter, and Nelson, S. C., 'Global Governance in Time: Institutional Sequences, International Regime Complexes, and the Politics of Global Governance,' 76 *World Politics* (2024): 379–416.

[61] R. Jennings, 'The Judiciary, International and National, and the Development of International Law', 45 *International and Comparative Law Quarterly* (1996): 6.

[62] T. Wilhelmsson, 'Legal Integration, op.cit.p.134.

[63] O. Casanovas and la Rosa, 'Unidad y Pluralismo' op.cit.pp.95-96.

1. Knowledge on the rules of general international law,
2. Knowledge on the rules of their own special regime and
3. Knowledge on the rules of the rest of special regimes.

66. Certainly, when the rules of an external regime are integrated into the adjudicative procedures of another, adjudicators inevitably enter less familiar terrain.[64] The difficulty, however, lies not merely in their status as insiders to some regimes and outsiders to others,[65] nor in their varying knowledge of international law. Rather, it stems from the fact that, by definition, intergovernmental functionalism does not assign the application of external, non-referred rules as a primary responsibility of any special treaty-based regime, and thus not as part of its core functions and operations.

67. Not incidentally, the procedures of international adjudication are constrained not only by the formal rules of the regime but also by the government departments and agencies that crafted those rules, and whose representatives and senior officials participate in them on behalf of the state. As noted, their collective perceptions of regime functions often reflect the public goods and values associated with the domestic departments they administer. These perceptions inevitably shape how adjudicative bodies within those regimes apply other rules of international law.

68. While shared understandings among practitioners provide important context, it remains essential to examine the operation of the rules of adjudication themselves, given their central role in enabling regime functions. Each dispute settlement mechanism serving a special treaty-based regime operates on the basis of procedural rules that delineate the legal perimeter within which disputes are resolved. These secondary rules of adjudication govern fine procedural requirements and are often set out in treaty provisions specifying the 'applicable law' or 'applicable rules' of the relevant adjudicative mechanism.

69. In other words, the operations of a special adjudicative jurisdiction differ from those of a general adjudicative jurisdiction such as the International Court of Justice (ICJ).[66] For the World Court, the *applicable law* consists of the generally accepted sources of international law codified in Article 38 of its Statute—namely, any relevant rule of international law produced by those sources. By contrast, the applicable law of specialized dispute settlement mechanisms tends to prioritize regime rules, thereby excluding the applicability of inconsistent, non-referenced external rules. In consequence, not all rules within the broader universe of international law are accorded the same procedural status (and thus treated on *equal footing*) within these bodies as those explicitly referenced in the provisions of their treaty-based regimes: by definition, regime adjudicators give precedence to their own regime's rules and decisions, apply other *compatible* international rules and decisions only secondarily, and prevent the application of *incompatible* rules not formally incorporated into the regime rulebook.

70. The institutionalization of international law into subject-matter domains—namely, into special treaty-based regimes—inevitably generates a distinction between *internal* and *external* norms. Whether or not all of international law is, in principle, deemed applicable within a given regime—a proposition that is neither straightforward nor always practicable—the reality is that rules not explicitly

[64] Oda, S. 'The International Court of Justice Viewed from the Bench (1976/1993)', *Recueil des Cours. Collected Courses of the Hague Academy of International Law*, Tome 244, 1993, pp.144-145.

[65] The diversity of legal backgrounds among individuals selected to serve on specialized adjudicative bodies may nevertheless help to mitigate some of the general institutional weaknesses inherent in treaty-based special regimes. The inclusion of a significant number of individuals with expertise in other areas of international law can, to some extent, temper the overly predefined institutional behaviour often associated with international functionalism. See P-M. Dupuy, 'Sur le maintien ou la disparition de l'unité de l'ordre juridique international', *Harmonie et contradictions en droit international*, Rencontres internationales de la Faculté des Sciences Juridiques, Politiques et Sociales de Tunis (Editions A. Pedone 1996), pp.38-39.

[66] G. Guillaume, 'The Future of International Judicial Institutions', 44 *International and Comparative Law Quarterly* (1995): 861-862.

referenced become, for its organs, at best *applicable external rules* vis-à-vis *applicable internal rules*. And this distinction is not without implications.[67]

71. In essence, treaty-based adjudicative bodies selectively apply *compatible external rules* while excluding *incompatible* ones. Despite variations in institutional practice across regimes, any inconsistency between regime and external rules is precluded ex officio. In short, treaty-based regimes are structured to prevent the emergence of inconsistencies between internal and external rules at the level of legal application. Accordingly, incompatible external rules are set aside, whether they constitute *lex specialis*, *lex posterior*, or both. Where potential conflicts are formally raised —by parties, adjudicators, or other actors— they are typically reframed as apparent rather than actual conflicts, and resolved through interpretative techniques; in other words, they are interpreted away.[68]

72. In normative terms, the adjudicative bodies of special treaty-based regimes effectively serve as gatekeepers of regime rules, issuing authoritative interpretations that define and delimit them. Drawing on their regime's rulebook —and especially on procedural rules— they construct their own normative hierarchy, establishing internal (or contextual) normative primacies centred on the provisions of their respective treaty frameworks. In this setting, the formally applicable rule functions as a *bottleneck*, enabling the systematic exclusion of potentially *inconsistent* external rules.

73. The self-attribution of *internal primacy* is the logical by-product of international functionalism. Mainly accessed by the governmental departments and agencies with competences in the subject-matter domains for which they exercise adjudicative jurisdiction, these adjudicative bodies are designed to follow function and thus structurally aligned with the functional objectives of the regimes in which they are embedded. In the absence of any procedural integration of these special adjudicative bodies with the general adjudicative jurisdiction of an international court (e.g. ICJ), they inevitably develop self-referential perspectives of international legality made of special international law. In other words, these specialized bodies adopt decisions —and thereby solutions— grounded in the strictly *contextual* (or internal) primacies of the treaty-based regime.

74. In this context, the pragmatic course for adjudicative bodies is to set aside any antinomy in the conduct of their legal operations. International adjudicators are well aware that they cannot resolve a treaty antinomy impartially and objectively within the procedures of a specialized regime—let alone in a manner that accords primacy to external rules. Fundamentally, resolving treaty conflicts, whether by prioritizing the regime's own provisions or those of another, risks provoking political backlash—from the external regime or from their own, depending on the course taken. This explains why international adjudicative practice has long favoured a presumption against treaty antinomy, relying on interpretative techniques to reframe such situations as mere 'apparent conflicts.' In effect, antinomies are *interpreted away* and thus excluded from the mainstream of international legal reasoning.[69]

VIII.- The limits of so-called *systemic integration*

75. Against this background, interpretation emerges as not only fundamental to the practice of international law within institutionalized settings (such as international adjudicative bodies or other law-applying organs)—a point that scarcely requires emphasis—but also as a crucial second-order arena for preserving, expanding, or constraining the rationales underlying special regimes. Through interpretative

[67] In practice, this institutional behaviour closely resembles that of a domestic administrative agency. The critical distinction, however, is that the rules and decisions of the latter —and thus the outcomes of their application and interpretation— remain subject to the higher authority of constitutional state organs, including the legislature, the judiciary, and the constitutional court. By contrast, treaty-based regimes lack such equivalent organs.

[68] For an account of the operation, see Section 9 below.

[69] See e.g. P. Zapatero, 'The logic of …op.cit.

processes, treaty-based regimes may either open themselves to or insulate themselves from the rules of general international law, as well as from those of other special regimes.

76. Interpretation therefore assumes paramount importance in the institutional operations of both traditional international courts and tribunals and the adjudicative bodies of treaty-based regimes.[70] A paradigmatic illustration is the so-called constitutional interpretation of constitutive treaties in international organizations. By orienting internal legal practice around a regime's own ruleset,[71] constitutional interpretation —as an institutional practice that accords significant weight to teleological reasoning— can in effect produce a relative distancing from the general rules of treaty interpretation enshrined in the VCLT. This interpretative approach often yields regime-building outcomes that, while reinforcing internal coherence, also extend the autonomy of the special regime.[72]

77. Leaving aside, for present purposes, the constitutional interpretative approaches developed within certain international organizations —which undoubtedly complicate the openness of special regimes in relation to both the general regime of international law and other special regimes— this section examines the constructive interpretative techniques that, in recent years, have attracted growing scholarly and judicial attention as means of facilitating the so-called *systemic integration* of international legal rules in light of the general interpretative framework of the VCLT.[73]

78. Technically, the interpretative framework of the VCLT facilitates taking into account the broader universe of relevant international legal rules, whether or not they are formally referred to in the applicable rules of a given adjudicative body or incorporated by reference into the regime rulebook in which it is embedded. The reason is straightforward: Article 31(3)(c) of the VCLT —within the broader framework of Articles 31 and 32— requires *taking into account* 'any relevant rule of international law *applicable* in the relations between the parties' (emphasis added) in the operation of treaty interpretation (emphasis added). Accordingly, the so-called general rules of interpretation in international law are positively understood to facilitate the integration of external rules into the decision-making processes of treaty-based adjudicative organs.

79. In a nutshell, the doctrine of systemic integration facilitates the incorporation of external legal rationales into the adjudicative processes of specialized treaty-based regimes. Under this understanding, rules not explicitly incorporated by reference in a regime's rulebook are nonetheless preserved

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[70] On the diverging interpretative approaches, methods and choices of international courts and tribunals see, in particular, J. Weiler, 'The Interpretation of Treaties – A Re-examination Preface' 21 *European Journal of International Law* (2010): 507–512 and Pauwelyn, Joost and Manfred Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals', *Interdisciplinary Perspectives on International Law and International Relations*, edited by Jeffrey Dunoff and Mark Pollack (Cambridge University Press, 2013), pp. 445–473.

[71] See i.e. T. Sato, *Evolving Constitutions of International Organizations. A Critical Analysis of the Interpretative Framework of the Constituent Instruments of International Organizations* (Kluwer Law International 1996), pp.231-233 (chapter 5 in particular). On constitutional interpretation in international organizations see also C. E. Amerasinghe, *Principles of the International Law of International Organizations* (CUP, 2005), pp.24-65. On the topos of constitutionalization see A. Peters 'The Constitutionalisation of International Organisations' in N. Walker, J. Shaw and S. Tierney (eds), *Europe's Constitutional Mosaic* (Hart 2011), pp. 253-285.

[72] This does not necessarily imply a wholesale contracting-out of the VCLT rules of interpretation. Rather, it often reflects a selective or expansive emphasis on a regime's functions or on its object and purpose, which may, depending on the adjudicative body, coexist with the general interpretative rules. It should be noted, however, that in some instances the practice of constitutional interpretation may approach what Sato characterizes as an operation of legal modification. See T. Sato, *Evolving Constitutions*, op. cit.

[73] For an original formulation of the concept as 'systemic integration', see Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention,' 54 *International and Comparative Law Quarterly* (2005): 279–320. For a comprehensive and updated treatment, see Campbell McLachlan, *The Principle of Systemic Integration in International Law* (Oxford University Press, 2024). For a critical and in-depth monographic analysis, see Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill/Martinus Nijhoff 2015). For an overview and further references, see Panos Merkouris, 'Principle of Systemic Integration,' *Max Planck Encyclopedia of International Procedural Law* (2020).

in adjudication through the operation of interpretation regulated by the VCLT. This forms the underlying rationale for international legal interpretation encapsulated in the principle of systemic integration.

80. For a considerable period, as Philip Sands observes, there was marked reluctance to engage with the practical implications of Article 31(3)(c) in international adjudication.[74] In 1971, the International Court of Justice stated that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of its interpretation,'[75] without referring to the recently adopted, though not yet in force, VCLT. It would take another three decades before Judge Weeramantry, in his separate opinion in the *Gabcíkovo-Nagymaros* case, observed that Article 31(3)(c) provides a means of addressing the relationship between different international legal rules—referring specifically to the interplay between treaties and customary law. He nonetheless noted that the provision 'scarcely covers this aspect with the degree of clarity requisite to so important a matter.'[76]

81. This initial hesitancy is further illustrated by the fact that, as ICJ Judge Torres Bernárdez recalls, the Court was in fact among the last international tribunals to regularly refer to the VCLT rules on treaty interpretation.[77] By contrast, the 'early adopters' of Article 31(3)(c) in their case law were the European Court of Human Rights and the Iran–United States Claims Tribunal during the 1970s and 1980s.[78]

82. The scope of this provision of the Vienna Convention has, in any case, been the subject of considerable debate and controversy. In the wake of this jurisprudence, for example, in the early 1990s some commentators suggested that Article 31(3)(c) might alternatively permit international adjudicators to accord primacy to other international legal rules *even* in cases of antinomy. This position was advocated by prominent environmental lawyers such as James Cameron[79] and Daniel Esty[80] on the complex issue of conflicts between trade and environmental treaties. By the end of that decade, another environmental lawyer, Richard Tarasofsky, encapsulated this reasoning as follows: 'By taking Article 31 rather than Article 30 of the VCLT as the point of departure, constructive steps can be taken to make this de jure compatibility a reality in fact.'[81]

83. However, this interpretation has not gained general acceptance. Ultimately, the interpretative process is regarded as providing flexibility to reconcile treaty provisions only where it is technically feasible to argue that no irreconcilable contradiction exists between their normative prescriptions. A harmonizing interpretation, by contrast, becomes untenable when faced with a direct contradiction between the conduct prescribed by the respective provisions (e.g., conduct Y is prohibited versus conduct Y is compulsory). In all other cases, so long as it remains plausible to characterize the situation as an 'apparent conflict,' interpretative harmonization remains a viable —and generally preferred— approach.

84. Therefore, notwithstanding the doctrinal and jurisprudential engagement with Article 31(3)(c), this provision cannot, despite the arguments of its advocates, serve to fill the gaps in the general procedural integration of international law with respect to antinomies. Its capacity to operate as a tool for

[74] See P. Sands 'Treaty, Custom and the Cross-fertilization of International Law', 1 *Yale Human Rights & Development Law Journal* (1998): 95-99

[75] See *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 1971 I.C.J. 16, 31.

[76] See *Judgment in Case Concerning the Gacikovo-Nagymaros Project* (Hungary v. Czech and Slovak Federal Republic), 37 I.L.M. 162 (1997) at 22 (separate opinion).

[77] See S. Torres Bernardez. 'Interpretation of Treaties by the ICJ following the Adoption of the 1969 Vienna Convention on the Law of Treaties,' Gerhard Hafner et al. (eds.), *Liber Amicorum, Professor Seidl-Hohenveldern* (Kluwer 1998), p.721.

[78] See, in particular, *ILC Fragmentation Report*, paragraphs 435-438.

[79] J. Cameron, 'Dispute Settlement and Conflicting Trade and Environment Regimes', in Agata Fijalkowski and James Cameron (eds), *Trade and Environment: Bridging the Gap* (Cameron and May 1998) at 17 and J. Cameron, 'The GATT and the Environment', in Philippe Sands (ed.), *Greening international Law* (Routledge 1993), pp.120-121.

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

[81] R. Tarasofsky, 'Ensuring Compatibility', op.cit.pp.62-68 and 72-73.

ensuring international legal consistency under the banner of so-called systemic integration should not be overestimated. This limitation becomes evident from an analytical legal perspective. Under Article 31, the operation of interpretation is conducted with respect to one of the two rules in tension (for example, provision *a* of treaty A), while the other rule (provision *b* of treaty B) is merely to be 'taken into account' (emphasis added) as part of the context of the former— an operation that risks degenerating into a form of *petitio principii* (to beg the question, i.e. circular reasoning).[82]

85. That is, the two rules are not to be interpreted in tandem, on an equal footing, but rather through a formal process that *ab initio* subordinates one to the other. Strictly speaking, one of the two rules is instrumental to perfecting the interpretation of the other and is therefore subordinated to the ascertainment of that rule's core of certainty. In the context of interpretation by any international adjudicative body operating within the framework of a treaty-based regime (that is, all adjudicative bodies other than the general jurisdiction of the ICJ), the operation is carried out from the legal perspective of the regime in question. In such cases, treaty A —and thus provision *a*— is taken as the rule to be interpreted in the context of treaty B (and provision *b*), but not vice versa.

86. Consequently, whenever a dispute settlement mechanism within a treaty-based regime (Treaty A) seeks to integrate external legal rationalities (Treaty B) through Article 31(3)(c), it faces a structural limitation: it must accord primacy to provision *a* of Treaty A—the provision under interpretation—over provision *b* of Treaty B. In other words, the interpretative process undertaken under Article 31(3)(c) cannot override or undermine the core certainty of provision *a*.

87. In light of this structural circularity, Article 31(3)(c) does not place external rules that are not explicitly referred to (i.e. non-referred rules) on an equal footing with those explicitly contained in or referred to by the regime's ruleset. In short, so-called systemic integration simply cannot grant an equivalent status to the former within regime procedures in the absence of proper incorporation by reference. Granting primacy to external rules to solve their inconsistency with a regime rulebook goes well beyond the letter of the provision that regulates so-called systemic integration in the VCLT. The *taking into account* of other rules in the operation of interpretation does not equate to *granting primacy* to those rules in case of a contradiction.

88. Building on this, when the adjudicative body of a regime performs the operation of *taking into account* an external rule to interpret regime rules, that rule is subordinated to the latter: the external rule is placed in the 'back seat' of the operation of interpretation. Consequently, Article 31(3)(c) is not an effective tool to correct the constraints imposed by the secondary rules of adjudication of any special regime in relation to the universe of international legal rules. In this regard, systemic integration could never help a dispute settlement mechanism of a special treaty-based regime to grant legal primacy to *inconsistent* non-referred external rules. As Wolfram Karl observes, the harmonizing interpretation regulated in Article 31(3)(c) only allows for the resolution of 'apparent conflicts.'[83]

89. Every interpretation undertaken by a special adjudicative body is, by definition, conducted from an institutionalized legal perspective. That is the inner logic of functionalism, which is firmly embedded in the regular operations of any treaty-based regime by special secondary rules of adjudication. In this context, the general rules of interpretation set out in the VCLT neither enhance nor diminish this

[82] This type of reasoning constitutes a classic case of petitio principii ('to beg the question', i.e. circular reasoning). The paradox is clearly addressed by Carlos Santiago Nino at highlighting the circularity of the controversy over the precedence of constitutional law versus international treaties: each side, he argues, justifies its position by relying precisely on the norm whose validity is in dispute. See Carlos S. Nino, *Fundamentos de Derecho Constitucional* (Astrea, 1992), p. 26. A comparable circularity can be observed in the present treaty–treaty context, where systemic integration under Article 31(3)(c) rests on the prior assumption of one rule's primacy.

[83] W. Karl, 'Conflict between Treaties', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 7 (1984): 472.

well-established functional pattern, as the operations of each regime are structurally grounded in —and therefore supported and constrained by— its own special secondary rules of adjudication.

90. Notwithstanding the positive interpretations of Article 31(3)(c), so-called systemic integration offers limited guidance for navigating the complex terrain of inter-regime normative conflicts—that is, legal conflicts between the rules of the treaty-based regimes that populate the international community. Thus, systemic integration does not resolve the procedural deficiencies of international law; rather, it serves merely as a legal palliative for the absence of effective general procedural integration —both between each special regime and the general regime, and among the special regimes themselves— ultimately subsumed under the overarching authority of the general regime. Ultimately, actual antinomies can only genuinely emerge and be effectively addressed impartially and independently under the aegis of general international procedures and organs endowed with both adjudicative and prescriptive jurisdiction to resolve them.

91. Admittedly, adjudicative creativity often provides pragmatic solutions to issues and problems not envisioned by lawmakers.[84] In this respect, systemic integration may indeed serve as a convenient tool to avoid treaty conflict in international adjudication for decades to come. This utility is further reinforced by the prevailing presumption in international law against the existence of treaty conflicts, which encourages harmonizing interpretations whenever possible. Nonetheless, recasting antinomy as a merely *apparent conflict* through creative harmonizing interpretation is not a particularly promising path for advancing the rule of law, , as this approach ultimately obscures genuine instances of treaty antinomy within international law.

IX.- The manufacture of internal primacy

92. The importance of adjudication by independent third parties lies not only in the need for authoritative dispute resolution within society, but also in its contribution to ensuring a basic level of consistency in legal rules. This is precisely the function of special secondary rules in any legal system— a quality inherent in both rules of adjudication and rules of change. In the international sphere, adjudication is similarly called upon not only to provide authoritative resolutions to inter-state disputes, but also to promote the consistency of international law. However, the adjudicative bodies of special treaty-based regimes are primarily designed to deliver functional outcomes based on their respective rulebooks. The limitations they face stem less from the individual adjudicators and practitioners who compose them, and more from the structural constraints within which these bodies are required to operate. That is, they are procedurally ill-equipped to ensure international legal consistency — specifically, the independent and impartial identification and resolution of antinomies with other rules of international law.

93. When the law-applying bodies of special treaty-based regimes address the rules of other special regimes —i.e. special international law— as well as those of the general regime —i.e. general international law— they do so through the lens of their own regime's rulebook and the shared internal perceptions surrounding its agreed functions. In essence, these bodies tend to defer to other international rules in their adjudicative operations only insofar as those rules are construed as consistent with their own rulebook. Expressed in more technical terms, through the mechanisms of *rule selection* (in application) and *rule subordination* (in interpretation), internal primacy emerges as a structural procedural outcome of international adjudication within any special treaty-based regime. In cases where two regimes contain potentially contradictory rules, each regime's institutional perspective on these rules follows the structural scheme outlined below:

[84] M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1981) at 63.

Table 4. **Enforcing a structural presumption against antinomy**

Antinomy (rule selection)	'Apparent conflict' (rule subordination)
An *antinomy* between the rules of regime A (rule *a*) and regime B (rule *b*) is subject to two alternatives: – Option 1: application of rule *a* in place of rule *b*. – Option 2: application of rule *b* in place of rule *a*. Under the paradigm of functionalism, the adjudicative bodies of Regime A and Regime B are structurally constrained to apply their own rules in the case of antinomy, since each of them is functionally anchored to its respective regime rulebook (*internal primacy*). Consequently, Regime A *precludes* its adjudicative bodies from adopting Option 2, while, conversely, Regime B *precludes* its adjudicative bodies from applying Option 1.	An '*apparent conflict'* between rules of regime A (rule *a*) and regime B (rule *b*) is subject to two alternatives: – Option 1: 'taking into account' rule *a* in order to interpret rule *b* (i.e. rule *a* is subordinated to rule *b* for the purposes of interpretation). – Option 2: 'taking into account' rule *b* in order to interpret rule *a* (i.e. rule *b* is subordinated to rule *a* for the purposes of interpretation) Under the paradigm of functionalism, the adjudicative bodies of Regime A and Regime B are structurally constrained to take into account other rules at interpreting their own rules in the case of an apparent conflict, since they are functionally anchored to its respective regime rulebook (*internal primacy*). As a result, Regime A *precludes* its adjudicative bodies from adopting Option 2, while Regime B equally *precludes* its adjudicative bodies from adopting Option 1.

94. In a nutshell, antinomy is systematically sidelined through rule selection or, if required, transformed into a mere apparent conflict which will be conveniently *resolved* by interpreting the seemingly contradictory external rule as subordinate to the interpretation of the rule belonging to the regime.[85] This latter approach —situating the 'external rule' in the *backseat* of interpretation— is undoubtedly a fundamental feature of the customary general rules of interpretation contained in the VCLT ('taking into account') as applied within special treaty-based regimes, as well as of any alternative interpretative elaboration such regimes may employ. Nonetheless, for illustrative purposes, the table reflects the former, as it is generally regarded as customary law.

95. Ultimately, through processes of rule selection in application and rule subordination in interpretation, adjudication within special regimes often circumvents engagement with antinomies and thereby ensures the manufacture of internal primacy. Apart from the fact that this fosters internal —and thus purely contextual— primacies, which is already problematic, this institutional dynamic reinforces the prevailing structural presumption against antinomies in the practice of international law, a development that has significant implications for the systemic functioning of international law and, concomitantly, for the maintenance of the rule of law. The regular resolution of conflicts of rules (and/or decisions) constitutes a defining characteristic of legal order, one that is secured through secondary rules of adjudication and change. In the international sphere, however, the fact that special regimes are neither procedurally integrated with one another nor with any general adjudicative and prescriptive jurisdiction means that the vast majority of existing international bodies lack both the institutional capacity and the procedural means to resolve antinomies objectively and impartially. Indeed, the very act of avoiding such conflicts —rather than confronting them— underscores this lack of objectivity and impartiality,[86] thereby undermining the systemic integration of international law. Arguably, so long as intergovernmentalism fails to address this due process deficiency, it falls to other constitutional state organs —namely, legislatures and constitutional courts— to exercise heightened vigilance and actively compensate for this shortcoming.

[85] That is, antinomy is either neutralized through a *petitio principii* (see above, note 79) or dissolved *ex ante* through an a priori solution that reclassifies the contradiction as merely apparent.

[86] The prevailing lack of procedural integration among international adjudicative bodies makes it accurate to characterize the dispute settlement mechanisms of special treaty-based regimes as primarily 'coexisting' —both with one another and with the general adjudicative jurisdiction of the ICJ— operating in parallel rather than within a hierarchically integrated system of justice.

96. At the same time, the absence of both horizontal and vertical procedural integration —that is, both among special regimes and between these regimes and the general regime (i.e., general procedural integration)— exacerbates the paradox of *self-reference* in international law.[87] In the absence of a general multilateral treaty regulating the allocation of international jurisdiction —whether adjudicative or prescriptive— as well as procedures for resolving conflicts of rules and/or acts arising from the respective regimes constituting such jurisdiction, self-referentiality becomes a significant issue: new self-referential jurisdictional clauses can be drafted each time state representatives convene at the treaty negotiating table.

97. Nonetheless, the rulemaking dynamics inherent in intergovernmental functionalism have shown little to no contribution to the development of international legislation aimed at advancing the procedural integration of special regimes under international bodies endowed with a general authority rationale. Rather, such dynamics typically tend to reinforce the autonomy of those special regimes that governments design and administer.

98. In short, procedural integration under general authority rationales is neither a central aim nor a prevailing priority in the design of special treaty-based regimes. Consequently, the provisions resulting from the negotiation of such regimes are typically crafted from a particular perspective — namely, one shaped predominantly by the functionalist interests and objectives specific to the regime in question. As a result, their design tends to ensure that ultimate *controlling authority* remains vested within those regimes themselves, rather than being procedurally integrated with external, general international organs.

99. In functionalist treaty-making practices, the jurisdictional scope of a special treaty-based regime is primarily designed by the legal services of those governmental departments and agencies with principal responsibility for the relevant issue area — its natural drafters. As a result, the process is more likely to yield self-referential jurisdictional provisions specific to the regime's subject matter, rather than to produce procedural mechanisms that would integrate the regime within broader general authority rationales.

100. Furthermore, when alternative rationales are incorporated, they tend to take the form of other functionalist rationalities — even when such input is influenced by pressures from civil society or other external actors. More precisely, when effective input from alternative rationales is reflected in the final text, it is ultimately filtered through — and shaped by — the policy rationales and interests of governmental departments or agencies other than those directly responsible for negotiating the regime. In practice, the outcome typically takes the form of *ad hoc* adjustments to the treaty's procedural rules (i.e. secondary rules), designed to procedurally align the regime with the specific policy rationales and interests of those governmental departments and agencies that succeed in being represented in the negotiation process. In other words, the prospect of general regime-building does not form part of the negotiating mindset.

101. This underscores the fundamental importance of establishing general legislative bodies, rather than relying solely on specialized ones, as well as the necessity of generalist courts in addition to specialized adjudication. While such procedural realities are well established in domestic legal systems, they remain largely absent in international law. In essence, without general procedural integration, the multiple layers of special regimes —primarily constructed under the limited public rationales of specific governmental departments and agencies— are incapable of ensuring the consistency of their international rules and/or decisions (i.e., inter-regime consistency).

102. Arguably, the presence of general organs endowed with both prescriptive and adjudicative authority over special regimes constitutes not only the most effective but also the most legitimate mecha-

[87] See P. Zapatero, 'Self-reference in international law', *Eunomia* (forthcoming)

nism — and perhaps the only one reasonably capable — of integrating these regimes within a procedural framework capable of effectively resolving conflicts between their respective rules and/or decisions. However, treaty-making under intergovernmental functionalism is institutionally conceived to discount the procedural integration of general authority rationales. Put differently, functionalism not only stands in tension with but also effectively inhibits —and thus produces a chilling effect with respect to— the establishment of general international organs and procedures for articulating the general interest at the international level, organs and procedures that can only be established through general international legislation.

103. Consequently, the *structural bias* entrenched by the practice of intergovernmental functionalism in international law[88] —proceeding through special regimes without any procedural integration with general international organs— carries significant implications for the rule of law. This situation calls for constitutional state organs beyond the executive to place greater emphasis on the general procedural integration of international law, particularly in light of the persistent collective failure of governments to meet this basic rule-of-law objective.

X. Functionalism as *structural bias*

104. The inherent plurality of public goods and values in society resists subsumption under any singular 'master value.'[89] Yet even in the face of their incommensurability —and the absence of a unified metric for hierarchizing them[90] — legal systems contingently and dynamically allocate their relative positions in society through secondary rules.[91] As Joel Trachtman observes, 'we are thus forced to choose the extent to which each value is to be implemented: i.e., we must make trade-offs among these values; and we do so through legislative or adjudicative processes.'[92] That is, public goods and values are incorporated into the primary rules of the legal system and administered (and thereby balanced) through secondary rules of adjudication and change. These are operations of a general authority rationale, exercised in states by government, parliament, and judiciary — organs of general authority structured under a scheme of separation of powers and checks and balances.

105. In stark contrast, treaty-based regimes perform a markedly different operation: by means of special rules of adjudication and change, they *primarily* (and *preferentially*) administer the *selected* global public goods and values incorporated into their primary rules. This operation is not performed by organs exercising general authority but rather by specialized organs endowed with functional authority — understood as authority limited to a specific public issue area or subject-matter domain. Specifically, these organs are composed of representatives from governmental departments and agencies with administrative competence in the subject-matter domain governed by the regime, serving as state representatives within the regime.

106. In essence, treaty-based regimes serve to align domestic and global public authority within selected subject-matter domains. While they undoubtedly represent the most formal manifestation of

[88] For the original formulation of the notion of 'structural bias' in international law as well as its treaty-based regimes see, respectively, M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006, originally published 1989) (the system of international law has a structural bias, wherein it favours some outcomes or distributive choices over others) and M. Koskenniemi, 'The Fate of International Law: Between Technique and Politics.' 70 *The Modern Law Review* (2007): 1–32.

[89] J. Raz, 'The Relevance of Coherence', *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press 1994) at 261 and C. Sunstein, Legal Reasoning and political conflict (Oxford University Press 1998) at 43

[90] See for example C. Sunstein, 'Conflicting Values in Law', 6 Fordham Law Review (1994):1661-1673, also C. Sunstein, 'Incommensurability and valuation in Law', 92 *Michigan Law Review* (1994): 780-861. (rational decisions may not be adopted when we measure assets with values (social and personal) whose relation is incommensurable).

[91] M. Volcansek, 'Supranational Courts in a Political Context', *Law Above Nations. Supranational Courts and the Legalization of Politics* (University Press of Florida 1997) at 10.

[92] J. Trachtman, 'Trade and... problems' op.cit.p.33.

international authority today, they lack the capacity to objectively and impartially balance their own rulebooks against the global public goods and values formally recognized in other international legal instruments. They are expert systems designed to produce pre-selected operations and outcomes. By their very institutional design (i.e., functionalism), they do not perform operations of a general authority rationale. In short, special regimes are, in a strict sense, *functionalist* entities.

107. From the standpoint of general legal theory, and in line with a procedural conception of the rule of law, special treaty-based regimes appear to face significant limitations — when considered individually — in ensuring inter-regime consistency and, by extension, international legal consistency. It is therefore reasonable to question whether they possess sufficient institutional legitimacy to unilaterally produce final international legal determinations in this regard.

108. The same concerns arise at the collective level. From any procedural conception of the rule of law, the current aggregation of treaty-based regimes — together with their largely ad hoc, case-by-case inter-institutional coordination — appears to fall short of any legitimate procedural construction in that direction. Instead, and perhaps unavoidably, this coordination tends to generate a technocratic and increasingly intricate global legal rhizome.

109. Regimes, both individually and collectively, are inherently incapable of ensuring the consistency of their respective rulebooks and of the subsequent international rules and decisions they adopt. Consequently, they are unable to achieve an appropriate balance among the global public goods and values they are tasked with administering. To perform this higher-order function, it is necessary to establish general international organs and procedures under which these regimes can be procedurally integrated.

110. Accordingly, as noted above, there exists a qualitative distinction between the extent to which states and treaty-based regimes administer public goods and values. While domestic legislative and judicial authorities hold general jurisdiction to prescribe and adjudicate across the full spectrum of public goods and values, treaty-based regimes exercise international authority only with respect to selected public goods and values, and thus within limited subject-matter domains. As a result, their prescriptive and adjudicative jurisdiction is necessarily circumscribed, confined to the specific scope and issue areas for which formal international authority —or jurisdiction— to prescribe or adjudicate has been expressly delegated to them by states.

111. Once authority has been delegated to them, treaty-based regimes exercise jurisdiction over the specific public goods and values enshrined in the treaty's object and purpose and in accordance with the regime's ruleset. By regulating selected global public goods and values, the regime thereby accords them preferential status within its formal operations. In other words, the regime's operations are structurally aligned with the specific regulatory arrangements governing these public goods and values, as set out in its rulebook. Consequently, the exercise of prescriptive and adjudicative jurisdiction within the regime —that is, the subsequent production of international rules and decisions— gives effect to the foundational public choice embodied in its treaty law.

112. In this context, formal adherence to the regime's functional 'master values' — that is, the global public goods and values regulated by its rulebook, such as the protection of human rights, public health, the environment, investments, or other public goods and values — constitutes a collective expectation that guides the conduct of officials within the regime, whether international civil servants or state representatives. Firmly embedded within a political machinery,[93] regime practitioners are subject to institutional loyalties in a variety of ways. Whether appointed by governments directly or indirectly through regime treaty bodies, the individuals who join regime units are, as Volcansek observes, 'plausibly committed to the goals of the regime,' in a pattern reinforced by organizational culture.[94]

[93] M. Shapiro, *Courts,* op.cit. p.31.
[94] M. Volcansek, 'Supranational Courts in a Political Context', op.cit.p.10.

113. In the transition to the twenty-first century, as Thomas Franck observes, certain transnational loyalties —together with their respective *ethos*— began to emerge.[95] This pattern is particularly evident among regime practitioners appointed to serve in the most authoritative law-applying units of the regime, whatever their form and nomenclature (e.g., dispute settlement mechanisms and other adjudicative bodies). Collectively, regime practitioners align their professional activities with the public goods and values embodied in the object and purpose of the treaty, thereby embedding subsequent rules and decisions within the self-reinforcing four corners of the regime's rulebook. Ultimately, practitioners align their professional conduct —and thus the operations of the regime units in which they participate— with the functional master values predefined in the regime's rulebook.

114. This visible organizational pattern is reinforced not only by the particular culture of the regime but also by its own global constituency.[96] Indeed, an epistemic community emerges when the shared perceptions and expectations of regime functions and operations are collectively defined and enforced by its practitioners over time — a phenomenon that imprints participants with a preference for, and sensitivity to, the regime's public goods and values.[97]

115. In general, the outcomes collectively produced by professionals within organizations tend to depend on the design, structure, and functions of those organizations.[98] As social beings, we all tend to conform, in some way, to basic community practices and values. Regime practitioners are no different: they likewise nurture and develop a collective sense of common direction. This structural social phenomenon —which, in the case of institutions (and thus treaty-based regimes), is reinforced by authoritative *formal* rules (i.e., normative legal prescriptions)— inevitably increases the costs associated with both endogenous and exogenous change.

116. As a result of this institutional phenomenon, the practices of law-applying regime units are oriented toward an ongoing process of institutional construction, characterized by the progressive elaboration and reinforcement of regime rules and decisions. Consequently, regime practitioners tend to cultivate intra-regime technicalities and specificities. Over time, the functional construct that emerges from this collective experience enables the regime to develop its own distinct legal perspective on any international legal issue conceivably related to its functional domain.

117. Consistent with the social logic underpinning the role of precedent in adjudication — whether operating *de facto* or *de iure* within any nation-state with procedurally integrated adjudication (e.g., judicial hierarchy)— legal path dependency invariably emerges within treaty-based regimes: prior rules and decisions rendered through the regime's (internal) procedures exert a sustained influence on, and thus condition, subsequent legal outcomes.[99]

118. Just as chemicals bind a dye to a substance to form stable compounds, these legal patterns condition the direction of subsequent legal and policy developments. Irrespective of whether formally

[95] T. Franck, 'Community Based on Autonomy', op.cit.p.43 y T. Franck, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice', 90 *American Journal of International Law* (1996): 359-383.

[96] As part of these transnational loyalties, regime constituencies tend to support the functional orientation of the regime and the public goods and values embedded in its primary rules, while lobbying governments to improve the regime's functional performance — whether by expanding its scope or by making operational adjustments. This dynamic is also evident in the context of international courts, where their legitimacy 'capital' and authority among 'compliance constituencies' are shaped through similar processes of support and advocacy. For a detailed analysis of how international courts build such legitimacy and authority, see in particular K. Alter. *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014), pp. 348-349.

[97] P. Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organization* (1992): 1-36, 3 ('a network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain issue area… they are (1) a shared set of normative and principled beliefs…;(2) shared causal beliefs…; (3) shared notions of validity…; and (4) a common policy enterprise).

[98] Allision, *Essence of Decision. Explaining the Cuban Missile Crisis* (Little Brown 1971).

[99] W. Aceves, 'Economic analysis', op.cit.p. 1062. For broader analysis of precedent in international adjudication see, in particular, Jacob, Marc. 'Precedents: Lawmaking Through International Adjudication,' 12 *German Law Journal* (2011): 1005-1032.

recognized as part of the regime's acquis[100] or simply manifested in practice, legal path dependency within treaty-based regimes constitutes one of the critical drivers of functionalism. That is, it enhances the internal predictability of a regime — a quality largely cultivated by a technocracy that, by definition, is aligned with the regime's core functions and its *distinct* unity of purpose.[101]

119. It is fair to say that a marked reluctance to accept exogenously induced legal change — and, by extension, redirection — constitutes a defining hallmark of the institutional practice of treaty-based regimes. This reluctance is particularly evident in that institutional change is rarely formally grounded in the rules and decisions of other regimes. Ultimately, the tendency to resist outside intervention is an enduring trait of bureaucracies. Regimes self-construct around the functions originally assigned to them, refining themselves through their own legal components and practices, while selectively borrowing from other institutional experiences to pursue function.

120. Building on this pattern, the intrinsic alignment of a regime with a particular ethos —understood as a set of basic collective expectations regarding its agreed functions— may constrain not only its openness to the institutional application of certain international legal rules and decisions (and thus the global public goods and values they embody), but also its very capacity to perform that operation impartially and independently within the regime's procedures. This dynamic is particularly evident when such rules are not perceived as directly pertinent to the regime's core functions — for instance, human rights within trade regimes, the right to health in intellectual property treaties, or environmental protection in investment treaties, to name just a few examples.

121. These institutional constraints are reminiscent of the rationale underlying special regimes, which is somewhat analogous to that of administrative agencies. However, unlike domestic legal systems, special regimes are not integrated into a unified procedural whole — a distinction of considerable significance for understanding both their operation and their limitations, as noted at the outset.

122. Stated differently, and by way of a straightforward example, it would be implausible to expect that a competition authority's interpretation of intellectual property law (such as technological patents) —when issuing a normative act or rendering a decision within the scope of its regulatory powers— would be insulated from review by bodies vested with general adjudicative and prescriptive jurisdiction over both domains. Such review may be initiated either by other authorities or by affected private parties and organizations.

123. The analogy with administrative agencies helps to clarify the procedural limitations faced by special regimes. Turning back to special regimes, by anchoring their authoritative interpretations of the regime's rulebook in the shared assumptions and conceptions of regime functions, the law-applying bodies of a regime secure *internal legitimacy* for the decisions they render.[102] Moreover, any potentia-

[100] The example par excellence is the acquis communautaire, since it accompanies the construction of the European Union's polity, transcending the formal procedures of its institutions. Built up over decades of integration, it reflects a distillation of legislative and political practices with significant implications for the evolution of EU treaties. As such, the acquis becomes a 'transmission belt between political processes and constitutional construction'. Embedded in a socially sustained institutional construction, it constitutes a key cultural vehicle for the governance of the European polity. A. Wiener, 'The Embedded Acquis Communautaire. Transmission Belt and Prism of New Governance', EUI Working Papers 98/35, pp.6-11; see also J.H.H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press, 1999), for a broader discussion of the constitutional and integrative significance of the *acquis communautaire* in the evolution of the European Union.

[101] Departures from this pattern by regime practitioners —and particularly by state representatives, as opposed to international officials— rarely involve directly contesting the public goods and values regulated by the rules themselves. Rather, such departures typically take the form of challenges to the interpretation of the rules or to the impartiality of the bodies responsible for their application.

[102] R. Behboodi, 'Legal Reasoning and the International Law of Trade: The First Steps of the Appellate Body of the WTO', *International Trade Law on the 50th Anniversary,* op.cit.pp.319-321 and 365.

lly divergent decision in this direction is subject to political oversight by the regime's plenary bodies, such as Conferences of the Parties or other institutional formulations. These formal and procedurally entrenched constraints — institutionally embedded to safeguard the regime's operational integrity and adherence to its agreed functions — make it highly improbable that regime bodies will be able to independently and impartially apply, and thereby defer to, other international legal rules and decisions, much less accord primacy to conflicting external rules and decisions adopted by other regimes.

124. In this broader context, the current international community may be best understood as a community of argumentative legal practices —a system of argumentative international law[103]— partially institutionalized within selected subject-matter domains through special treaty-based regimes. Whether and how this order might evolve into a more fully-fledged legal system depends on the extent to which it operates under basic procedural rule-of-law parameters. From this perspective, the challenge lies less in governmental action than in strengthening legislation and adjudication through an international separation of powers and effective checks and balances. The observation is not novel: it lies in taking the secondary rules of international law seriously, so as to reinforce the construct of international law with general organs and procedures through which special regimes can be procedurally integrated under general authority rationales.

125. Since special treaty-based regimes primarily operate as functional proxies of intergovernmentalism, the question of where primary responsibility lies for ensuring the consistency of international law remains central. This responsibility does not rest with international lawyers and officials operating within and across treaty bodies, who may attempt to achieve technical alignment, but with the constitutional organs of states themselves: not only governments, which have proactively shaped the current state of affairs, but also legislatures and constitutional courts. Attention to this structural issue should therefore lie more squarely with constitutional organs, whose collective role is indispensable to advancing procedural integration in international law. Yet, in today's interdependent world, international law continues to lack the general organs and procedures required both to resolve legal conflicts and to balance dynamically the rules and decisions produced by special treaty-based regimes. In turn, this limits its capacity to accommodate, in a consistent manner, the plurality of global public goods and values administered by these regimes.

[103] See M. Koskenniemi, *From Apology to Utopia,* op.cit. for a foundational work where the conception of international law as argumentative practice is developed.