Self-reference in International Law
La autoreferencia en el Derecho Internacional

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Resumen
La autorreferencia permea el derecho internacional. Los regímenes basados en tratados –las formas más sólidas de autoridad internacional– suelen coexistir, exhibiendo patrones de pluralismo jurídico. Como construcciones autorreferenciales, los regímenes especiales operan como subsistemas abiertos del derecho internacional que gestionan la incorporación de otras normas y decisiones internacionales. Su autonomía relativa encarna la lógica del funcionalismo intergubernamental. En ausencia de órganos o procedimientos generales para su integración, esta situación permite crear perspectivas jurídicas internacionales igualmente válidas –aunque potencialmente divergentes– sobre cuestiones y casos. A pesar de las interpretaciones armonizadoras (i.e., la denominada integración sistémica) por parte de los órganos de los tratados, avanzar la consistencia jurídica internacional, o equilibrar eficazmente los bienes y valores públicos globales, sigue siendo un significativo desafío colectivo. La competencia y el arbitraje normativo resultantes de los regímenes basados en tratados lo ilustran con claridad, revelando las limitaciones de la falta de integración procedimental general representa para el Estado de derecho moderno.

Palabras clave
Autoreferencia, régimen de autonomía, incorporación, apertura, pluralismo legal internacional, arbitraje regulatorio.

Abstract
Self-reference pervades international law. Treaty-based regimes –the most robust forms of international authority– typically coexist, exhibiting patterns of legal pluralism. As self-referential constructs, special regimes operate as open subsystems of international law that manage the incorporation of other international rules and decisions. Their relative autonomy embodies the logic of intergovernmental functionalism. In the absence of general organs or procedures for their integration, this situation enables equally valid –yet potentially divergent– international legal perspectives. Despite harmonizing interpretations (i.e., so-called systemic

integration) by treaty bodies, achieving a measure of consistency, or effectively balancing global public goods and values, remains a significant collective challenge. This is further illustrated by regulatory competition and arbitrage arising from treaty forms, underscoring the difficulties that the absence of general procedural integration poses for the modern rule of law.

Keywords
Self-reference, regime autonomy, incorporation, openness, international legal pluralism, regulatory arbitrage.

SUMMARY. 1. Analytical legal pluralism. 2. The horizontality and relative autonomy of regimes. 3. Variable degrees of openness. 4. A kaleidoscope of legal perspectives. 5. Inventory of 'international jurisdictions'. 6. The elusiveness of international jurisdiction. 7. Such a thing as general international legislation. 8. The hard case of treaty-led regulatory arbitrage.

1. Analytical legal pluralism

Self-reference has long occupied a central place in legal theory, raising foundational questions about the authority and limits of legal systems.[1] As H.L.A. Hart famously observed, every legal system must ultimately provide its own criteria of validity, leading to a situation in which the system is, to some extent, both the source and the subject of its own rules (Hart, 1961, pp. 94–96). This paradox –whereby law authorizes itself– becomes particularly acute in the context of international law, since it lacks the general organs and procedures necessary to ensure its formal validity within domestic legal systems. Furthermore, its current layers of institutionalization (*international institutional law*), primarily structured through the treaty form, are not subject to any meaningful general procedural integration.[2] As a result, international law constitutes a procedurally non-integrated plurality of self-referential international authorities. This condition stands in fundamental tension with modern conceptions of the rule of law and,[3] arguably, with the interests and legitimacy of the international community as a whole.[4]

On a related but distinct note, by sustaining a narrative of systemic unity in international law, the «integrated» among public jurists –in Eco's sense[5]– have perpetuated the mantra of two systems: domestic law and international law, with the former conceived as incorporating the latter. Accordingly, it falls to domestic legal systems to determine the conditions under which international law as a whole acquires binding force within them. In other words, each domestic legal system defines its own criteria for the reception –and thus *incorporation*– of international rules and decisions. In this context, domestic legal systems incorporate international law on their own

[1] Examining logical objections to self-referring laws and arguing against their wholesale rejection, using constitutional examples, see also Hart (1983), as well as the different position of Alf Ross (1969). For analysis see, in particular, Suber (1990, 1999) and Sauca (2001).
[2] See e.g. Klabbers, (2008, pp. 1–23 and 13-14) (various laws (legal orders) of international organizations, but no such thing as a coherent body of international institutional law).
[3] In this context, the integrity and effectiveness of a legal system depend on the enactment of well-crafted general legislation. For a comprehensive analysis see Zapatero (2019).
[4] For the procedural conceptions of the rule of law see Laporta (2007) and Tamanaha (2004). For approaches incorporating substantive values –such as fundamental rights– see Díaz (1966) and Bingham (2010).
[5] The popular culture surrounding international law is largely produced by the integrated jurists themselves–an evolution that calls for analysis through the lens of cultural studies, in line with Eco's distinction between the apocalyptic and the integrated. See Eco (1994) and the insightful comments of the editor Robert Lumley, at pp. 1–25 ('Introduction').

terms, with state organs conveniently performing enforcement functions through the so-called *dédoublement fonctionnel*, or *role splitting*.[6]

Against this backdrop, the reception of international law emerged as a salient concern in the twentieth century, particularly as global interdependence deepened in the aftermath of the First World War (1914–1918). The formal incorporation of international law into domestic legal systems was increasingly presented as a logical means of rendering international commitments credible and enforceable. Yet, even in the first quarter of the twentieth century, it was already apparent that the mere recognition by states, at the international level, of treaties and customary law as binding was insufficient. Diplomatic declarations and the signatures of plenipotentiaries no longer sufficed to domestically manage the growing complexity and scope of treaty-based commitments.

Consequently, the process of incorporating international law into domestic law gained momentum, ostensibly aiming to foster greater uniformity in the enforcement of international rules and decisions by state organs. By binding state organs to the mast of international law –analogous to Ulysses securing himself against the Sirens' call– public administration and domestic courts were, at least in normative terms, rendered better able to resist parochial pressures and thus fulfil international commitments.[7]

In brief, after the Second World War, policymakers and state lawyers across nations succeeded in mainstreaming the idea of *incorporating* international law into domestic law through formal rules, procedures and practices, thus *de facto* overcoming the doctrinal debates on monism or dualism in favour of the latter.[8] As a result, today all domestic legal systems contain a set of *relational rules* (and concomitant procedures and practices) that give form –*à la carte*– to the incorporation of international law into domestic law. As needs have arisen, these relational rules have become increasingly structured (and refined) to administer the relationship with international law. Even today, however, there is no general international legislation defining the conditions for such a process of incorporation into domestic legal systems.

Nonetheless, the edifice of dualism is grounded on the conventional recognition that, for centuries –and particularly since Jeremy Bentham coined the term *international law* in 1789[9]– two basic and closely related legal orders have existed: the domestic and the international. The former governs the domestic political community constituted by individual states, while the latter regulates the international political community composed of those very states. In other words, on one side lies the community of states conceived as modern tribes; on the other, the tribes themselves;

[6] The theory of *dédoublement fonctionnel* elaborated by George Scelle posits that, in the absence of dedicated international organs, state officials and institutions perform a dual role: they act both as agents of their national legal order and as functionaries of the international legal order. This 'role-splitting' mechanism allows domestic organs to implement international legal rules, thereby compensating for the institutional deficits of international law. See Scelle (1932, pp. 43, 54–56, 217; 1934, pp. 10, 319, 450; 1956, pp. 324–342).

[7] This binding of state organs to international law can be understood as a form of precommitment, akin to Ulysses binding himself to the mast to resist the Sirens' call–a classic metaphor for rational self-constraint against future pressures or preference shifts. See Elster (1979).

[8] For a fine overview of the debates, see (d'Aspremont, 2018, last modified 27 June).

[9] Jeremy Bentham, in his *An Introduction to the Principles of Morals and Legislation* –completed in 1780 but published in 1789– introduced the term 'international law' to designate matters 'between nation and nation,' describing it as 'a new though not inexpressive appellation.' Its novelty lay both in the adjective 'international' and in its association with jurisprudence. In the 1823 edition, Bentham explicitly asserted authorship of the term, noting its subsequent adoption and expansion. See Bentham (1823, vol. 2, pp. 260–261).

and, in between, humanity –and with it the human condition– whose interests are, more often than not, lost in translation.

Turning from the critical philosophical and moral dimensions of these social constructs to their doctrinal development, dualism –though theorized in the nineteenth century by scholars such as Triepel and Anzilotti (Triepel, 1899; Anzilotti, 1923)– became particularly entrenched in practice during the mid-twentieth century.

During this period, states increasingly adopted detailed relational rules to structure the interface between domestic and international law, largely in response to the growing reliance on the treaty form as the principal instrument of inter-state coordination across multiple domains.

Consequently, with the rise of treaty-based regimes –and the concomitant construction of new forms of international public authority– states' alignment of domestic with international law has come to include not only treaty provisions but also an expanding body of international rules and decisions adopted by treaty organs. As a result, the once distinct domains of domestic and international law are increasingly overlaid by a densely populated environment of public law forms:

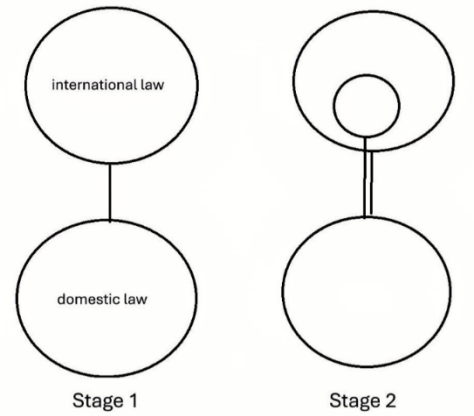

Figure 1: from dualism to pluralism

In this way, a sub-process emerged within international law itself –anchored in treaty lawmaking– that would, in time, reshape the relationship between domestic and international law and, by extension, the paradigm of dualism. This development gave rise to a new reality of international institutional law, gradually opening the door to international legal pluralism. Contemporary international law now consists of a general regime –i.e. general international law– alongside a diverse array of special treaty-based regimes –i.e. 'special regimes'– which, structured around specific subject-matter domains, typically reflect the logic of intergovernmental functionalism.[10] As a result, the exercise of public law in today's interdependent world unfolds within a more complex environment comprising three distinct bodies of public law, each with its own structural features:

1. The traditional *general regime of international law*, which is primarily custom-based, codified and progressively developed through multilateral treaties;

[10] For a comprehensive treatment of functionalism as the paradigmatic conception of international institutional law –including its historical development, foundational premises, and a critical assessment of its limitations– see Klabbers (2015); and for a further elaboration on its shortcomings, see Klabbers (2016).

2. The *special regimes of international law*, which are self-referentially constructed and administered, primarily on the basis of their respective treaty provisions;
3. The *domestic legal systems* of states, which are likewise self-referentially constructed and administered, primarily on the basis of their respective constitutional texts.

The defining characteristic of this scenario is the dynamic interaction among these bodies of public law, each influencing and being influenced by the others in a continuous feedback loop that collectively –and often elusively– serves to define ordinary legality. As a result, the original dual interplay (1) between domestic legal systems and 'international law as a whole' has now been transcended by a far more complex and plural set of interactions: (2) between special regimes of international law and domestic law (e.g. EU law and the domestic law of EU Member States); (3) among the special regimes themselves (e.g. WTO law and ILO law, or EU law and multilateral environmental agreements); and, last but not least, (4) between each special regime and the general regime of international law:

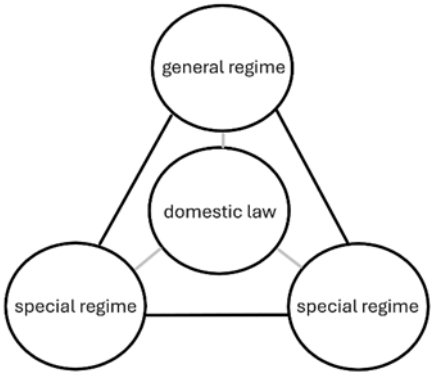

Figure 2: a more crowded legal environment

In turn, this development has led to the emergence of a fundamentally relational paradigm, in which the *new normal* consists of domestic legal systems and special regimes, each ultimately incorporating rules both from the general regime of international law and from other special regimes. This process manifests itself in at least four principal forms of incorporation:

1. The incorporation of the rules and decisions of general international law into domestic law;
2. The incorporation of the rules and decisions of certain qualified special treaty-based regimes into domestic law (e.g. EU law into the domestic law of EU Member States);
3. The incorporation of the rules and decisions of the general regime of international law into special treaty-based regimes; and
4. The incorporation of the rules and decisions of special treaty-based regimes into one another.

In essence, the conventional conception of dualism –and with it the simplified notion of a unitary, one-way process of incorporation– that emerged in the first half of the twentieth century, when international law was largely flat in terms of special secondary rules, has given way to the mainstream acceptance of international legal pluralism as the prevailing condition of ordinary legality. As a result, the relationship between the legal systems of states (domestic law) and international law as a whole –

and thus the incorporation of the latter into the former– is no longer the only relevant interplay. Significant differences may arise in how domestic legal systems incorporate both general international law (i.e., the general regime of international law) and the plurality of special treaty-based regimes.

At the same time, a similar phenomenon occurs within the normative systems established by treaty-based regimes themselves: each such regime operates under its own distinct legal conditions, and thus incorporates both general international law and the law of other special regimes through its institutional procedures for adopting international rules and decisions. By their very existence as public law forms, treaty-based regimes self-referentially incorporate rules of the general regime of international law as well as those of other special regimes. They do so in much the same way that domestic legal systems incorporate rules of the general regime of international law and, in certain cases, the law of special regimes –that is, by following their own relational rules, procedures, and practices of incorporation.

In establishing a wide variety of treaty-based regimes, states have expanded and greatly transformed the Westphalian landscape (see Grewe, 2000).[11] By employing treaty law in all its myriad forms, the possibilities for innovation in public law have become virtually limitless.[12] In this way, traditional international organizations represent only the most formal manifestation of the diverse array of structures that treaty-based regimes can produce.[13] Structured as unities of primary and secondary rules (see Hart, 1961, chapter V), their secondary rules of adjudication and change are capable of self-referential construction and adaptation, and thus foster their relative autonomy. Drawing on these regime-building practices, the potential for certain treaty-based regimes to evolve into sophisticated (international) legal systems is best exemplified by the ongoing process of European integration.[14]

Indeed, the emergence of treaty-based regimes as a form of public law constitutes a critical development –and a significant challenge– for understanding the rule of law in its foundational, procedural form. By giving concrete form and structure to the exercise of international authority, and thereby generating a plurality of such authorities, each of these entities is called upon to relate to its counterparts in systemic terms. How this is to be achieved, however, in the absence of general international organs and procedures, and thus general international legislation designed for that

[11] For an analysis of the development of the state, see in particular, van Creveld (1999: chapter 2). While the classical narrative emphasizes the centrality of the state and the Westphalian order, critical and intellectual histories highlight the evolving role of jurists and legal imagination in shaping international law. See Koskenniemi (2021 and 2002).

[12] For a nuanced reflection on how international law enables states to do things they could not otherwise do –including the production of public goods across borders– see Hurd (2017).

[13] See, for example, the influential analysis by Churchill and Ulfstein (2000).

[14] The treaty-based regime of the European Union, which gradually evolved through decades of iterative and incremental processes, stands out as a remarkable case of institutional transformation. Despite its ups and downs, the regime has deeply embedded nation-states within a procedurally integrated and complex set of law-making and law-applying entities–a sophisticated machinery of secondary rules rooted in treaty law. Over time, it has demonstrated to generations of public law and policy practitioners the capacity for social transformation through international legislation. By assembling its own primary and secondary rules, the regime has given rise to (1) a highly developed, specialized legal system of international law; (2) a variety of procedurally integrated treaty bodies –including the European Commission, the Council, the European Parliament, and the Court of Justice–; and (3) an entirely new subject of international law–the European Union itself. Yet, for all its innovations, the entire construct remains, at its core, a treaty-based regime. A historical precursor to this vision of institutional transformation can be found in the *Project for a Constitution of the United States of Europe* (New York, March 25, 1944), drafted by Fernando de los Ríos, former Minister of Justice and Foreign Affairs of the Spanish Republic, in collaboration with Richard Coudenhove-Kalergi and Arnold J. Zurcher as part of the Legal Committee of the Pan Europa Conference.

very object and purpose, remains an open question –a question that becomes particularly salient when the rule of law is taken as the relevant lens for analysis.

A horizontal relational paradigm appears to be taking hold –one that characterizes not only the relationship between domestic and international law, as traditionally conceived, but also the interactions among special regimes of international law. Accordingly, this characterization generally applies to inter-regime relations, unless otherwise specified in their *relational rules* (e.g. the conflict clause in Article 103 of the UN Charter). In other words, these relations are typically understood as «horizontal in nature» (see Seidl-Hohenveldern, 1998, pp. 8-9, 12-13 and 18):

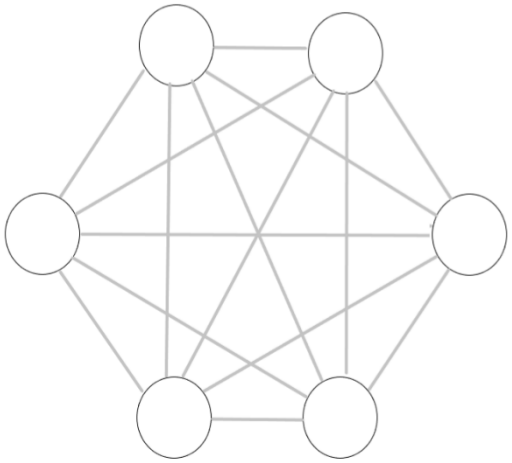

Figure 3: special regimes as horizontal legal systems

The notion of horizontality in inter-regime relations began to emerge in conventional legal thought during the 1980s. As Max Sørensen observed as early as 1983, some treaties upon which regimes are built erect legal subsystems, with international organizations representing the most formalized distillation of such a development (Sørensen, 1983). The Scandinavian jurist explicitly addressed the issue of *autonomous* «legal orders» or «subsystems» within international law, questioning whether the legal order of the European Community was truly «unique» or if other instances of *autonomous* «new legal orders» had already been established by treaty law.

To determine the autonomy of a legal order, Sørensen proposed analyzing three basic elements: (a) the creation of law, (b) the application of law, and (c) the settlement of disputes. Anticipating later debates, he suggested that the analysis of specific cases could potentially reveal the existence, in practice, of a variety of «independent legal systems» (Sørensen, 1983, p. 575). In order to elucidate this question, a number of issues had to be considered:

> It is impossible through comparative law alone to answer […] whether autonomous legal orders have been created. For that purpose, it is necessary to understand each individual organization in its entirety, that is to say, to examine the interplay of such relevant factors as organizational structures, powers and organs and practical working method, just as much as each individual factor in itself (Sørensen, 1983, p. 563).

A first structured case study exploring the construction of diverse legal perspectives across treaty-based regimes was offered the following year by Richard Lauwaars: the selected case study of regime interaction was none other than South

African Apartheid and the refusal of the Netherlands to apply United Nations Sanctions against South Africa on the grounds of incompatibility with the 1957 Treaty of Rome establishing the European Economic Community (EEC), the 1951 Treaty establishing the European Coal and Steel Community (ECSC), the 1958 Treaty of the Benelux Economic Union, and the 1947 General Agreement on Trade and Tariffs (GATT): an issue which proper legal conclusion required, in Lauwaars´ words, «a painstaking analysis of each relevant set of organizational laws» (Lauwaars, 1984).[15]

2. The horizontality and relative autonomy of regimes

The 1980s saw the gradual emergence of the issue of how treaty-based regimes relate to each other on the international public agenda, both in terms of the relationship between the general regime of international law and special regimes, and among the special regimes themselves. At that time, the concept of 'self-contained regimes' – most influentially articulated by Bruno Simma in his 1985 work, building on the analysis of ILC Special Rapporteur Willem Riphagen (Simma, 1985)[16]– marked a watershed in the understanding of regime autonomy within international law, albeit perhaps unintentionally.[17] Their original use of the concept of 'self-containment' was circumscribed to the debated exclusivity of the sanctioning mechanisms of certain special regimes, specifically regarding the use of countermeasures under the general law of State responsibility when enforcement within the special regime failed. In other words, the notion was technically limited to addressing whether the parties to a treaty intended to «contract out' of the general regime of countermeasures by establishing their own autonomous enforcement and dispute settlement mechanisms» (see Kuijper, 1994, pp. 229–230 and 242–245, in particular). In Hartian terms, therefore, the debate was initially confined to the legal validity of applying general secondary rules of adjudication to the enforcement of the primary rules established by certain special regimes.[18]

Nonetheless, the popularization of the evocative term 'self-containment' unintentionally paved the way for far-reaching interpretations of regime autonomy vis-à-vis the general regime of international law. As a result, 'self-containment' soon became a terminological proxy –particularly during the 1990s– for the notion that the specialization of certain regimes of international law (i.e., special treaty-based regimes) might have entirely disconnected them from both general international law and other special regimes. By the early 2000s, however, both the practical operation of special regimes and the ILC's authoritative 2006 analysis had demonstrated the

[15] This was a study published shortly before Lauwaars succeeded Henry Schermers as Chair of International Organizations Law at the University of Amsterdam (UvA).
[16] See also a later reflection in Simma and Pulkowski (2006).
[17] Riphagen had specifically observed that, in some cases, treaties may establish a self-contained regime of responsibility, thereby excluding the application of the general law of state responsibility. See W. Riphagen, Third Report on State responsibility, in ILC Yearbook 1982, Vol. II Part One, 24 para 16 and ILC Yearbook 1982, Vol. I at 202, para. 16 ('A theoretical answer might be that a system was an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed in as much as it had an interrelationship with other subsystems').
[18] This is to say, the legal validity of default enforcement arises when a special regime prescribes exclusive recourse to its own secondary rules of adjudication, but those mechanisms fail to operate effectively. Arguably, and notwithstanding Article 55 (*Lex Specialis*) of the final ILC Draft Articles adopted in 2001, the possibility of a fall back to general international law is not excluded. The provision, in any case, stipulates that the general rules codified by the ILC do not apply 'where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. See International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, YBILC, 2001, Vol. II, Part Two, UN Doc. A/56/10.

inner shortcomings of this conceptualization, making it clear that the notion of 'self-contained regimes' was a legal oxymoron.[19]

Interestingly, while international legal scholars over the past decades have largely rejected the narrative of self-containment, they have not overlooked the *relative autonomy* exhibited in the practices of international institutional law –and thus, treaty-based regimes– in relation to the systemic concept of public international law. The demands of interstate cooperation amid growing global interdependence have provided strong incentives for the progressive deepening of this specialization.

In this context, as both practitioners and scholars sought to understand the functioning of these regimes in systemic legal terms, the idea of horizontality in their relationships began to gain traction in international legal practice and theory. This development is evident, for example, in the late 1980s, when Philippe Cahier argued that the internal law of international organizations constituted an autonomous legal order with respect to both domestic law and international law (Cahier, 1988). Similarly, at the turn of the century, Nicolás Valticós observed that these 'particular international legal orders' were, in somewhat puzzling words, 'somehow associated' with general international law (Valticós, 1996).

The aim of these international lawyers was primarily to rationalize the impact of special treaty-based regimes –especially their secondary rules of adjudication and change (i.e., the emergence of distinct secondary rules of international law)– on the functioning of international law, as envisioned at that time by conventional legal thinking: that is, as a normative system in the making. Nonetheless, and notwithstanding that no treaty-based regime is an island, the operationalization of this very 'somehow' –as articulated by Valticós– poses critical questions for the modern rule of law, given that general international law currently lacks the organs and procedures to perform that operation.[20]

From a strictly public law perspective, the past century and a half of the institutionalization of international law –and thus of international institutional law–has produced a reality characterized by horizontal legal systems, within which several distinct patterns can be identified:[21] (1) domestic law incorporates international law; (2) international law itself is disaggregated into special regimes, which in turn incorporate rules of other special regimes; (3) all such regimes incorporate the rules of the general regime of international law. To complicate matters further, certain special regimes assert a form of self-referential primacy in their relationship with (a) the domestic legal systems of participating states, (b) other special regimes, and (c) the general regime of international law (as exemplified by EU law).

Therefore, focusing on the analytical dimensions of this phenomenon, public law –as the formal manifestation, and thus exercise, of public authority– no longer operates within an orderly and singular interplay between domestic and international law. At the international law end of this relationship, there is simply no unitary construct

[19] It is not surprising that the refutation of self-contained regimes (the idea of *self-containment* in treaty-based regimes) plays a prominent role in the ILC's 2006 debates on the fragmentation of international law. See ILC 2006 (especially, paras. 278–293). Indeed, this reflects the very idea of common rules for all, which, at a high conceptual level, has underpinned the universalist narrative of international legal scholarship since its early modern inception.

[20] In Trachtman's words, the present international legal system is rudimentary in that it tends to make and administer rules «in separate functional categories, often without a clear and effective system for integrating the resulting rules». See Trachtman (2013, pp. 30–35).

[21] For the concept of horizontality see Falk (1959).

to be incorporated into domestic law.[22] In this respect, the traditional conception of a domestic legal system incorporating a unitary construct of «international law»[23] –in the sense of a consistent, and thus procedurally integrated, whole– is subject to challenge.

Today, the exercise of public authority is disaggregated across a plurality of regimes, each potentially characterized by specific normative relationships with others, which may differ qualitatively due to their distinct and self-referential relational rules and practices. As a result, the incorporation of international law into domestic legal systems is no longer a straightforward process: there is no unitary construct of international law to be incorporated, but rather an assemblage of rules and decisions. Similarly, the incorporation of the rules of the general regime of international law into any given special regime –alongside those of multiple other special regimes– is equally diverse.

Undoubtedly, much has been written about the socio-legal notion of legal pluralism. Without delving into the debate over whether this concept has historically encompassed phenomena that were not, strictly speaking, law[24] –and acknowledging that it often referred to non-law (see, in particular, Tamanaha, 1993 and 2000)– it is clear that today we are confronted with a genuine form of international legal pluralism, which is unmistakably a phenomenon of public law. Paradoxically, this international legal pluralism is grounded in public law forms and is, as such, structurally orchestrated by public authority –or to be precise, by public authorities and their specialized bureaucracies. Consequently, the overall picture of normative relationships that emerges today in the international legal sphere can only be depicted as a profusion of lines and dots, perhaps too many, reflecting both its increasingly technocratic character and complexity:

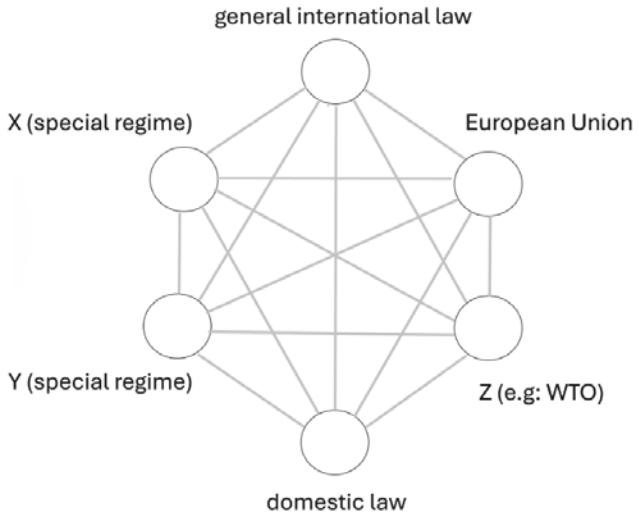

Figure 4: its all about relationships

[22] For a classic and canonical contribution to the debate on whether international law constitutes a system or merely an assemblage of disparate rules, see Combacau (1986) in particular.
[23] Mario Prost provides a critical analysis of the elusive and contested nature of unity in international law, identifying and comparing several competing conceptions of unity. See Prost (2012).
[24] On this see prominent figures such as Falk Moore (2005, p. 357) and Griffiths (2005, pp. 49, 63–64), who, while underscoring the analytical value of normative pluralism in understanding non-state norms, critically argue for restricting the use of the term *legal pluralism* to state-based normative systems.

The shift from the traditional dual legal perspective –between domestic law and international law (i.e. dualism)– to multiple legal perspectives within international law itself (i.e. international legal pluralism) complicates the exercise of public authority when measured against rule-of-law standards. This complication affects not only the exercise of public authority at the domestic level –where state organs must incorporate the ongoing flux of international legal rules and decisions– but also the exercise of public authority by special regimes themselves.

Special regimes are increasingly expected to incorporate other international legal rules and decisions in order to align their operations with ordinary international legality, much as domestic legal systems do. Nonetheless, and somewhat paradoxically, this reasonable expectation presupposes the consistency of international rules and decisions–when, in reality, general procedures and organs to ensure the systemic integration between special regimes and the general regime simply do not exist:

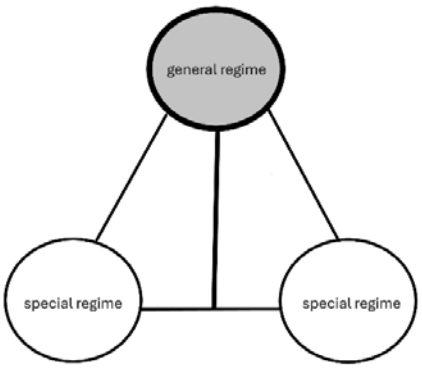

Figure 5: the case for general procedural integration

Indeed, their lack of procedural integration –and, consequently, their procedural inadequacy in ensuring a modicum of consistency– stands in marked contrast to domestic law. In domestic legal systems, the procedural integration of constitutional organs –most notably the formal interplay among the legislature, judiciary, and executive– is designed not only to secure the separation of powers and checks and balances,[25] but also to sustain the systemic operation of domestic law, and thus its consistency, through clear and complete procedures.

As Sabino Cassese notes, a fair procedure plays an important role in building social consensus: «Process control or voice encourage people's cooperation with authorities and lead to legitimacy» (Cassese, 2011, p. 6). This assertion could indeed also be applied to the inter-institutional dimensions of international law, where general procedural integration is pending. Still today, as von Bogdandy and Venzke observe, the procedural law of international institutions is largely of their own making (von Bogdandy and Venzke, 2012); and it should be added that there is no general body of international procedural law systemically governing their inter-institutional relations.

In this context, states –and particularly their governments– have collectively and gradually embedded our societies in an amorphous, if not rhizomatic, global

[25] For distinct critical perspectives on checks and balances in relation to international institutional law, see Klabbers (2007) and Benvenisti and Downs (2009). For Benvenisti's broader theorization of international institutional law, see Benvenisti (2014).

normative environment of public law: that of international legal pluralism. This outcome stems from privileging the layering of special international legislation –namely, special treaty-based regimes– over general international legislation,[26] while neglecting the systemic integration of the entire legal construct; that is, its general procedural integration.

In standard technical terms, this phenomenon is essentially the by-product of the reification of intergovernmental functionalism within international institutional law. This reification was originally designed –and is now deliberately sustained– by governments and, by extension, their departments, agencies, and technocracies, capitalizing on the privileged position historically enjoyed by executives –particularly during the emergence of the nation-state and absolutist monarchies in the sixteenth century– in the formation (and *administration*) of international law.

Whatever emerges from this complex web of normative relations makes any meaningful balancing of the global public goods and values recognized by international primary rules exceedingly difficult.[27] From the perspective of international legal consistency –conceived as an intrinsic procedural quality of the rule of law– the lack of general procedural integration in international law –or, more precisely, in international institutional law– is not only problematic but also arguably unreasonable in public law terms. Indeed, the absence of appropriate general secondary rules in international law to address these inherent inconsistencies threatens the coherence of domestic legal systems, thereby undermining the very foundations of the modern conception of the rule of law. Arguably, resolving this problem in international law entails grappling with the procedural challenges represented by the following arrows:

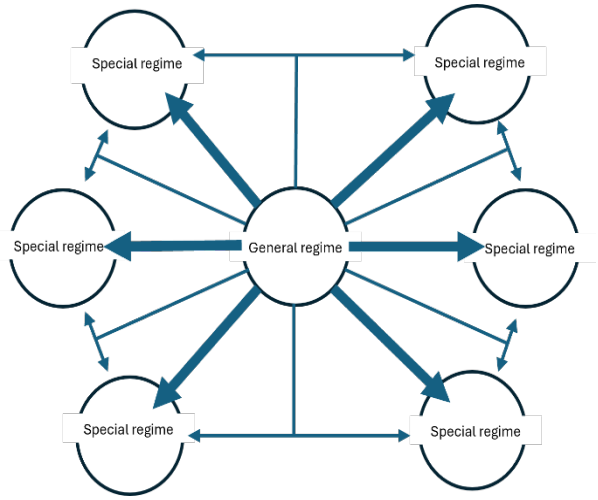

Figure 6: a one-stop shop to connect all dots

Indeed, to ensure procedural completeness in international institutional law, and thereby international legal consistency, it would be reasonable for inter-institutional legal relations to be governed by general international legislation. This approach would avoid reliance on ad hoc, self-referential rules, constructed anew with each treaty negotiation, including any resulting inter-institutional procedure. That is, all

[26] The strategy of 'layering'–adding new arrangements alongside existing ones rather than replacing them–is well documented in institutionalist analyses. See Mahoney and Thelen (2010, p. 16).
[27] As Dunoff observes, «international law is made in a highly decentralised manner, often in specialized regimes […] [and] the values and interests advanced by any particular regime are not necessarily consistent with those advanced by a different specialized regime» (Dunoff, 2017, p. 187).

interactions should reasonably be regulated by general rules of adjudication and change.

3. Variable degrees of openness

From a general legal-theoretical perspective, Hart's distinction between primary and secondary rules is particularly instructive for analysing treaty design and practice, and thus for addressing the problem of self-reference in international law (see Hart, 1961, Chapter 5). In Hart's terms, primary rules prescribe or prohibit conduct, whereas secondary rules –such as rules of recognition, change, and adjudication– are «rules about rules» that govern how primary rules are identified, modified, or enforced.[28] Hart's framework thereby offers a valuable tool for understanding the structure of international law,[29] enabling a comparative analysis of the secondary rules of both the general regime and the special regimes –and, consequently, of the state of the rule of law, viewed through the lens of comparative international law.[30]

The first comprehensive analyses of the systemic notion of international law that explicitly employed Hart's categories were produced mainly in the 1990s.[31] Prior to this, a distinction between primary and secondary rules had already been recognized and applied in the work of the International Law Commission (ILC) on state responsibility, though in a more limited sense.[32] Building on these theoretical advances, the 'Hartian' studies of the 1990s –which explicitly employed Hart's distinction– began to examine the possible effects of special secondary rules within special treaty-based regimes on the so-called unity of international law. In doing so, they analysed the relationship between the general regime and special regimes from that perspective, while paying less attention to the normative relationships among the special regimes themselves (see Wellens, 1994, pp. 4-5) –a subject that, due to the lack of procedural integration, exhibits its own distinctive dynamics.

In this context, the controversial term «self-contained regime» –as discussed in the previous section–was increasingly being used in a loose and expansive manner

[28] Interestingly, Jeremy Waldron has argued that, within legal philosophy, public international law remains the only major domain that has not been sufficiently explored through the lens of Hartian analytical theory. See Waldron (2008, p. 67 and 2013).

[29] Incidentally, for a critical analysis of Hart's approach to international law, see (Brownlie, 1998, pp. 3-8), Abi Saab (1987, pp. 119-126), and Gottlieb (1972). More recently, see in particular Payandeh (2011) and Pave (2018).

[30] For seminal works advancing the field of comparative international law, see Koskenniemi (2009a), Mamlyuk and Mattei (2011), and Roberts, Stephan, Verdier, and Versteeg (2015 and 2017).

[31] The editorial board of the *Netherlands Yearbook of International Law* took an important step in this direction when, on the occasion of its 25th anniversary, it dedicated a special issue to discussing, in Hartian terms, the emergence of so-called closed and semi-closed «legal systems» in international law. See «Presentation», 25 *Netherlands Yearbook of International Law* (1994), and in particular Wellens (1994, pp. 3–37, at 4).

[32] Roberto Ago introduced the distinction between «primary rules» (imposing substantive obligations on States) and «secondary rules» (determining the legal consequences of breaches of such obligations) in the context of state responsibility. Unlike H.L.A. Hart's broader typology of secondary rules, Ago's framework narrowly focused on rules governing the legal consequences of internationally wrongful acts. These rules regulate the new legal relationships arising from breaches, such as obligations of cessation, reparation, and non-repetition. His distinction was further developed and elaborated in the 1980s by the International Law Commission, particularly in the work of successive Special Rapporteurs Willem Riphagen and Gaetano Arangio-Ruiz, before being authoritatively codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts. See Roberto Ago, *Third Report on State Responsibility*, YBIL 1971, vol. II(1), UN Doc. A/CN.4/246, paras. 12–15; Willem Riphagen, *Fourth Report on State Responsibility*, YBIL 1983, vol. II(1), UN Doc. A/CN.4/380, paras. 59–66; Gaetano Arangio-Ruiz, *Seventh Report on State Responsibility*, YBIL 1995, vol. II(1), UN Doc. A/CN.4/469, paras. 1–50; YBIL, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, YBIL 2001, vol. II(2), art. 1, cmt. 1.

to differentiate certain special regimes as, so to speak, «closed systems» of international law, in contrast to «open subsystems» of international law; a distinction that was based on their special secondary rules.[33] This way of framing special regimes risked being interpreted as granting them *carte blanche*, thereby reinforcing their traditional *relative autonomy* –a feature already embedded in functionalist logic– and enabling their disengagement from the general regime of international law as well as from other special regimes.

In light of the well-established intergovernmental reluctance to procedurally strengthen the general regime of international law in its relations with special regimes, narratives of self-containment attracted considerable critical attention, and in some quarters even explicit recognition. The 2000s thus witnessed numerous explorations of how the plurality of special secondary rules affected the general regime of international law and, consequently, the capacity of the international legal architecture to ensure a modicum of consistency. Although these explorations often did not employ standard analytical legal terminology, they shared a common feature: the application of systemic concepts of law–understood as internally consistent sets of rules–to an increasingly complex international legal sphere.

A decisive moment in the recognition of these concerns came with the International Law Commission's 2006 Report on the so-called «fragmentation of international law» (ILC, 2006). This comprehensive effort addressed the challenges posed by the diversification and expansion of international law and the resulting emergence of special regimes. It provided a thorough analysis of the phenomenon and sought to moderate regime-based narratives by anchoring the debate in the conventional discourse of international law. In essence, responding to some narratives and institutional signals favouring self-containment,[34] the ILC authoritatively clarified that, in practice, special regimes are not strictly self-contained.[35]

Undoubtedly, a decisive moment in the recognition and analysis of these concerns –and the point at which they were firmly placed on the agenda of international legal analysis– was marked by the International Law Commission's 2006 Report on the so-called «fragmentation of international law» (ILC, 2006). This comprehensive effort to address the challenges posed by the diversification and expansion of international law –and the resulting emergence of special regimes (and thus corresponding secondary rules)– provided a thorough analysis of the phenomenon and sought to moderate the narratives arising within these regimes and their expert communities by anchoring the discussion in the conventional discourse of international law. In essence, reacting to narratives and institutional signals backing

[33] A particularly illustrative example of such a conception can be found in the work of Alex Marschik, who writes: «Self-contained regimes are fully autonomous legal systems. They are part of the general system and created by international law, but they explicitly exclude any application of norms that are not part of the regime.» For the Austrian jurist, in contrast to open subsystems, they are characterized as excluding recourse to the rules of general international law: «Open subsystems […] require that the internal norms are applied first. However, should there be the situation in which the norms of the subsystem prove inadequate; international law may be applied to achieve the goal for which the special norms failed» (Marschik, 1998, pp. 232-233).

[34] See, for example, ICTY, *Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber*, 2 October 1995, para. 11 ('in international law, every tribunal is a self-contained system (unless otherwise provided)').

[35] The ILC originally included the topic in its work programme in 2000 as *'Risks ensuing from the fragmentation of international law'*. The work culminated in the 2006 Report entitled *'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law'*, finalized by Martti Koskenniemi and the ILC Study Group. See ILC, *Report of the International Law Commission*, 58th sess., UN Doc. A/CN.4/L.682 (13 April 2006), reprinted in YBILC 2006, vol. II(2), 1–479. Paradoxically, the ILC did not examine the institutionalization and/or special secondary rules of adjudication in international law.

self-containment,[36] the Commission authoritatively clarified that, in practice, special regimes do not operate on the basis of strict self-containment.[37]

Indeed, special regimes are not self-contained. Special regimes exhibit varying degrees of openness both towards each other and towards the general regime, frequently making regular use of general international law as well as the rules of other special regimes. This reflects the prevailing understanding that, while special regimes may claim a measure of autonomy (i.e. *relative autonomy),* they are not sealed off from either the general regime or other special regimes.

Decades before the emergence of international legal pluralism, Santi Romano, in his 1960s theory of the plurality of legal systems, used the concepts of «relevance» and «degree of relevance» (complete relevance, partial relevance, and irrelevance) to explore the nuanced relationships between legal systems (Romano, 1963).[38] These ideas remain important for examining both the interplay between the general regime of international law and its special regimes, as well as among the special regimes themselves. The following discussion addresses each in turn.

With respect to the former, mainstream legal thought reasonably conceives the rules of special treaty-based regimes as branches derived from an overarching general regime –namely, general international law. Consequently, *all* rules of general international law are conventionally regarded as requiring no *act of incorporation* to be formally relevant within the internal procedures of special regimes. In other words, it is conventionally accepted that the *automatic* incorporation of general international law operates within special regimes, enabling regime bodies to ensure the *direct applicability* of such norms within their respective domains.

By contrast, with respect to the latter, this is not so clearly the case for the normative relations between special regimes. Logically, if *all* the rules of other special regimes were equally applicable (or applicable on an equal footing) within a given regime, there would be little justification for the establishment of special regimes as distinct functional entities within international law. In practicing the intrinsic logic of functionalism, therefore, special regimes act selectively with respect to non-referred international rules (and thus the *external* special rules of other regimes), precisely because they are designed to fulfil specific functions.

In practical terms, the incorporation of normative outputs (i.e. international rules and decisions) from one regime into the operations of another becomes a self-referential process of selective adjustment and adaptation based on the institutional preferences and interpretive choices of regime bodies. Special treaty-based regimes are designed to advance their respective subject-matter domains self-referentially, through the application of their own secondary rules of adjudication and change. In doing so, they incorporate –and thus grant a measure of deference to– other international rules and decisions, under certain conditions. For non-referred international rules to have the same procedural standing as a regime's own provisions

[36] See, for example, ICTY, *Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber*, 2 October 1995, para. 11 ('in international law, every tribunal is a self-contained system (unless otherwise provided)').

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[38] See Romano (1963: 242-243, 248-249 and 305).

within that regime –and thus be applied on an equal footing– *incorporation by reference* into the regime's treaty rulebook is required.[39] This reflects the self-referential construction of special regimes, which are designed to perform selected functions and thus accord internal primacy to their own rules (see Zapatero, 2025a, forthcoming).

Since special regimes are self-referentially constructed to perform selected functions –and thus accord internal primacy to their own rules by default– the incorporation of non-referenced rules from other special regimes into their procedures tends to be both conditioned and, consequently, restrictive. Such incorporation generally occurs only when these international rules are perceived to be (1) plainly consistent with the regime's rulebook and (2) relevant to the performance of its functions and, therefore, to the attainment of its object and purpose. Inevitably, then, the legal notion of consistency within regimes is primarily conceived and constructed intra-systemically (as *internal legal consistency*), while relevance is likewise conceived and constructed as a predicate of regime functions (as *internal legal relevance*). In sum, it is the practitioners of each respective regime who formally undertake the self-assessment.

Therefore, recourse to binary descriptions of «openness» and «closure» –as if special regimes functioned as institutional mechanisms with simple on/off switches– proves inadequate to capture the diversity and complexity of normative relations that actually exist between special regimes. As a result of their secondary rules and related institutional practices, their reality may be more accurately explained by depicting them as a plurality of open subsystems of international law.

As Sørensen explains, two basic types of references between regimes shape the outcome: (a) normative references formally incorporated in regime rules (i.e., strict incorporation by reference); and (b) references generated in practice by regime bodies –particularly adjudicative bodies– to the rules and decisions of other regimes (Sørensen, 1983, p. 575). It is the interplay between static normative references –such as incorporation by reference– and dynamic references made by qualified regime bodies –such as the case law of adjudicative bodies– to the general regime and to other special regimes that determines each regime's level of openness. Thus, this combination of rules and practices ultimately renders legal openness both dynamic and diverse.

In consequence, notwithstanding the structural legal limitations of special treaty-based regimes –and thus the practice of intergovernmental functionalism– in engaging with other international rules and decisions, the concept of degrees of openness arguably offers a more nuanced account of how the rules of special regimes interoperate in practice. In essence, the legal relevance that regime bodies attribute to external rules depends on a combination of the regime's rulebook and the practices associated with the functions the regime is expected to perform, both as originally envisaged in its object and purpose and as subsequently implemented by the governmental departments or agencies competent in the relevant domain.

Therefore, the degree of openness of any given treaty-based regime is shaped by the interplay of these static and dynamic references. In this context, determining a regime's openness to the general regime and to other special regimes requires mapping both what is formally prescribed by regime rules and the related practices of

[39] That is, external special rules attain formal legal relevance on an equal footing with a regime's own provisions only through incorporation by reference into its treaty rulebook.

regime bodies. That is, analysis should reasonably begin by focusing on relatively static normative questions:

(1) the design of the normative references contained in the regime's rulebook (i.e. clauses of conflict and incorporation by reference); and
(2) the design of the regime's secondary rules of adjudication with respect to the formally applicable rule (if any) of its most authoritative law-applying body (i.e. an international adjudicative body).[40]

At the same time, this analysis needs to be supplemented by examining the dynamic institutional practices of regime bodies, focusing on:

(3) the manner in which the regime's most authoritative law-applying body (i.e. a qualified adjudicative body) applies the regime's rulebook –including its relational rules– and how its case law evolves over time; and
(4) the ways in which plenary bodies develop subsequent authoritative interpretations and/or, where political will exists, engage in treaty amendment to adapt the regime to correct legal imbalances in relation to global public goods and values regulated in other external primary rules.[41]

This combination of rules and institutional practices determines the (potentially variable) degree of openness of a given regime to both the general regime and other special regimes of international law. Accordingly, shifts in the degree of openness arise not only from evolving perceptions among regime practitioners about the regime's functions but also from contestation of regime outcomes by global constituencies concerned with other public goods and values. In their advocacy, these constituencies often invoke the rules of other special regimes regulating different global public goods and values to support their legal positions and arguments.

While this is especially apparent among human rights and environmental constituencies, it is by no means exclusive to them, as illustrated by corporate practices. In a sense –and borrowing a literary license from Dworkin (Dworkin, 1977)– all these actors routinely and strategically rely on the rules of other regimes, or on the global public goods and values those regimes protect –for example, health, culture, or innovation– as trumps to demand deference within targeted regimes. Sometimes this involves invoking specific legal provisions; at other times, it entails appealing to the broader public goods and values underlying those regimes. In both cases, the legitimacy of their claims is reinforced by grounding them in the authority of existing international legal rules.

Nonetheless, the fact that special regimes are open subsystems of international law –and thus, in practice, permeable to both the general regime and other special regimes– does not resolve the issue of international legal consistency in rule of law terms. As observed, regime bodies tend to formally defer to the rules of other special regimes that are explicitly incorporated into their treaty rulebooks. With respect to non-referred rules of international law, those deemed consistent with the regime's rulebook are constructed as such through interpretation and subsequently applied. Conversely, rules perceived as inconsistent are either excluded *ex officio* or, in more diplomatic terms, recharacterized as merely apparent conflicts and thereby interpreted away within the regime's law-applying procedures, in line with the well-

[40] The existence of a formally defined *applicable rule* in the secondary rules establishing adjudicative bodies (i.e., special secondary rules of adjudication) is necessarily a variable that shapes the degree of openness a special regime displays toward the general regime and toward other special regimes.
[41] See below for a brief illustrative example concerning the WTO/TRIPS amendment.

established presumption against treaty conflicts in international law (see Zapatero, 2025b).

In this context, it may be argued that special treaty-based regimes are, in rule-of-law terms, ill-suited to ensure international legal consistency on their own. These regimes, after all, remain structurally constrained and, as institutional by-products of intergovernmental functionalism, are unable to perform that function effectively.[42] Accordingly, the decentralized provision of consistency by special regimes is inherently inadequate for this purpose. Because special regimes are not procedurally integrated –either with one another or with the general regime of international law– the principal tool currently available for advancing international legal consistency paradoxically lies within each individual special treaty-based regime. This is achieved primarily through legal interpretation, most notably via systemic integration, or, failing that, through compromised patterns of inter-institutional bargaining.[43]

In this regard, systemic integration is codified in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires interpreters to take into account, together with the context, any relevant rules of international law applicable in the relations between the parties. In its *Report on the Fragmentation of International Law* (2006), the International Law Commission (ILC) characterized systemic integration as an interpretive principle that «call[s] upon … to situate the rules that are being invoked by those concerned in the context of other rules and principles that might have bearing upon a case». In this process, 'the more concrete or immediately available sources are read against each other and against the general law «in the background». The critical point, according to the ILC, is that the interpretation of a rule «refers back to the wider legal environment, indeed the 'system' of international law as a whole»[44].

Yet interpretive creativity by law-applying bodies cannot resolve all issues. Inevitably, there are situations in which the seams begin to show –regardless of how carefully they may be managed, whether through diplomatic or technical means. Because regime bodies cannot grant primacy to external rules over their own regime rules, plenary bodies –such as Conferences of the Parties, Meetings of the Parties, General Councils, and comparable organs– occasionally function as political safety valves in this context. By producing authoritative interpretations, institutional declarations, and other formal acts and decisions, these plenary bodies enable law-applying regime units to broaden their public rationales and thereby help mitigate potential inter-regime tensions, whether concerning their respective primary rules or, alternatively, the global public goods and values they regulate. A paradigmatic example of such institutional practice is the so-called Paragraph 6 issue in the WTO Ministerial Declaration regarding access to medicines in developing countries, which

[42] In Koskenniemi's words: «It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias … whatever the rules». See Koskenniemi (2007) (emphasis in original).

[43] As former WTO Director-General Pascal Lamy has put it, the «disorganized multiplication of international legal sub-systems' cannot be remedied by making coherence depend on 'ad hoc solutions based on the goodwill and interests of the jurisdictions concerned». See Lamy (2006, p. 984). For a seminal early reflection on these issues, see Jenks (1951).

[44] See ILC 2006 (para. 479). Campbell McLachlan was probably the first to systematically formulate the principle of systemic integration in international law. See McLachlan (2005). For a comprehensive and updated treatment, see McLachlan (2024). For a critical and in-depth monographic analysis, see Merkouris (2015). For an overview and further references, see Merkouris (2020, last updated, August 2020).

references public health –but not the WHO[45]– and the subsequent agreed reform of the TRIPS rules.[46]

Indeed, consistently balancing global public goods and values across a plurality of regimes on the basis of their respective rules is, in practice, unfeasible. Technocracy –whether exercised within a single regime or through an aggregation of regimes under some elusive form of inter-institutional negotiation– is, by definition, ill-suited to perform such an operation. Each technocratic entity –that is, every special treaty-based regime, much like domestic agencies– is structurally constrained to «follow function» through procedure. As a result, and notwithstanding varying degrees of openness, the global public domain is constructed as a disaggregated multiplicity of regimes whose functional authorities tend to perpetuate suboptimal outcomes in integrating other international rules and decisions–or, in some cases, to engage in compromised patterns of inter-institutional bargaining outside their respective procedures, which may produce outcomes even less satisfactory from a rule-of-law perspective.

4. A kaleidoscope of legal perspectives

The promise of international legal consistency –and, with it, the sustainability of the rule of law in an increasingly interdependent world– appears precarious, and may even be open to serious challenge. The existence of international legal pluralism –and, in consequence, that of non-procedurally integrated special regimes– inevitably implies that potentially different «legal perspectives» on any given international legal issue, question, or case may emerge, depending on the regime to which international legal practitioners ultimately turn. The use of special secondary rules to advance functional domains through treaty-based regimes has paved the way for a rather challenging situation: one in which special treaty-based regimes across a variety of domains (e.g. trade, security, human rights, environment, labour, health, intellectual property, migration, drug control) could develop divergent legal approaches to issues, questions, and cases.

In the absence of procedural integration, special treaty-based regimes –and thus their respective functional bodies, acting on the basis of their own sets of rules– could offer potentially alternative, yet valid, legal perspectives on any given international legal issue, question, or case. As a result, when applying international law self-referentially –as they inevitably do– different special regimes could develop alternative, and potentially equally valid, legal positions.

Adversarial or confrontational approaches among regimes do not usually emerge in a direct or overt manner, as interdepartmental power balances within governments tend to preclude such outcomes.[47] Within these dynamics, certain governmental actors often prevail –particularly when their technocratic interests or regulatory authority are perceived to be at stake. Notably, it is often economic

[45] Interestingly, these institutional practices of plenary bodies –in which specialized governmental departments and agencies represent their nation-states– do not necessarily make explicit reference to the articles, sections, or paragraphs of other regimes' rulebooks, or to their functional authority. Rather, they refer more indirectly to the global public goods and values regulated by those regimes.

[46] See WTO, *Doha Ministerial Declaration*' WT/MIN(01)/DEC/1 (20 November 2001); WTO, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (20 November 2001); WTO General Council, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*" WT/L/540 and Corr.1 (1 September 2003). For comments see Correa (2004) and Zapatero (2014).

[47] For a classic account of policymaking as an incremental process shaped by mutual adjustment and negotiation among governmental actors, see Lindblom (1959).

departments and agencies that emerge as the dominant actors in shaping such power balances.

Since treaty-based regimes are neither procedurally integrated with one another nor subject to general international organs exercising legislative oversight or judicial review, it follows that the choice of regime can significantly influence, if not determine, the outcome.[48] Regimes are functional entities that tend to feedback primarily on their own components. Decision-making is constrained by their treaty provisions, upon which their bodies operate. As functional instruments, their institutional output reflects normative constraints. Consistent with the logic of functionalism, these bodies exercise prescriptive and adjudicative jurisdiction over selected subject matters, *ratione materiae*, grounded in the treaty's object and purpose, its operative provisions, and the interpretative guidance drawn from its preamble.[49] Therefore, any given regime will invariably discount the application of inconsistent external international rules, since its treaty rulebook serves as its ultimate source of legitimate authority. This necessarily conditions the result, as the reasoning of its organs is guided by the automatism of *internal legal primacy* that characterizes functionalism (see Zapatero, 2025a).

To put it differently, depending on which international authority analyses an issue, question, or case, it will perform the legal operation differently, using its own set of treaty rules on the relevant subject domain as its primary structural reference. That is, the *internal* legal perspective constructed by regime A is, by definition, merely an *external* legal perspective for regime B –and vice versa.

In consequence, the allocation of international authority to a particular special regime both determines and constrains the outcomes to be expected, since regime bodies construct their legal perspectives on issues, questions, and cases on a functionalist basis –granting structural preference to their own rules. Strictly speaking, this situation would not pose a rule-of-law problem were it not compounded by the absence of any higher general international authorities with the competence –that is, general prescriptive and adjudicative jurisdiction– to exercise authority and, where necessary, to (re)balance the rules and decisions of one regime against those of others. This, in turn, produces a *latent* multiplicity of potentially competing international legal perspectives.

In the absence of overarching general international organs and procedures, determinations of international legality by special treaty-based regimes are necessarily contextual but in practice final, as there exist no mechanisms for their external review or challenge. In this context, while the perspective of the general regime of

[48] A particularly clear illustration appears in the ILC's *Report on the Fragmentation of International Law* (2006, para. 55): «For example, maritime transport of oil has links to both trade and the environment, as well as to rules on the law of the sea. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity? The responses are bound to vary depending on which is chosen as the relevant frame of legal interpretation». For another illustrative example of matters that may simultaneously fall within the competence of several specialized agencies, see the Dissenting Opinion of Judge Weeramantry in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion), ICJ Reports 1996, pp. 150–151.

[49] Central to defining the functions and interpretive boundaries of any treaty-based regime is the concept of object and purpose. It underpins the general rule of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties–namely, that «a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose». For doctrinal analysis and debate regarding the contours and practical application of this concept in treaty interpretation, see, in particular, Bianchi and Zarbiyev (2024, ch. 6); Buffard and Zemanek (1998); and Hollis (2010).

international law does exist –and can, in principle, be constructed for any given issue, question, or case– it nevertheless operates, at present, in a distinctly limited capacity.[50] This limitation stems from the absence of international organs and procedures capable of integrating the potentially divergent (and thus alternative) perspectives of international legality that may arise from the operation of special treaty-based regimes.

Therefore, it can be contended that the international legal perspective of the general regime may at times exist in a state of latent competition with special regimes, a situation that parallels the competitive dynamics that may also be observed among the special regimes themselves.[51] Yet, as a matter of general legal theory and practice –measured against basic rule-of-law standards– this ought not to be the case. The problematic, if not paradoxical, nature of this intergovernmental arrangement thereby becomes apparent. On this view, the general regime of international law ought not to operate as a mere *primus inter pares* in its relations with other regimes, and certainly not with such a diminished institutional infrastructure.

At present, the general regime of international law lacks the secondary rules of adjudication and change necessary to procedurally integrate special regimes. Set against the fragile institutional infrastructures of general international law, the plurality of latent legal perspectives within special regimes transforms the international legal order into a kaleidoscope of potentially competing interpretations.[52]

Since the general regime of international law lacks proper organs and procedures with authority over the prescriptive and adjudicative jurisdiction of special regimes,[53] no public law construct ensures international legal consistency, and thus the sustainability of international legality under rule-of-law standards. As a result of this general authority default, the international legal realm comprises an increasingly complex plurality of institutionalized legal perspectives –paradoxically underpinned by forms of public law.

Special regimes operate horizontally, integrating the rules and decisions of other regimes selectively. As a logical legal by-product of functionalism, the degree of openness –and thus internal relevance– to other international rules and decisions within each regime is primarily, and self-referentially, defined by its own rules, decisions, and practices. In other words, law-applying bodies structurally adhere to the legal certainties provided by their own treaty texts when carrying out their operations.

[50] As Koskenniemi observes, «In order to move confidently in a world of many regimes, one needs some point of reference from which to examine rival regimes and conflicting preferences. In order to compare, one needs a tertium» (see Koskenniemi, 2009a, p. 7). See also Koskenniemi (2007, p. 4) («[t]he choice of the frame determine[s] the decision. But for determining the frame there is no meta-regime, directive or rule»). This observation underscores a significant gap in public law. In this respect, constitutional courts should take the advancement of general procedural integration in international law–and thus the procedural dimensions of the general regime–more seriously.

[51] On embedded preferences, see Koskenniemi (2009a, pp. 4-5) and Koskenniemi (2011) (Hegemonic Regimes).

[52] The metaphor of a «kaleidoscopic world» is employed by Edith Brown Weiss in her conceptualization of contemporary international law; see Brown Weiss (2022). Here, international law itself is referred to as a kaleidoscope.

[53] Benvenisti (2014) offers an elaborate –though not unproblematic– defense of external review of international bodies by domestic actors, particularly domestic courts, in the absence of international mechanisms. Such pragmatic conceptions could acquire systemic significance if constitutional state organs –such as constitutional courts– exerted sustained and concerted pressure on governments, yet this solution does not address the structural limitation that not all constitutional organs operate within states committed to rule-of-law standards.

As a result, special regimes accord *de facto* primacy to their own rules over non-referred international rules within their procedures.[54]

Therefore, the lack of general procedural integration in international law is of material significance, particularly for constitutional state organs. In its absence, the self-referential determinations of international legality made by each special regime amount to merely one among several possible international legal perspectives. This situation has significant implications for the rule of law in an increasingly interdependent world.

5. Inventory of 'international jurisdictions'

Disparities in institutional effectiveness among regimes, or the absence of regimes in certain subject-matter domains, help define the relative position of global public goods and values within the international community. By extension, this process concomitantly shapes the relative status of public goods and values within domestic legal orders, as international rules and decisions are incorporated into them. It is therefore reasonable to argue that the establishment and exercise of 'international jurisdiction' –whether prescriptive, adjudicative, or both– through treaty forms constitutes a matter of fundamental significance for public law, and by extension, for the rule of law.

Arguably, few terms capture as precisely as 'jurisdiction' the nature of the authority exercised by a treaty body empowered to adjudicate disputes, monitor compliance, adopt binding rules and decisions, or perform other public functions under international law. As F. A. Mann observed in his seminal work *The Doctrine of Jurisdiction in International Law*, «jurisdiction … is concerned with what has been described as one of the fundamental functions of public international law, viz. the function of regulating and delimiting the respective competences *of states*» (Mann 1964, p. 15, emphasis added).

The paradox, however, lies in the fact that while states establish international authority through treaties both to ensure cooperation and to mitigate conflicts and overlaps in their respective jurisdictional competences –objectives that are, in practice, mutually reinforcing– no equivalent mechanisms exist to regulate the allocation of competences among treaty bodies themselves, and thus among treaty-based regimes. Put differently, there is an absence of rules governing what might be termed, in a strict legal sense, international jurisdiction. In this light, the formal authority –and hence the jurisdiction– of treaty bodies serves not only to define and delimit competences between states, but also, paradoxically, among the treaty bodies themselves. This secondary function assumes particular importance in domains characterized not only by adjacent but also by overlapping institutional mandates, yet it remains insufficiently addressed in general international legislation, with all the problems this entails for legal certainty and the rule of law.

The first multilateral diplomatic initiative to focus explicitly on the codification of an 'international law of jurisdiction' took place at the Hague Conference on the Codification of International Law in 1930.[55] In the inaugural address at the opening

[54] Framing regimes as 'decomposable hierarchies' see e.g. Keohane and Nye (2001, p. 264).

[55] Pursuant to a resolution adopted by the Fifth Assembly of the League of Nations on 22 September 1924, the Council established a Committee of Experts, chaired by M. Hammarskjöld, to compile a provisional list of international law subjects whose regulation by treaty was considered desirable. This list formed the basis of the conference programme. Composed of seventeen members, the Committee was tasked with identifying topics 'the regulation of which by international agreement' was regarded as most 'desirable and realizable.' It was further instructed to review governmental responses to this list and to

session, Beelaerts van Blokland, Minister of Foreign Affairs of the Netherlands, explicitly noted the problem of the absence of rules establishing international jurisdiction. Nonetheless, the understanding of the «international law of jurisdiction' at the time generally referred to, and was thus largely limited to, the 'international law *of state* jurisdiction» –with some attention to international adjudicative jurisdiction, but little to international prescriptive jurisdiction.[56]

Despite nearly a century of successful practice with special treaty-based regimes, there has been no significant progress toward the adoption of a general multilateral treaty specifically addressing international jurisdiction –the logical corollary of the 'international law of state jurisdiction,' as it concerns the exercise of international authority and, more precisely, the allocation of jurisdictional competences to prescribe and adjudicate at the strictly international level.

All special treaty-based regimes currently exercise international prescriptive and adjudicative jurisdiction by virtue of delegation from states, typically without explicitly invoking the formal term «international jurisdiction» in the course of these operations. Yet, apart from regime-specific provisions on object and purpose, there has been no concerted effort to elaborate a general multilateral treaty addressing the delimitation –and the concomitant general procedural integration– of the international jurisdictions established through treaty form.[57]

As Mann explained, there is no more important way to avoid conflict than to establish clear norms as to which public authority can exercise authority over whom, and under what circumstances: In his words, without this allocation, «all is rancour and chaos» (Mann, 1964, p. 89). Since state jurisdiction has been highly regulated by treaty law in the last century, the point could well be applied to treaty-based regimes and their respective 'international jurisdictions'. As long as states delegate competences to international entities, these entities operate *de iure* or *de facto* as such at adopting international legal rules and decisions.

However, the allocation of international jurisdiction to special treaty-based regimes –by the very governmental departments and agencies that subsequently administer them– has not been regulated by general international legislation. In particular, neither the international prescriptive nor the international adjudicative jurisdiction of such regimes has been the object or purpose of any general legislative initiative at the international level. As a result, the allocation of jurisdiction to these regimes –and, by extension, to the global public goods and values reflected in their

report on those issues deemed 'sufficiently ripe,' as well as on the procedures appropriate for preparing conferences aimed at their resolution. See *League of Nations, Official Journal, Special Supplement*, No. 21, Records of the Conference for the Codification of International Law (Geneva, 1930), p.10.

[56] See *Acts of the Conference for the Codification of international law*, League of Nations, Official No.: C. 351. M. 145. 1930. Vol. I Plenary Meetings, page 15 (March 13th, 1930): «It was the absence of rules of law which, in 1907, prevented the definite establishment of compulsory arbitration; *it was the absence of rules of law which frustrated the first attempt to create a true world court, the International Prize Court*. Yet again, it was the *absence of rules of international law* which –fortunately– did not frustrate, though it certainly retarded, the materialisation of the plan that the Advisory Committee of Jurists, convened by the League of Nations at the Peace Palace in 1920, had prepared regarding the compulsory jurisdiction of the Permanent Court of International Justice. Now, *owing to the development of law, international jurisdiction will be able, in an ever-greater measure, to extend its sway* over the whole domain which must be entrusted to it if the nations are ever to wrest themselves free from that appalling calamity, war, which, like a nightmare of blood, still haunts one generation after another» (emphasis added).

[57] For insightful reflections on the extent to which the treaty form does not readily lend itself to accommodating objectives associated with a community perspective, see, e.g., Brölmann (2005), who analyses how the traditional treaty paradigm –grounded in the notion of the treaty as a contract between states– faces limitations when applied to the practice of international institutional law.

subject-matter domains– remains prone to blurring, shifting, and overlapping under the prevailing patterns of intergovernmental bargaining.

Evidently, the world map of state jurisdictions –numbering around 200 today– does not correspond to an equally stable map of international jurisdictions. Even today, allocations of international prescriptive and adjudicative jurisdiction remain relatively fluid. Whereas state jurisdiction over territory and persons has remained largely stable for several centuries –despite the enduring challenge of extraterritorial jurisdiction– the jurisdiction of international regimes over subject-matter domains has not. Rather, it has evolved through organ-led treaty forms that began to emerge in the second half of the nineteenth century and were further developed throughout the twentieth and into the twenty-first. In terms of organizational forms, this timeframe is remarkably brief. As a result, the international legal construct remains in a state of fluid iteration. This helps explain the disaggregation of the exercise of international authority across subject-matter domains, through special treaty-based regimes, particularly in the late twentieth and early twenty-first centuries.

Even at a purely intellectual level, an authoritative mapping of international jurisdictions could help expose the extent to which intergovernmental assertions of international authority –emanating from different treaty-based regimes– may, at times, lack sufficient consistency with rule-of-law standards. While largely aspirational, such an endeavour could at least provide a reference point for diligent and observant constitutional organs of the state –beyond the executive itself– when they scrutinize these assertions and, perhaps, reassert a role for general international legislation in this domain by questioning such inconsistencies.

Understood as the international authority to prescribe and adjudicate, international jurisdiction could be tentatively mapped by developing an analytical chart of the provisions on object and purpose (and related preambles) contained in the constituent treaties of formal international organizations and other treaty-based regimes.[58] To date, however, there have been few conceptual initiatives to undertake such a mapping. In the early 2000s, the idea of establishing a group of experts 'without vested interests' to compile an inventory defining the functions and purposes of existing international organizations was unsuccessfully advanced within the United Nations Administrative Coordination Committee, now the UN Chief Executives Board.[59]

If one accepts the premise that an issue, question, or case can be substantiated as falling within the jurisdictional competences–and therefore within the object and purpose–of a given treaty-based regime, it follows that such regimes, in exercising prescriptive or adjudicative jurisdiction, may give rise to concurrent international jurisdictions. In this context, the absence of a general international

[58] The allocation of international jurisdiction has important implications for the relative preeminence of particular global public goods and values over others –and, in turn, for the proliferation of strategic manoeuvres when competences are not clearly defined. For an illustration, consider regime-shifting and jurisdictional reallocation in the area of intellectual property –and related proposals for moratoriums– discussed in Helfer (2004) and Zapatero (2013a, 2013b), respectively; see also infra.

[59] See the speaking note of Director-General Mike Moore at the WTO General Council informal meeting, Thursday, 18 January 2001, titled *Coherence in global economic policy-making: WTO cooperation with the IMF and the World Bank*: 'I have suggested privately that an EPG [Eminent Persons Group] or a group of wise men and women, with no vested interests, could do a study of the goals, objectives and outcomes of all the institutions. How we can do our jobs better, and be more accountable and transparent to our owners, the Governments." For the telling alternative concept of 'coherence' as inter-institutionally understood within special economic regimes (WTO, IMF, and the World Bank) –particularly in the period of official neo-liberal ascendancy in the 2000s, when liberalization was advocated with remarkable openness and confidence– see Zapatero (2006).

jurisdiction becomes a matter of considerable significance for public law, as the default is, at best, filled by intergovernmental arrangements and technocratic diplomacy. This situation, in turn, raises pressing questions regarding the consistency, accountability, and efficacy of the current protection of global public goods and values under any meaningful conception of the rule of law.

Probably the most significant opportunity in recent decades to move toward a general framework in this regard was the negotiation of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO). However, the issue was only marginally addressed in the final text. Still pending entry into force (Article 24),[60] the VCLTIO largely replicates the provisions of the 1969 VCLT –such as Article 5 (treaties constituting international organizations and treaties adopted within an international organization), Article 30 (application of successive treaties relating to the same subject matter), and Articles 31 to 33 (interpretation of treaties)– and thus represented a missed opportunity to address the allocation and procedural integration of international jurisdictions.

In essence, because the general regime of international law embodies the general authority rationale of the international community, it should be regarded as a multifunctional authority vis-à-vis special regimes –that is, as a regime entrusted with a higher authority over them. Special treaty-based regimes, by contrast, exercise authority only in functional terms, confined to selected subject-matter domains. Yet the institutional underdevelopment of the general regime prevents it from exercising the elemental functions of general authority –legislation, governance, and adjudication– over those regimes. As a result, international community interests are often lost in translation within special regimes, for there exists no overarching *general* authority capable of procedurally integrating, and thereby balancing, the global public goods and values they administer through their myriad rules and decisions.

Notably, the only explicit institutional attempt within the UN's otherwise documentary *babel* to delimit the domain of general international legislation is the ILC Committee's definition, in its Draft Articles on the 1969 VCLT, of a '*general multilateral treaty'* as

> [A] multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole (emphasis added).[61]

[60] In the course of a protracted ratification process, many of its conventional provisions replicate those of the VCLT, which are in any case regarded as reflective of customary international law. The VCLTIO has received formal confirmations from 12 international organizations: the International Atomic Energy Agency (IAEA), International Civil Aviation Organization (ICAO), International Criminal Police Organization (Interpol), International Labour Organization (ILO), International Maritime Organization (IMO), Organisation for the Prohibition of Chemical Weapons (OPCW), Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO), the United Nations (UN), United Nations Industrial Development Organization (UNIDO), Universal Postal Union (UPU), World Health Organization (WHO), and World Intellectual Property Organization (WIPO). As of July 2025, 33 states have ratified or acceded to the Convention, which requires 35 ratifications to enter into force. Notably, formal confirmations by international organizations do not count towards this threshold, which may partly explain why some organizations have been slow to confirm the Convention. For the current status of ratifications and formal confirmations of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO, 1986), see United Nations Treaty Collection, Chapter XXIII, available at: https://treaties.un.org.

[61] See International Law Commission, *Yearbook of the International Law Commission* 1962, vol. II, p. 239. The final draft did not include the provision as a result of the objections of the United States and Great Britain expressed in their observations on the draft circulated to governments for comment.

This principled definition articulates the notion of a legislative category directed to community-wide concerns. However, this conceptual elaboration by the ILC did not make it into the Diplomatic Conference where the VCLT was adopted. The result is that the category persists in latent form: textually acknowledged, but never translated into a procedural or institutional infrastructure. It therefore lacks an international legal architecture capable of completing and ordering general multilateral primary and secondary rules under the very idea of 'matters of general interest to States as a whole' – that is, of *international community interest* in its legal sense.[62]

The significance of this should not escape the attention of constitutional state organs; for the aggregation of their individual state interests ultimately contains a collective and thus general multilateral element. This points towards primary and secondary rules of international community interest. These are embodied substantive and procedural expressions of international community interest, respectively. Their systemic unity can only be secured through general international legislation.

6. The elusiveness of international jurisdiction

Intergovernmental functionalism has played a significant role in facilitating multilateral coordination within selected subject-matter domains, thereby enabling effective, piecemeal state coordination in response to the challenges of an increasingly interdependent world. At the same time, however, it has contributed to the entrenchment and perpetuation of a general authority default in the international legal sphere. As a direct consequence, the international community now faces a persistent and open contestation regarding the relative legal status of competing global public goods and values, and thus the relations of primacy among them. Paradoxically, this contestation is further intensified through the treaty form itself –still the privileged modern form of public international law– via the strategic layering of contractualized geopolitical treaties by hegemonic states, most notably expansive free trade agreements (FTAs) and similar vehicles. In this way, a broad spectrum of subject-matter issues is channelled into intergovernmental bargaining and made subject to the secondary rules of adjudication of those geopolitical legal instruments (see Benvenisti, 2016, and Cottier, 2015).

These ongoing trends in treatymaking –with traditional general international law, to say nothing of general international legislation, remaining in the background– manifest themselves not only in classic regime-building through the treaty form, but also in phenomena such as regime-shifting[63] and counter-regime-building (see Morse and Keohane, 2014). Notwithstanding the variety of definitions already available to describe these processes, the concepts of regime-building, regime-shifting, and counter-regime-building most comprehensively capture the fundamental state stances toward the treaty-based regime.[64] That is, they exacerbate instrumental and opportunistic conceptions of public law, which produce paradoxical competitive forms of international authority anchored in the Westphalian model of treaty-based ordering.[65]

Still today, the rules governing the exercise of international authority within the international community remain unsettled. The definition of the general interest

[62] For a comprehensive analysis of the evolution and significance of community interests in international law, see Benvenisti and Nolte (2018); and Simma (1994).
[63] See first formulations of regime-shifting in Braithwaite and Drahos (2000), and Helfer (2004).
[64] Interestingly, the categories of regime-shifting, counter-regime-building, and traditional regime-building closely mirror Albert O. Hirschman's classic taxonomy of institutional responses: exit, voice, and loyalty, respectively (Hirschman, 1970).
[65] For a particularly insightful analysis, see Benvenisti and Downs (2007).

through multilateral procedures is difficult to achieve and is regularly contested, notably through public law practices rooted in the treaty form itself, as noted above. Regardless of institutional arrangements, the principal actors in these processes include governmental departments and agencies, the international organizations and technocratic bodies in which they participate, and a range of civil society entities. Importantly, they likewise comprise international corporate forms and structures through which capital holders with controlling interests (or de facto influence) operate across jurisdictions, thereby structuring the global exercise of private power, as a correlate to the global accumulation of capital.[66]

In this challenging global setting, new regimes are established and existing ones reformed to: (1) fill institutional gaps in selected subject-matter domains where no regimes exist; (2) address enforcement gaps of less effective regimes, often by linking issues across domains; and (3) counterbalance the rules and decisions of existing regimes. Through this last function, the international legal status of global public goods and values is not merely refined or expanded, but instead frequently subject to strategic contestation, eventually leading to renegotiation.

In such a setting, governmental departments and agencies may seek to allocate or reallocate prescriptive and adjudicative jurisdiction among special treaty-based regimes –or even establish new ones– to expand their administrative competences, policy priorities, and agendas within ongoing processes of global policy (re)definition. Naturally, such efforts are often aligned with the interests of constituencies connected to the public goods and values subject to their domestic administrative competence. These constituencies may be public or private, profit or non-profit, or some combination thereof.

Building on this dynamic, these constituencies not only strategically leverage rules of other regimes within the internal procedures of targeted regimes to secure greater deference to the public goods and values they prioritize (see Cameron, 2000, p.19); they also frequently lobby for (1) the direct and formal incorporation of the public goods and values they select –thereby introducing new issues and functional objectives– into the rulebook of the targeted regime (so-called issue linkage), or (2) the creation of new regimes to protect those global public goods and values.

Again, a plausible explanation for this situation is the absence of a clear allocation of competences among the international authorities established by special treaty-based regimes (i.e., international jurisdictions). In this context, existing general international law, in its current non-institutional configuration,[67] proves incapable of providing effective inter-institutional ordering in the interest of the international community. Although it is the body of public law that might reasonably be expected to embody the general authority rationales embodied by constitutional state organs at

[66] The global expansion of private power increasingly conditions existing forms of public authority, including contemporary international authorities operating through special treaty-based regimes. In today's regulatory environment, as captured by the concept of meta-regulation, societal actors at all levels simultaneously function as both regulators and regulatees. Thus, the same actor may function as regulator in one context and regulatee in another. The state itself illustrates this duality, being subject in certain contexts to oversight by non-state actors such as credit rating agencies –a paradigmatic, yet by no means unique, example of how public authority can be regulated by private actors. More broadly, the interplay of regulatory roles among state and non-state actors permeates all spheres of activity, resulting in a system characterized by regulatory circularity. See, in particular, Drahos (2017, pp. 761–783). For the original idea of states as 'rule takers' as distinct from 'rule makers,' see Braithwaite and Drahos (2000, pp. 3–4).

[67] Josef L. Kunz described general international law as «a primitive law lacking special organs» highlighting its limited institutional development; see Kunz (1953, p. 457) (General international law is, up to now, a primitive law lacking special organs).

the international level, its present non-institutional configuration leaves the center of institutional activity to the special treaty-based regimes. As a result, consistent with the institutional practice whereby governmental departments represent the state in specialized treaty bodies, the locus of international authority resides in the realm of intergovernmental functionalism.

The environmental movement and its constituencies were among the first to recognize the phenomenon of default international jurisdictions several decades ago, and to draw attention to its far-reaching implications, particularly with respect to the law of the then so-called «world trade system» (i.e., GATT). In the telling words of influential world trade scholar John H. Jackson (1993, p. 516), «it is no surprise [...] that the environment and trade issues are often discussed only in the context of the one comprehensive regime that exists: that governing trade». In Jackson's usage, 'existing' referred to the relatively effective secondary rules of international law in the field of world trade law.

Despite the somewhat sweeping nature of Jackson's assertion, his observation proved prescient, as only a few years later the multilateral treaty-making negotiations underway at the time culminated in the creation of the WTO. Without delving further into that process, this episode stands as a paradigmatic example of the public challenges inherent in the self-referential construction of authority. Such dynamics permeate intergovernmental functionalism, as discussed in these pages. The practice of treaty-making under this logic consolidates into treaty law the structural biases of specialized administrative departments and agencies with regard to other competing global public goods and values. This consolidation occurs as a matter of course, by layering rules of adjudication and change –such as dispute settlement mechanisms, rule-making protocols, and their respective international procedures– upon the primary rules that enshrine those global public goods most closely aligned with domestic administrative authority.[68]

Emerging in the late nineteenth century from the consent of states, special treaty-based regimes constitute a new form of international authority, which lacks a stable constitutional allocation of jurisdictions, such as constitutions do in distributing competences among state organs at the domestic level.[69] While the United Nations Charter is often described as a constitutional treaty framework for the international community, it does not provide procedural integration for multilateral and plurilateral treaty-making across different subject-matter domains. Nor does it do so for the international rules and decisions subsequently adopted by treaty bodies within those domains, leaving the system without meaningful procedural integration.[70]

Moreover, the principal organs of the United Nations lack the jurisdictional competence to advance this objective on behalf of the international community –with certain qualifications in the case of the ICJ,[71] and, by contrast, with the Security

[68] On the unorthodox invention and remarkable development of GATT panels, see Hudec (1970, 1990) and Zapatero (2000).

[69] For a relevant legal analysis of how authority is delegated within international organizations, with special attention to institutional structures and comparative practice (notably in the United Nations and the European Union), see Kuijper (2022). For the principal-agent theoretical framework and empirical patterns of delegation and agency, see Hawkins, Lake, Nielson, and Tierney (2006).

[70] See, for a comprehensive argument on the constitutional character of the UN Charter, (Fassbender, 1998 and 2009). See also Dupuy (1997), as well as Jürgen Habermas (Habermas, 2006), who appears to endorse this line of argument. For a critic see Klabbers (2017) (no separation of powers neither accountability of the UN or its organs).

[71] The International Court of Justice lacks contentious jurisdiction over international organizations, which may only request advisory opinions through designated UN organs or specialized agencies, as provided under Articles 65 and 96 of the UN Charter. Interestingly, however, through landmark advisory opinions

Council exercising extensive powers that remain constitutionally contentious in its current configuration.[72] In essence, their powers are circumscribed by the logic of intergovernmental functionalism underpinning most contemporary international institutional law, with the exception of certain organs within regional integration organizations.[73]

In the absence of a constitutional treaty framework for the international community, multilateral and plurilateral treaty-making across different subject-matter domains remains unfixed. This leaves the question of «who does what» –and thus who decides –relatively unsettled and subject to reconfiguration and change. As a result, the geography of special regimes resembles an interactive map of shifting tectonic plates (see Trachtman, 1992, pp. 459-460), with international jurisdictions layered across functional areas (i.e., treaty-based regimes) that can be subdivided, shifted, and overlapped[74] –an arrangement that stands in sharp contrast to the relative stability of institutional forms of public authority characteristic of state legal systems.

When examining the shifting map of international jurisdiction,[75] it becomes evident that the formal exercise of jurisdiction through treaty-based regimes is subject to ongoing renegotiation. Jurisdiction may be subdivided, or reallocated among regimes through mechanisms such as «issue linkage», while overlaps are sometimes deliberately engineered to counterbalance or contest the authority of existing regimes. In this way, treaty-based regimes can be deliberately designed to establish alternative international legal perspectives on particular issues. By doing so, they challenge the authority of incumbent special regimes and, in turn, contribute to the continuing redefinition and repositioning of global public goods and values within the international legal sphere.

Particularly telling examples are the 2005 UNESCO Convention on Cultural Diversity (i.e. culture vis-à-vis trade) and the 2001 Shanghai Cooperation Organization (i.e. national security vis-à-vis human rights), each seeking to rebalance global public

–such as *Reparation for Injuries* (1949), *WHO/Egypt Agreement* (1980), and *Nuclear Weapons* (1996)– the ICJ has contributed to the development of the active dimensions of international organizations' legal personality, as well as their implied powers to fulfill their purposes. By contrast, the Court has addressed the negative dimensions of legal personality only more recently. See, generally, S. Rosenne, *Rosenne's The World Court: What It Is and How It Works*, 7th rev. ed., D. Richemond-Barak ed. (Brill Nijhoff 2021); *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, p. 174; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Rep. 1980, p. 73; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, ICJ Rep. 1996, p. 66.

[72] The entrenched veto power of the permanent members of the Security Council (P5), together with the Charter provision requiring their consent for any reform of this privilege, constitutes perpetual and unamendable procedural obligations unknown to any modern constitution. No constitutional order recognizes unamendable rules of this kind, as public power –and therefore authority– is always delegated and must remain so to preserve its validity. On this basis, it is reasonable to contend that any constitutional state organ may –most recently illustrated by the *Kadi* litigation before the European Court of Justice– challenge the authority of such arrangements under both domestic and general international law, and may accordingly make compliance with Security Council rules and decisions conditional. For Hans Kelsen's analysis see Kelsen (1946: 1121) («[t]he veto right of the five permanent members of the Security Council places them above the law of the United Nations, establishes their legal hegemony over all the other members, and thus stamps the Organization with the mark of an autocratic regime»); Kelsen (1948: 790) (discussing the ICJ being under the political control of the Security Council); and Kelsen (1950, chapter X) (The Security Council).

[73] See e.g. Weiler (1991) and Stone Sweet (2004).

[74] For a strand in political science arguing that 'functional overlaps' between international institutions foster competition, specialization, and coordination among regimes –rather than conflict– thereby enhancing global governance, see Gehring and Faude (2014).

[75] With the principal exceptions of the amendment rigidity of the UN Charter and the entrenchment of the Security Council, whose permanent members hold a veto over amendments (see note 88 above).

goods and values by creating new regimes that deploy alternative legal categories to reshape the international legal status quo. Respectively:

A. A treaty-based regime promoted by ministries of culture –initiated by the EU, Canada, and other actors– that seeks to rebalance the international legal conception of culture as distinct from mere goods and services. It does so by introducing the categories of 'cultural objects' and 'cultural expressions' as alternatives to those of world trade law. Designed to rebalance the conventional market-oriented interpretation of cultural transfers by existing trade treaty bodies, the initiative aims to legitimize restrictions on national treatment and most-favoured-nation obligations within the territories of its member states.
B. A treaty-based regime promoted by authoritarian governments –initiated by China, Russia, and others– that seeks to rebalance the post-war legal conception of international civil and political rights by introducing an expansive understanding of national security and terrorism. Designed to rebalance the conventional interpretation of civil and political rights by established human rights treaty bodies, the initiative aims to legitimize restrictions on international civil and political rights within the territories of its member states.

Without delving into the notably distinct and contrasting nature of these examples,[76] the unrestrained use of the treaty form to construct alternative international authority presents an unpromising scenario for the rule of law, as it is exposed –and potentially compromised– by strategically blurred boundaries of international legality within the international community.[77] Arguably, this is the inevitable legal by-product of the current open-ended approach to the formation, allocation, and reallocation of international jurisdiction through ordinary treaty forms. What ultimately emerges is a highly contractualized conception of public law, reliant on self-referential treaty forms, that risks undermining the rule of law.

In a similar vein, the well-documented proliferation of expansive, multi-issue Free Trade Agreements (FTAs) serves as a salient example of these contested public law practices. A paradigmatic case of the opportunistic deployment of the treaty form by governments is evident in the diverse array of FTAs –whether bilateral, plurilateral, regional, or inter-regional– concluded over recent decades.[78] These rhizomatic treaty forms, often likened to 'Christmas trees,' are notable for incorporating provisions that span a wide spectrum of public and social issues, frequently extending well beyond the traditional domain of trade. The purported *trade-relatedness* of such provisions is often justified on highly contestable premises and rationales.[79] Recent examples include the EU–Canada Comprehensive Economic and Trade Agreement (CETA,

[76] For the 'mimicking and repurposing' of international legal rules by authoritarian regimes, see Ginsburg (2020: 241–52). For the official narrative, see the Russia–China *Joint Declaration on Promotion and Principles of International Law* (June 25, 2016), and the *Joint Statement of the Russian Federation and the People's Republic of China on International Relations Entering a New Era and the Global Sustainable Development* (February 4, 2022). See also Scheppele (2018) and, more generally, Müller (2016).

[77] The rule of law, however unclear in its international implementation, is structurally linked to the protection against the abuse of power. See e.g., Waldron (2011, p. 323).

[78] The phenomenon by which FTAs fall into disuse without formal termination –leaving «skeletons in the cupboard» in the form of overlapping or dormant legal rules and fora, as observed by Pauwelyn and Alschner– exemplifies the practice of *layering*, whereby new arrangements are superimposed on existing ones rather than replacing them. See Pauwelyn and Alschner (2015, pp. 25–26).

[79] The lead agencies managing these pluri-issue negotiations –which increasingly encompass a wide range of issues– tend to be domestic trade agencies. This position naturally enhances their leverage over other governmental departments and agencies in determining the content, form, and direction of final treaty outcomes.

2017), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, 2018), the United States–Mexico–Canada Agreement (USMCA, 2020), the Regional Comprehensive Economic Partnership (RCEP, 2022), the India–Australia Economic Cooperation and Trade Agreement (2022), and the EU–Mercosur Trade Agreement, among others.[80]

In the absence of an institutionalized general regime of international law, treaty-based regimes and their prescriptive and adjudicative jurisdictions paradoxically blur international legal consistency, as states engage in an ongoing meta-game of reallocating, duplicating, and overlapping authority across both established and emerging special regimes.[81] This plural allocation of international jurisdiction –lacking international organs and procedures to integrate it– renders international legality, and by extension foundational elements of modern law, at risk of being lost in translation. This occurs when global public goods and values are subjected to self-referential treaty-making practices that not only reinforce, but also reposition or contest those very public goods and values, and in doing so inevitably foster a plurality of international legal perspectives.

This phenomenon both reflects and exacerbates the dysfunctions associated with the absence of general international organs and procedures with authority over treaty provisions as well as over the international rules and decisions generated by these special regimes–a dynamic in which cause and effect continuously swap and reinforce one another. In this sense, the international legal order appears caught in a paradox of eternal return, as treaty-making practices not only generate new regimes but also outcompete, displace, or overlap with existing ones –often without necessarily terminating them– thereby contributing to an ongoing blurring of legal authority and perpetuating international legal indeterminacy.

7. Such a thing as general international legislation

Over the past century and a half, governments have primarily promoted regime-building within functional domains. Intergovernmental functionalism –manifested through special treaty-based regimes– has long dominated global affairs,[82] significantly fostering interstate cooperation and contemporary interdependence. Yet, paradoxically, the cumulative effect of successive layers of specialized rules and institutions has contributed to the stagnation of multilateralism.[83] This preferential, if not structural, reliance on special regimes has come at the expense of developing general international organs and procedures, mechanisms essential for ensuring general procedural integration and, consequently, a degree of consistency across regimes.

Unsurprisingly, in the absence of overarching international adjudicative and prescriptive authorities with jurisdiction over these special regimes –and thus of general rules of adjudication and change– legal positions concerning global public goods and values become entrenched within them. Such entrenchment not only

[80] For an overview of the scope of this centuries-long phenomenon, see the documentation and follow-up reports of the WTO Committee on Regional Trade Agreements, which is formally tasked with exercising multilateral oversight of free trade agreements and customs unions pursuant to GATT Article XXIV and GATS Article V.

[81] See, in particular, Benvenisti and Downs (2007).

[82] On functionalism more generally, see the leading works of Jan Klabbers cited in the preceding notes. For a focused analysis of its colonial origins, see his Klabbers (2014). A detailed examination of the legal regimes established under colonial rule and their enduring legacies can be found in Mommsen and de Moor (1992) and Benton (2002).

[83] For an analysis of the stagnation of formal international law and the rise of so-called informal lawmaking, see Pauwelyn, Ramses, Wessel, and Wouters (2014).

fosters strategic regime-building and manoeuvring across regimes, but also makes attempts at new multilateral rulemaking increasingly difficult to achieve. In this sense, and exposing the limits of its own expansion, the long-standing paradigm of intergovernmental functionalism appears to have been undermined by its very success.

The pursuit of international legal consistency across this layering of self-referential legal constructs proves to be a particularly complex, if not elusive, endeavour. As a result, international law is rendered less an order than a playing field;[84] that is, one shaped primarily by the so-called regulatory state,[85] which has entrenched intergovernmental functionalism through special treaty-based regimes and, in doing so, expanded technocratic decision-making within current forms of international institutional law.[86]

In contrast to what might be described as contemporary global executive overreach, constitutional state organs other than governments –namely, legislatures and constitutional courts– have played a comparatively limited role. Rather than actively promoting the establishment of overarching general international organs and procedures to ensure the procedural integration of special treaty-based regimes under a general authority rationale, these state organs have largely confined their involvement to the binary approval or rejection of such regimes –even where they were clearly legitimized to demand arrangements more consistent with their constitutional functions.

Over time, parliamentary involvement and judicial oversight in the processes of treaty-making and withdrawal have increased.[87] This trend suggests a complex and gradual shift away from the traditional executive-dominated model of treaty-making, reflecting concerns about the domestic separation of powers. Nevertheless, ensuring effective checks and balances also requires careful consideration of their international dimensions –a factor to which constitutional state organs do not always appear to pay sufficient attention.

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[84] For a comprehensive reflection on the indeterminacy, structural biases, strategic politics of definition, and managerialism in international law, see Martti Koskenniemi, 'The Politics of International Law–20 Years Later', (2009). The earlier article, 'The Politics of International Law' (1990), lays the foundational analysis of the inherent indeterminacy and political contestation in international legal argumentation.

[85] On the concept and evolution of the «regulatory state» –characterized by the delegation of authority to administrative agencies and the diffusion of regulatory capacity across networks involving state, market, and civil society actors–see Majone (1990, pp. 1–6 and 1994); and Scott (2017). For foundational studies of global regulatory networks and the regulation of corporate capitalism, see Braithwaite and Drahos (2000); and Picciotto (2011a). For the global diffusion and adaptation of regulatory models, and the emergence of "regulatory capitalism," see Braithwaite (2008); Levi-Faur (2005); and Jordana, Levi-Faur, and Marín (2011). For the challenges posed by the hybrid functions of administrative agencies to the classical separation of powers, and the adaptation of accountability mechanisms, see Cassese (2005) and Sunstein (2024).

[86] For an insightful reflection on the regulatory state and the erosion of the distinction between public and private spheres, see Picciotto (2011b). Relatedly, for an in-depth analysis of technocratic decision-making and the widening gap between technocracy and politics through processes of technicization –using global taxation as a case study– see Picciotto (2022).

[87] Drawing on a comprehensive dataset covering the period from 1815 to 2013, Verdier and Versteeg trace the evolution of the separation of powers in treaty-making. Their findings confirm a sustained trend toward greater parliamentary involvement and new constraints on the executive's ability both to conclude and to withdraw from international agreements. At the same time, they document the continued proliferation of executive «work-arounds» –alternative mechanisms enabling executives to bypass full legislative approval, albeit under significant legal and constitutional constraints. They also highlight the growing role of national judiciaries in subjecting treaties to constitutional review prior to ratification. See Verdier and Versteeg (2019).

The laissez-faire approach to the institutionalization of international law through mere special treaty-based regimes not only disregards the subsequent decision-making processes within those regimes –and thus the international rules and decisions that emerge from them– but also implies that the general function of balancing these regimes –and, by extension, the global public goods and values they regulate– ironically defaults once again to governments and to the very special regimes primarily administered by their departments. In strict rule-of-law terms, this situation amounts to a perverse Faustian bargain for our societies: a technocratic *totum revolutum*, lacking any meaningful general international organs and procedures capable of deliberative balancing.

It is reasonable to maintain that, since special regimes operate as intergovernmental vehicles for functional cooperation –exhibiting, if not mimicking, features akin to administrative agencies– it would be logical to apply general authority rationales to these regimes at the international level: (1) ideally, through general international organs and procedures in which constitutional organs collectively participate; or (2) alternatively, through mechanisms in which the rationales articulated by constitutional organs are at least indirectly expressed.

Still today, the authority rationales of special regimes lack any general correlate in the international legal sphere. In their current configuration, UN regime bodies do not function as organs of general authority –save for the fragile exception of the International Court of Justice (ICJ). Indeed, the UN General Assembly, the ICJ itself, ECOSOC, and the relatively new UN Chief Executives Board –not to mention the Security Council– are, by design, excluded from the task of balancing the legal outcomes generated by the prescriptive and adjudicative jurisdiction of these regimes. As a result, the very global public goods and values that special regimes have increasingly regulated over the past decades remain outside the scope of such balancing.

On the one hand, while the UN General Assembly is undoubtedly an organ of general international authority, it paradoxically does not produce general international legislation (see Yuen-Li Liang, 1948). On the other hand, although the International Court of Justice is an organ of general international authority, it lacks adjudicative jurisdiction to exercise judicial review over conflicts between special regimes, or the international rules and decisions emanating from those regimes.

Furthermore, the UN Economic and Social Council (ECOSOC), despite its broad mandate to coordinate the economic and social work of the United Nations and its specialized agencies, is similarly constrained: it lacks the treaty competences required to assert any genuine general authority.[88] The UN Chief Executives Board, for its part, serves as a high-level forum for inter-agency coordination and maintains a reporting relationship with ECOSOC, but functions merely as an inter-administrative body without the treaty competences necessary to exercise any formal general authority (see Zapatero, 2015). Last but not least, as previously noted, little can be

[88] Notably, Article 62(3) of the UN Charter empowers ECOSOC to 'prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.' At the dawn of the United Nations era, Wilfred Jenks –already an influential international legal scholar and later Director-General of the International Labour Organization– expressed the hope that this power would be «used with imagination and vigour' to achieve 'a far-reaching rationalisation of the technique of the multipartite instrument». See Jenks (1945, p. 48).

said in favour of the Security Council, which remains a structurally biased treaty body operating under a largely pre-modern legal configuration.[89]

Therefore, in the absence of any general international organs or procedures capable of balancing the prescriptive and adjudicative jurisdiction of special regimes in line with rule of law standards, the international community is, in effect, left in the hands of governments, their respective departments, and the very special treaty-based regimes for which they have secured parliamentary ratification. In this context, the international disaggregation of state authority –and, by extension, state consent[90]– into these regimes serves to consolidate and aggregate international authority within them. As a result, state authority becomes dispersed across these regimes, as treaty bodies governing areas such as trade, environmental protection, and human rights entrench distinct forms of international authority within their respective subject-matter domains.

This phenomenon dilutes the exercise of general authority rationales–and thus those of constitutional state organs other than governments–over these function-oriented international entities. In short, general authority rationales beyond those of governments are excluded from this longstanding grand intergovernmental bargain. As a result, the institutional operations of special regimes, designed and administered by governmental departments and agencies, unfold within a general authority void. Crucially, there are no general international organs to ensure the procedural integration of these regimes, whether with the general regime of international law or with one another.

Paradoxically, state consent has tended to advance special rather than general authority rationales within international law, thereby privileging the rationales of governmental departments and agencies. Ironically, this process has unfolded in a context where, through special secondary rules of adjudication and change, governments have created treaty-based regimes in specific subject-matter domains that mimic the norm-production and adjudicative functions originally attributed to parliaments and courts –much as administrative agencies have done within the regulatory state.[91] By contrast, and to borrow a circus metaphor, the crucial difference lies in the fact that administrative agencies perform their rulemaking and adjudicative operations with a safety net –legislative oversight and judicial review–whereas special regimes walk a tightrope without one, owing to the absence of general organs and procedures capable of exercising this function in the interest of the international community.

The future of public authority in administering world affairs in the interest of the international community depends on whether intergovernmental functionalism continues to inhibit –and thus structurally disregard– the incorporation of general

[89] Beyond the recent interventions by constitutional courts and the European Court of Justice–which have exercised review over the Security Council's activities–it would be timely for constitutional courts, acting jointly, to raise the issue of reforming these and other pre-modern elements of international law. Such an initiative could take the form of a collective declaration within the World Conference on Constitutional Justice (WCCJ). Drawing inspiration from the Vilnius Declaration on the Rule of Law –focused primarily on domestic constitutional law– a comparable initiative could be envisaged in relation to international institutional law, whose condition likewise bears directly on the rule of law. See Declaration on the Rule of Law, adopted by the WCCJ, Vilnius, 2017.

[90] The notion of «disaggregation of consent» captures how international organizations have evolved beyond the classical paradigm of unified state consent. Consent is broken down into distinct elements, enabling institutional decision-making and the creation of legal obligations through procedures that do not rely exclusively on the direct and explicit approval of states. For a comprehensive analysis, see Brölmann (2023).

[91] See *supra*, footnotes.

authority rationales into international decision-making processes. Arguably, the most effective –albeit challenging– path forward is to address the existing gaps in general authority rationales within international law. Only by doing so can the limitations of functionalism be overcome and a standard international legal system established. Yet (government-driven) state consent has fuelled the development of function-oriented forms of international authority through special treaty-based regimes, while neglecting the formation of general forms of international authority. In other words, it has set aside the institutional forms and procedures of general authority that articulate public decision-making in rule-of-law principles.

8. The hard case of treaty-led regulatory arbitrage

The dysfunction produced by these global public practices is nowhere more evident than in the economic sphere, or so-called 'international economic law':[92] a label whose ever-expanding boundaries risk conflating 'the economic' with virtually all other domains,[93] often to the detriment of meaningful distinctions and decisions in the general interest –understood as the interest of the international community.

Following the collapse of the Soviet Union, governmental economic departments and agencies actively promoted the expansion of special regimes within their respective administrative spheres, under the official banner of world market formation –or so-called global liberalization– and instrumental conceptions of public goods and values associated with the international free movement of capital, goods, and services, though notably not individuals.[94] Operating confidently within a persistent void of general international authority –and, crucially, neglecting the establishment of effective multilateral regimes such as those for tax and competition – this simplified technocratic worldview has, in recent decades, exacerbated traditional regulatory arbitrage as a result of increasing general authority default.

In light of this, the theory of regulation draws a crucial distinction between regulatory competition and regulatory arbitrage –two distinct yet closely related phenomena. This distinction is particularly pertinent for conceptualizing the problem of self-reference in treaty law, as the design of special treaty-based regimes can be strategically employed to create new, alternative, and even 'movable' or creeping international jurisdictions.[95] Regulatory competition refers to regulators –typically states– competing to attract firms by offering more favourable legal environments for capital.[96] By contrast, regulatory arbitrage refers to firms exploiting these differences in public law to minimize regulatory burdens and maximize capital formation and

[92] For an influential account of the field, situated in the intellectual climate of its time, see Trachtman (1996).
[93] By extension, it is already contested –and nor would it be advisable– to simply transpose the economic analogy onto international law. See, in particular, Dunoff and Trachtman (1999). See also the references below.
[94] See landmark accounts on regulation and capitalism by Sol Picciotto (2011). See also Braithwaite and Drahos (2000, introduction, chapter 1 and 23) and Yergin and Stanislaw (1998, chapters 8–10).
[95] In this respect, although technocratic creativity is widespread, the resulting treaty design does not necessarily align with a meaningful understanding of the interests of the international community – interests that might yield quite different outcomes were the regime procedurally subject to general authority rationales. By contrast, as discussed above, domestic administrative agencies –as public bodies whose functions are in certain respects analogous to those exercised by special regimes– are logically anchored to general authority bodies through judicial review and legislative oversight, thereby preserving legality and ensuring institutional accountability to the political community.
[96] For early treatment of the concepts of cooperation (horizontal/vertical regulatory cooperation) and competition (horizontal/vertical regulatory competition) as applied to states as well as to international organisations and certain treaties, see Trachtman (1993). See also Trachtman (2008) for a significant effort to apply economic theory to international law.

accumulation.[97] In short, competition is about states setting the rules to attract capital, while arbitrage is about firms navigating or circumventing those rules for maximum advantage:

A. Regulatory competition refers to the competition among states' (prescriptive and adjudicative) jurisdictions to create a more attractive legal environment for business and investment. For instance, a state may relax its public law rules to attract or retain capital relative to jurisdictions with stricter public law rules.
B. Regulatory arbitrage refers to the practice of exploiting legal differences between states' (prescriptive and adjudicative) jurisdictions in order to minimize regulatory burdens and maximize benefits. For example, companies may structure transactions or relocate operations to jurisdictions offering more favourable legal environments.[98]

These concepts are commonly understood to refer to the state form –and thus to domestic law– within the broader global context of access to capital. Nonetheless, there are compelling reasons to argue that they can also be extended to international law more generally, and to treaty-based regimes themselves. In this respect, the possibility of allocating or reallocating international prescriptive and adjudicative jurisdiction over new subject matters to special treaty-based regimes can be understood as a form of regulatory competition –along lines commonly observed in domestic law– which in turn generates new forms of regulatory arbitrage, namely, treaty-led regulatory arbitrage.

This outcome is frequently facilitated by the economic departments and agencies of both home and host states, which play a pivotal role in the design and administration of economic treaty-based regimes, often under significant pressure from special interest groups. In this context, global corporations (or, more precisely, capital holders operating through international corporate forms and structures) can catalyze new forms of regulatory competition between regimes and, in turn, treaty-led regulatory arbitrage.

Ostensibly oriented toward advancing the primacy of global public goods and values associated with the free movement of capital, goods, and services in the long term, the resulting regimes are frequently designed and administered in ways that generate a significant degree of controlling authority –particularly when conflicts, disputes, or tensions arise– relative to other global public goods and values. This is achieved, in part, through the deployment of secondary rules of adjudication, which often serve to entrench the autonomy of these regimes in the face of competing normative claims.

This paradoxical interplay of regulatory competition and concomitant regulatory arbitrage may be understood as a logical consequence of the absence of procedural integration within the international community under general authority rationales. By default, public law is often structured to protect and advance the private interests of capital holders operating through international corporate forms and structures across multiple jurisdictions, to the detriment of the broader political community.[99]

[97] See, e.g. Vogel (1996:11) and Coffee (1998).
[98] For a broader discussion of these issues from the standpoint of regulatory interaction, see Section 3.2.2, 'Managing Regulatory Interactions,' in Picciotto (2011, pp. 84–99).
[99] For an intellectual history that illustrates how sovereignty (public power) and property (private power) intertwine and balance each other throughout the evolution of international law, see in particular Koskenniemi (2021).

For this reason, there has been a steady and pronounced expansion of globalized corporate rights and benefits –manifested, for instance, in the proliferation of international rules promoting trade and capital liberalization, investment protection, and the propertization of intangibles through intellectual property. Yet this expansion has not been matched by a commensurate development of international corporate obligations and responsibilities adequately adapted to the complex realities of contemporary corporate organization. As a result, a pronounced asymmetry persists between the rights and benefits conferred upon corporate actors and the global rules available to ensure their accountability and liability. Indeed, as Laporta observes, «the struggle against the rule of capital is exactly the struggle for the rule of law» (Laporta, 2014).

This fact illustrates the pressing need for states –and, in particular, constitutional organs– to devote greater attention to strengthening general authority rationales within international law. Accordingly, constitutional state organs must more rigorously engage with the procedural dimensions of the general regime of international law, particularly with regard to the gaps and shortcomings of special regimes –not only in the economic sphere, but across the entire international legal domain. The rule of law itself depends on the effective integration of special regimes within general international organs and procedures and, by extension, on the establishment of a legal system for the international community. Ultimately, only the collective construction of institutions that genuinely represent the international community as a whole can prevent technocracy from producing and administering self-referential treaties which –embedded in a general authority default– fail to reflect the interests of all. In sum, sustaining the rule of law in an interdependent world requires the procedural integration of special regimes into the general regime of international law, guided by robust general authority rationales.

The prevailing paradigm of intergovernmental functionalism –characterized by a persistent reliance on special treaty-based regimes– has indeed significantly advanced interstate cooperation over the past century and a half. Yet the self-referential layering of rules regulating selected global public goods and values ultimately contributes to the stagnation not only of general multilateral regime-building, but also of special regimes themselves. Consequently, while the emergence of a standard legal system that effectively serves the interests of the international community remains aspirational, a viable –albeit challenging– path forward is to progressively address the gaps in general authority rationales within international law, thereby fostering, over time, the development of such a system. The fundamental challenge, of course, is to determine how this can be realized in practice.[100]

As Klabbers observes, international law has long been idealized as a force for good, often grounded in the belief that 'everything international is wonderful precisely because it is international, and that international organizations embody our highest aspirations for legislative reason and global cooperation.[101] Indeed, multilateralism, cooperation, and international law are neither intrinsically good nor bad, as both contemporary realities and historical experience attest. Against this backdrop,

[100] For an elaborate approach to international authority that places particular emphasis on its legitimacy and control (developed by the so-called Max Planck school of 'international public authority' or 'international public law'), see, e.g., von Bogdandy, Wolfrum, von Bernstorff, Dann, and Goldmann (2010); and von Bogdandy, Goldmann, and Venzke (2017). For a contrasting approach that focuses on procedural and administrative mechanisms (commonly referred to as 'global administrative law'), see, e.g., Kingsbury, Krisch, and Stewart (2005) and Cassese (2015, 2021).
[101] See Klabbers (2001, pp. 287-288, and 2022: 12 and 19).

applying rule-of-law standards to international institutional law has become an increasingly critical area of inquiry, with far-reaching practical implications.

Over the past three decades, public law scholars have devoted considerable attention to the challenge of advancing the international dimensions of the rule of law.[102] Any synthesis of current approaches is inevitably subjective. Yet several principal domains have crystallized, each with its own terminology and methodology: the old and new approaches to international institutional law; approaches to international public authority; global administrative law; and the various strands of global constitutionalism.

Together, these areas reflect the ongoing global quest for *eunomia* within evolving forms of international legality, as understood in modern rule-of-law terms–a development with far-reaching implications in an increasingly interdependent world. If, as Tomuschat suggests, international law is to be regarded as a comprehensive blueprint for social life (Tomuschat, 1999: 63), constitutional state organs must promote a more robust general legal infrastructure in the interest of the international community. Otherwise, public law risks further entrenching global governance as a normative patchwork –or *potpourri*– in which public authority loses the capacity to define common rules and procedures in the general interest, and is thereby diluted, if not captured, by global private interests. Only by strengthening general authority rationales in international law can it move beyond a patchwork of regimes and secure the rule of law for the international community.

Bibliografía

Abi Saab, G. (1987). *Cours général de Droit international public*. Recueil des Cours, Vol. 207, 119–126.

Ago, R. (1971). Third report on state responsibility. *Yearbook of the International Law Commission, Vol. II*(1), UN Doc. A/CN.4/246.

Arangio-Ruiz, G. (1995). Seventh report on state responsibility. *Yearbook of the International Law Commission, Vol. II*(1), UN Doc. A/CN.4/469.

Bentham, J. (1823). *An introduction to the principles of morals and legislation* (Vol. 2). W. Pickers & R.Wilson.

Benton, L. (2002). *Law and colonial cultures: Legal regimes in world history, 1400–1900*. Cambridge University Press.

Benvenisti, E. (2014). The law of global governance. *Recueil des Cours*, Vol. 368, 47–435.

Benvenisti, E. (2016). Democracy captured: The mega-regional agreements and the future of global public law. *Constellations*, 23, 58–70.

Benvenisti, E., & Downs, G. W. (2007). The empire's new clothes: Political economy and the fragmentation of international law. *Stanford Law Review*, 60, 595–631.

Benvenisti, E., & Downs, G. W. (2009). Toward global checks and balances. *Constitutional Political Economy,* 20, 366–387.

Benvenisti, E., & Nolte, G. (eds.) (2018). *Community interests across international law*. Oxford University Press.

Bianchi, A., & Zarbiyev, F. (2024). What's the purpose of 'object and purpose'? In *Demystifying treaty interpretation* (pp. 118–141). Cambridge University Press.

Bingham, T. (2010). *The rule of law*. Allen Lane.

[102] For an elaborate approach to international authority that places particular emphasis on its legitimacy and control –developed by the so-called Max Planck school of 'international public authority' or 'international public law' –see, e.g., von Bogdandy, Wolfrum, von Bernstorff, Dann, and Goldmann (2010); and von Bogdandy, Goldmann, and Venzke (2017). Also, for a contrasting approach which focuses on procedural and administrative mechanisms–commonly referred to as 'global administrative law'–see, e.g., Kingsbury, Krisch, and Stewart (2005) and Cassese (2015 and 2021).

Braithwaite, J. (2008). *Regulatory capitalism: How it works, ideas for making it work better*. Edward Elgar.
Braithwaite, J., & Drahos, P. (2000). *Global business regulation*. Cambridge University Press.
Brölmann, C. (2005). Limits of the treaty paradigm. In M. Craven & M. Fitzmaurice (eds.), *Interrogating the treaty and the future of treaty law* (pp. 1–18). Wolf Legal Publishers.
Brölmann, C. (2007). *The institutional veil in public international law: International organizations and the law of treaties*. Hart.
Brölmann, C. (2023). International organizations and the disaggregation of consent. In S. Besson (ed.), *Consenting to international law* (pp. 100–116). Cambridge University Press.
Brown Weiss, E. (2022). *Establishing norms in a kaleidoscopic world*. Brill.
Brownlie, I. (1998). The rule of law in international affairs. In *International law at the fiftieth anniversary of the United Nations* (pp. 3–8). The Hague Academy of International Law, Martinus Nijhoff.
Buffard, I., & Zemanek, K. (1998). The 'Object and Purpose' of a treaty: An enigma? *Austrian Review of International and European Law*, 3, 311–343.
Cahier, P. (1988). L'ordre juridique interne des organisations internationales. In *Manuel sur les organisations internationales: A handbook on international organizations* (pp. 237–257). Martinus Nijhoff Publishers.
Cassese, S. (2005). Administrative law without the state? The challenge of global regulation. *New York University Journal of International Law and Politics* (37): 663–694.
Cassese, S. (2011). A global due process of law? In G. Anthony, J.-B. Auby, J. Morison, & T. Zwart (Eds.), *Values in global administrative law* (pp. 3–13). Hart Publishing.
Cassese, S. (2015). Global administrative law: The state of the art. *International Journal of Constitutional Law,* 13, 465–468.
Cassese, S. (2021). *Advanced introduction to global administrative law*. Edward Elgar.
Churchill, R. R., & Ulfstein, G. (2000). Autonomous institutional arrangements in multilateral environmental agreements: A little-noticed phenomenon in international law. *American Journal of International Law*, 94, 623–659.
Coffee, J. C., Jr. (1998). Competition versus cooperation: The future of regulation. *Columbia Law Review,* 98, 1193–1209.
Colin Scott. (2017). The regulatory state and beyond. In P. Drahos (ed.), *Regulatory Theory: Foundations and Applications* (pp. 265–280). ANU Press.
Combacau, J. (1986). Le droit international: bric-à-brac ou système? *Archives de philosophie du droit,* 31, 85–98.
Correa, C. (2004). Implementation of the WTO General Council Decision on paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health. *Journal of World Intellectual Property*, 7, 257–273.
Cottier, T. (2015). The common law of international trade and the future of the WTO. *Journal of International Economic Law*, 18, 3–20.
d'Aspremont, J. (2018). Monism and dualism in international law. In A. Carty (ed.), *Oxford bibliographies in international law*. Oxford University Press.
Díaz, E. (2010). *Estado de derecho y sociedad democrática* (Rev. and expanded ed.). Taurus. (Original work published 1966).
Drahos, P. (2017). Regulating capitalism's processes of destruction. In P. Drahos (ed.), *Regulatory theory: Foundations and applications* (Vol. 1, pp. 761–783). ANU Press.
Dunoff, J. L. (2017). The multifaceted relationship between functionalism and global constitutionalism. In A. F. Lang & A. Wiener (eds.), *Handbook on global constitutionalism*. Edward Elgar Publishing.

Dunoff, J. L., & Trachtman, J. P. (1999). Economic analysis of international law. *Yale Journal of International Law,* 24, 1–59.
Dupuy, P.-M. (1997). The constitutional dimension of the Charter of the United Nations revisited. *Max Planck Yearbook of United Nations Law,* 1, 1–33.
Dworkin, R. (2013). *Taking rights seriously*. Bloomsbury Academic. (Original work published 1977).
Eco, U. (1994). *Apocalypse Postponed: Essays by Umberto Eco*. Indiana University Press.
Elster, J. (1979). *Ulysses and the sirens: Studies in rationality and irrationality*. Cambridge University Press.
Falk Moore, S. (2005). Certainties undone: Fifty turbulent years of legal anthropology, 1949–1999. In S. Falk Moore (ed.), *Law and anthropology: A reader*. Blackwell.
Falk, R. (1959). International jurisdiction: Horizontal and vertical conceptions of legal order. *Temple Law Quarterly*, 32, 295–320.
Fassbender, B. (1998). The United Nations Charter as constitution of the international community. *Columbia Journal of Transnational Law,* 36, 529–619.
Fassbender, B. (2009). *The United Nations Charter as the Constitution of the International Community*. Martinus Nijhoff Publishers.
Gehring, T., & Faude, B. (2014). A theory of emerging order within institutional complexes: How competition among regulatory international institutions leads to institutional adaptation and division of labor. *Review of International Organizations*, 9, 471–498.
Ginsburg, T. (2020). Authoritarian international law? *American Journal of International Law,* 114, 241–252.
Gottlieb, G. (1972). The nature of international law: Toward a second concept of law. In *The Future of the International Legal Order* (Vol. IV, pp. 331–383). Princeton University Press.
Grewe, W. G. (2000). *The epochs of international law*. Walter de Gruyter.
Griffiths, J. (2005). The idea of sociology of law and its relation to law and to sociology. In M. Freeman (ed.), *Law and sociology: Current legal issues* (Vol. 8, pp. 49–67). Oxford University Press.
Habermas, J. (2006). Does the constitutionalization of international law still have a chance? In *The Divided West* (pp. 159–165). Polity.
Hart, H. L. A. (1961/2012). *The Concept of Law*. Oxford University Press. (Original work published 1961).
Hart, H. L. A. (1983). Self-referring laws. In *Essays in jurisprudence and philosophy* (pp. 170–189). Oxford University Press.
Hawkins, D., Lake, D., Nielson, D., & Tierney, M. (2006). *Delegation and agency in international organizations*. Cambridge University Press.
Helfer, L. R. (2004). Regime-shifting: The TRIPs Agreement and new dynamics of international intellectual property lawmaking. *Yale Journal of International Law*, 29, 1–83.
Hirschman, A. O. (1970). *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States*. Harvard University Press.
Hoekman, B. M., & Mavroidis, P. C. (2016). *World Trade Organization: Law, Economics, and Politics* (2nd ed.). Routledge.
Hollis, D. B. (2010). The object and purpose of a treaty: Three interpretive methods. *Vanderbilt Journal of Transnational Law,* 43, 623–679.
Hubert Thierry. (1990). The thought of Georges Scelle. *European Journal of International Law,* 1, 193–20.
Hudec, R. (1970) The GATT Legal System: A Diplomat's Jurisprudence. *Journal of World Trade* 5, 615 –665.
Hudec, R. (1990) *The GATT legal system and world trade diplomacy.* Butterworth Legal Publishers.
Hurd, I. (2017). *How to do things with international law*. Princeton University Press.

ICJ. (1949). *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports.
ICJ. (1980). *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports.
ICJ. (1996). *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion), Dissenting Opinion of Judge Weeramantry, ICJ Reports.
ICTY. (1995). *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October.
International Law Commission (ILC). (1962). *Yearbook of the International Law Commission*, Vol. II.
International Law Commission (ILC). (2001). *Draft articles on responsibility of states for internationally wrongful acts, with commentaries*. *Yearbook of the ILC*, Vol. II, Part Two, UN Doc. A/56/10.
International Law Commission (ILC). (2006, April 13). *Report of the International Law Commission*, 58th session, UN Doc. A/CN.4/L.682. *Yearbook of the ILC*, Vol. II(2), 1–479 (UN Doc. A/CN.4/L.682).
Jackson, J. (1993). Trade, environment and NAFTA: Introductory remarks. *Georgetown International Environmental Law Review*, 6, 519–522.
Jackson, J. H. (1997). *The world trading system: Law and policy of international economic relations* (2nd ed.). MIT Press.
Jenks, C. W. (1951). Co-ordination: A new problem of international organization. *Recueil des Cours,* Vol. 78, 55–149.
Jenks, W. (1945). Some constitutional problems of international organizations. *British Yearbook of International Law*, 22, 11–69.
Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development. (2022, February 4).
Jordana, J., Levi-Faur, D., & Marín, X. (2011). The global diffusion of regulatory agencies: Channels of transfer and stages of diffusion. *Comparative Political Studies,* 44, 1343–1369.
Kelsen, H. (1946). Organization and procedure of the Security Council of the United Nations. *Harvard Law Review,* 59, 1087–1129.
Kelsen, H. (1948). Collective security and collective self-defence under the Charter of the United Nations. *American Journal of International Law,* 42, 783–796.
Kelsen, H. (1950). *The law of the United Nations: A critical analysis of its fundamental problems*. Stevens & Sons.
Kennedy, D. (1987). The move to institutions. *Cardozo Law Review,* 8, 841–988.
Keohane, R. O., & Nye, J. S. (2001). The club model of multilateral cooperation and problems of democratic legitimacy. In R. B. Porter, P. Sauvé, A. Subramanian, & A. Zampetti (Eds.), *Efficiency, equity, and legitimacy: The multilateral trading system at the millennium* (pp. 264–294). Brookings Institution Press.
Kingsbury, B., Krisch, N., & Stewart, R. B. (2005). The emergence of global administrative law. *Law and Contemporary Problems,* 68, 15–61.
Klabbers, J. (2001). The life and times of the law of international organizations. *Nordic Journal of International Law,* 70, 287–288.
Klabbers, J. (2007). Checks and balances in the law of international organizations. In M. Sellers (Ed.), *Autonomy in the law* (pp. 141–166). Springer.
Klabbers, J. (2008). The paradox of international institutional law. *International Organizations Law Review,* 5, 1–23.
Klabbers, J. (2009). *An introduction to international institutional law* (2nd ed.). Cambridge University Press.
Klabbers, J. (2014). The emergence of functionalism in international institutional law: Colonial inspirations. *European Journal of International Law,* 25, 645–675.
Klabbers, J. (2015). The transformation of international organizations law. *European Journal of International Law,* 26, 9–82.

Klabbers, J. (2016). The transformation of international organizations law: A rejoinder. *European Journal of International Law,* 27, 549–562.
Klabbers, J. (2022). The love of crisis. In M. M. Mbengue & J. d'Aspremont (eds.), *Crisis narratives in international law* (pp. 9–26). Brill.
Koskenniemi, M. (1990). The politics of international law. *European Journal of International Law,* 1, 3–32.
Koskenniemi, M. (2002). *The gentle civilizer of nations: The rise and fall of international law 1870–1960*. Cambridge University Press.
Koskenniemi, M. (2007). International law: Constitutionalism, managerialism and the ethos of legal education. *European Journal of Legal Studies,* 1. (Accessed July 12, 2023).
Koskenniemi, M. (2007). The fate of public international law: Between technique and politics. *Modern Law Review,* 70, 1–30.
Koskenniemi, M. (2009a). The case for comparative international law. *Finnish Yearbook of International Law,* 20, 1–32.
Koskenniemi, M. (2009b). The politics of international law–20 years later. *European Journal of International Law,* 20, 7–19.
Koskenniemi, M. (2011). Hegemonic regimes. In M. Young (Ed.), *Regime interaction in international law: Facing fragmentation* (pp. 305–324). Cambridge University Press.
Koskenniemi, M. (2021). *To the uttermost parts of the earth: Legal imagination and international power, 1300–1870*. Cambridge University Press.
Kuijper, P. J. (1994). The law of GATT as a special field of international law: Ignorance, further refinement or self-contained system of international law? *Netherlands Yearbook of International Law,* 25, 227–258.
Kuijper, P. J. (2022). Delegation and international organizations. *Recueil des Cours,* Vol. 426, 9–240.
Kunz, J. L. (1953). General international law and the law of international organizations. *American Journal of International Law,* 47, 456–462.
Lamy, P. (2006). The place of the WTO and its law in the international legal order. *European Journal of International Law,* 17, 969–984.
Laporta, F. J. (2007). *El imperio de la ley: Una visión actual*. Trotta.
Laporta, F. J. (2014). ¿Imperio de la ley o gobierno del capital? *Teoría Política. Nuova Serie. Annali, IV*, 103–123.
Lauwaars, H. (1984). The interrelationship between United Nations law and the law of other international organizations. *Michigan Law Review,* 82, 1604–1619.
League of Nations. (1930). *Acts of the Conference for the Codification of International Law*, Official No.: C. 351. M. 145. 1930. Vol. I, Plenary Meetings (13 March).
Legality of the use by a state of nuclear weapons in armed conflict, Advisory Opinion, ICJ Reports (1996).
Levi-Faur, D. (2005). The global diffusion of regulatory capitalism. *Annals of the American Academy of Political and Social Science,* 598, 12–32.
Liang, Y.-L. (1948). The General Assembly and the progressive development and codification of international law. *American Journal of International Law,* 42, 70–77.
Lindblom, C. E. (1959). The science of 'muddling through'. *Public Administration Review,* 19, 79–88.
Mahoney, J., & Thelen, K. (2010). *Explaining institutional change: Ambiguity, agency, and power*. Cambridge University Press.
Majone, G. (1994). The rise of the regulatory state in Europe. *West European Politics,* 17, 77–101.
Majone, G. (Ed.). (1990). *Deregulation or re-regulation?* Pinter Publishers.
Mamlyuk, B., & Mattei, U. (2011). Comparative international law. *Brooklyn Journal of International Law,* 36, 385–452.

Mann, F. A. (1964). The doctrine of jurisdiction in international law. *Recueil des Cours,* Vol. 111, 1–162.
Marschik, A. (1998). Too much order? The impact of special secondary norms on the unity and efficacy of the international legal system. *European Journal of International Law,* 9, 212–239.
McLachlan, C. (2005). The principle of systemic integration and Article 31(3)(c) of the Vienna Convention. *International and Comparative Law Quarterly,* 54, 279–320.
McLachlan, C. (2024). *The principle of systemic integration in international law*. Oxford University Press.
Merkouris, P. (2015). *Article 31(3)(c) VCLT and the principle of systemic integration: Normative shadows in Plato's cave*. Brill/Martinus Nijhoff.
Merkouris, P. (2020). Principle of systemic integration. In *Max Planck Encyclopedia of International Procedural Law*.
Mommsen, W. J., & de Moor, J. A. (Eds.). (1992). *European expansion and law: The encounter of European and indigenous law in 19th- and 20th-century Africa and Asia*. Berg.
Morse, J., & Keohane, R. (2014). Contested multilateralism. *The Review of International Organizations,* 9, 385–412.
Müller, J.-W. (2016). *What is populism?* University of Pennsylvania Press.
Pauwelyn, J., & Alschner, W. (2015). Forget about the WTO: The network of relations between PTAs and 'double PTAs'. In A. Dür & M. Elsig (eds.), *Trade cooperation: The purpose, design and effects of preferential trade agreements* (pp. 21–48). Cambridge University Press.
Pauwelyn, J., Wessel, R. A., & Wouters, J. (2014). When structures become shackles: Stagnation and dynamics in international lawmaking. *European Journal of International Law,* 25, 733–763.
Pavel, C. E. (2018). Is international law a Hartian legal system? *Ratio Juris,* 31, 307–325.
Payandeh, M. (2011). The concept of international law in the jurisprudence of H.L.A. Hart. *European Journal of International Law,* 21, 967–995.
Picciotto, S. (2011a). *Regulating global corporate capitalism*. Cambridge University Press.
Picciotto, S. (2011b). International transformations of the capitalist state. *Antipode,* 43, 87–107.
Picciotto, S. (2022). Technocracy in the era of Twitter: Between intergovernmentalism and supranational technocratic politics in global tax governance. *Regulation & Governance,* 16, 634–652.
Project for a Constitution of the United States of Europe. (1944, March 25). Drafted by Fernando de los Ríos and Arnold J. Zurcher, Legal Committee of the Pan Europa Conference.
Prost, M. (2012). *The concept of unity in public international law*. Hart Publishing.
Raustiala, K., & Victor, D. G. (2004). The regime complex for plant genetic resources. *International Organization,* 58, 277–309.
Riphagen, W. (1982). Third report on state responsibility. *Yearbook of the International Law Commission, Vol. I & II*.
Riphagen, W. (1983). Fourth report on state responsibility. *Yearbook of the International Law Commission, Vol. II(1)*.
Roberts, A., Stephan, P. B., Verdier, P.-H., & Versteeg, M. (2015). Comparative international law: Framing the field. *American Journal of International Law,* 109, 467–474.
Roberts, A., Stephan, P. B., Verdier, P.-H., & Versteeg, M. (eds.). (2017). *Comparative international law*. Oxford University Press.
Romano, S. (1963). *El ordenamiento jurídico*. Instituto de Estudios Políticos.
Rosenne, S. (2021). *Rosenne's The World Court: What it is and how it works* (7th rev. ed., D. Richemond-Barak, ed.). Brill Nijhoff.

Ross, A. (1969). On self-reference and a puzzle in constitutional law. *Mind* (309): 1–24.
Russia–China Joint Declaration on Promotion and Principles of International Law. (2016, June 25).
Santos, B. de S. (1987). Law: A map of misreading. Toward a postmodern conception of law. *Journal of Law and Society,* 14, 279–302.
Santos, B. de S. (1995). *Toward a new common sense: Law, science and politics in the paradigmatic transition*. Routledge.
Sauca, J. M. (2001). Autorreferencia y contradicción en la derogación del procedimiento de reforma constitucional. El puzzle de Alf Ross. In *Cuestiones lógicas de la derogación de normas* (pp. 77–173). Fontamara.
Scelle, G. (1932). *Précis de droit des gens* (Vol. I).
Scelle, G. (1934). *Précis de droit des gens* (Vol. II).
Scelle, G. (1956). Le phénomène du dédoublement fonctionnel. In *Rechtfragen der Internationalen Organisation: Festschrift für H. Weberg* (pp. 324–342).
Scheppele, K. L. (2018). Autocratic legalism. *University of Chicago Law Review* (85): 545–583.
Scott, C. (2017). The regulatory state and beyond. In P. Drahos (ed.), *Regulatory theory: Foundations and applications* (pp. 265–280). ANU Press.
Seidl-Hohenveldern, I. (1998). Hierarchy of treaties. In *Essays on the law of treaties: A collection of essays in honour of Bert Vierlag*. Martinus Nijhoff Publishers.
Simma, B. (1985). Self-contained regimes. *Netherlands Yearbook of International Law,* 16, 111–136.
Simma, B. (1994). From bilateralism to community interest in international law. *Recueil des Cours,* Vol. 250, 217–384.
Simma, B., & Pulkowski, D. (2006). Of planets and the universe: Self-contained regimes in international law. *European Journal of International Law,* 17, 483–529.
Sørensen, M. (1983). Autonomous legal orders: Some considerations relating to a systems analysis of international organisations in the world legal order. *International and Comparative Law Quarterly,* 32, 559–576.
Stone Sweet, A. (2004). *The judicial construction of Europe*. Oxford University Press.
Suber, P. (1990). *The paradox of self-amendment: A study of logic, law, omnipotence, and change*. Peter Lang.
Suber, P. (1999). Self-reference in law. In C. B. Gray (ed.), *Philosophy of law: An encyclopedia* (Vol. 2, pp. 790–792). Garland Publishing.
Sunstein, C. R. (2024). Separation of powers is a they, not an it. *Harvard Public Law Working Paper* No. 24-15.
Tamanaha, B. Z. (1993). The folly of the 'social scientific' concept of legal pluralism. *Journal of Law and Society,* 20, 192–217.
Tamanaha, B. Z. (2000). A non-essentialist version of legal pluralism. *Journal of Law and Society,* 27, 296–321.
Tamanaha, B. Z. (2004). *On the rule of law: History, politics, theory*. Cambridge University Press.
Thierry, H. (1990). The thought of Georges Scelle. *European Journal of International Law* (1): 193–206.
Tomuschat, C. (1999). International law: Ensuring the survival of mankind on the eve of a new century. *Recueil des Cours,* Vol. 281, 9–438.
Trachtman, J. P. (1993). International regulatory competition, externalization, and jurisdiction. *Harvard International Law Journal*, 34, 47–104.
Trachtman, J. P. (1996). The international economic law revolution. *University of Pennsylvania Journal of International Law,* 17, 33–49.
Trachtman, J. P. (2008). *The economic structure of international law*. Harvard University Press.
Trachtman, J. P. (2013). *The future of international law: Global government*. Cambridge University Press.

United Nations Treaty Collection. (2025, July 13). *Chapter XXIII*. https://treaties.un.org
Valticos, N. (1996). Pluralité des ordres juridiques internationaux et unité du droit international. In J. Makarczyk (ed.), *Theory of international law at the threshold of the 21st century: Essays in honour of Krzysztof Skubiszewski* (pp. 623–632). Kluwer Law.
van Creveld, M. (1999). *The rise and decline of the state*. Cambridge University Press.
Verdier, P.-H., & Versteeg, M. (2019). Separation of powers, treaty-making, and treaty withdrawal: A global survey. In C. A. Bradley (ed.), *The Oxford handbook of comparative foreign relations law* (pp. 135–155). Oxford University Press.
Vogel, D. (1996). *Kindred strangers: The uneasy relationship between politics and business in America*. Princeton University Press.
von Bogdandy, A., & Venzke, I. (2012). In whose name? An investigation of international courts' public authority and its democratic justification. *European Journal of International Law,* 23, 7–41.
von Bogdandy, A., Goldmann, M., & Venzke, I. (2017). From public international to international public law: Translating world public opinion into international public authority. *European Journal of International Law,* 28, 115–145.
von Bogdandy, A., Wolfrum, R., von Bernstorff, J., Dann, P., & Goldmann, M. (Eds.). (2010). *The exercise of public authority by international institutions: Advancing international institutional law*. Springer.
Waldron, J. (2011). Are sovereigns entitled to the benefit of the international rule of law? *European Journal of International Law,* 22, 315–343.
Weiler, J. H. H. (1991). The transformation of Europe. *Yale Law Journal,* 100, 2403–2483.
Wellens, K. (1994). Diversity in secondary rules and the unity of international law. *Netherlands Yearbook of International Law,* 25, 3–37.
Woodman, G. R. (1998). Ideological combat and social observation: Recent debate about legal pluralism. *The Journal of Legal Pluralism and Unofficial Law,* 42, 21–59.
World Conference on Constitutional Justice (WCCJ). (2017). *Declaration on the Rule of Law*, Vilnius.
WTO General Council. (2003). *Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, WT/L/540 and Corr.1, 1 September.
WTO. (2001). *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, 20 November. WTO. (2001). *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2, 20 November.
Yergin, D., & Stanislaw, J. (1998). *The commanding heights: The battle for the world economy*. Simon & Schuster.
Zapatero, P. (2000). Level up: A history of regime-building at GATT club. *Cuadernos de Derecho Transnacional*, 12, 818-839.
Zapatero, P. (2006). Searching for coherence in global economic policymaking. *Penn State International Law Review,* 24, 595–627.
Zapatero, P. (2014). World-scale market segmentation: Market-driven solutions to the 'Paragraph 6' issue. *Journal of World Trade*, 48, 137–162.
Zapatero, P. (2015). Little islands: Limits and prospects of the United Nations Chief Executive Board. *Cuadernos de Derecho Transnacional,* 7, 369–380.
Zapatero, P. (forthcoming, 2025a). Anatomy of treaty-based regimes.
Zapatero, P. (forthcoming, 2025b). The logic of treaty antinomy.
Zapatero, V. (2019). *The art of legislation*. Springer.