MODERN INTERNATIONAL LAW AND THE ADVENT OF SPECIAL LEGAL SYSTEMS

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I. THE RELEVANCE OF SPECIAL SECONDARY NORMS

The tree of modern international law bears the burden of its increasingly heavy branches. Specialized international lawmaking and its concomitant web of treaties has a bearing on the *coherence* of international law and its operation as a system. International law as a global tool for social guidance is challenged by a proliferation of disconnected specialized institutions developing, administering, and enforcing their own norms. Inevitably, segmentation of international law has direct implications for its level of coherence, and therefore in its functioning as a system. International law comprises a number of both conventional and customary norms and a reduced group of coexisting treaty-based *specialised legal systems*.[1]

A variety of global institutions exercising legal power in potential competition have thus emerged. Today these specialized "international regimes" (international organizations and multilateral or regional treaties with a degree of institutionalisation) may generate their own diverging and even contradicting *legal perspectives*. The fact that some treaties incorporate an increasingly elaborate institutionalisation substantially modifies the functioning of international law; institutionalization impacts on the manner in which treaties interact and are administered and reduces the margins for applying general international law. Nowadays, the interpretation of international law by States currently coexists along with treaty-based organs producing diverse types of norms and acts and delivering binding interpretations on those treaties. We thus encounter a map in which, since the middle of the last century, institutionalized treaties operate with growing autonomy in international society. The current situation is one in which the study of treaty interactions is therefore of critical importance.

To this effect, the distinction between primary and secondary rules (H.L.A. Hart) is a useful tool for analysing the functioning of international law. Hart explains legal systems as a combination of the aforementioned rules. Applying this conventional distinction to international law helps shed light on

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1. *See* M. Sorensen, *Autonomous Legal Orders: Some Considerations Relating the Analysis of International Organizations in the World Legal Order*, 32 INT'L & COMP. L.Q. 559 (1983); N. Valticos, *Pluralité des Ordres Juridiques Internationaux et Unité du Droit International*, THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 301-22 (Kluwer L. Int'l, 1996); O. Casanovas & La Rosa, UNITY AND PLURALISM IN PUBLIC INTERNATIONAL LAW (Martinus Nijhof, The Hague 2001).

modern international law: primary rules establish the rules of conduct (obligatory/prohibited/positively permitted/negatively permitted) and secondary rules establish the rule of recognition, rules of change, and rules of adjudication.[2] Thus, the primary rules of the variety of treaties in force regulate conducts, and in doing so they enter a heterogeneous group of sectors. The secondary rules recognize, modify, and adjudicate the primary rules. Hart described the invention of the secondary rules as a step forward having as much importance for society as the invention of the wheel.[3]

From a theoretical perspective, there are several collective efforts in legal literature which take this analytical path. Up until the latter half of the 1980s, literature on international law did not contain any theoretical treatment of the rise in special secondary rules. Pioneering studies in this field include Sorensen's work on "autonomous systems" (1983)[4] and Bruno Simma's article which follows in the footsteps of works by Riphagen in the International Law Commission: "self-contained regimes" (1985).[5] A decade later, a collective monograph was published, promoted by the editorial board of the *Netherlands Yearbook of International Law* in commemoration of its 25th anniversary (1994).[6] This work supports the Hartian methodological distinction for analysing and evaluating the "combined functioning" of primary and secondary rules in international law as well as the interaction between the "subsystems" of international law.[7] The present study continues this line of work, making this distinction to dissect the functioning of international law as a tool for social guidance.

This distinction allows applying an analytical perspective to the current state of modern international law and the challenges arising from the emergence of *special* secondary rules in a scenario in which general rules of international law are scarce and their efficacy relative; in short, it enables approach to the impact of international regimes on international law. The concept of "international regimes" imprinted on political science decades ago,[8] clearly define these social artifacts in

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2. H.L.A. HART, THE CONCEPT OF LAW 92, 107 (Oxford Univ. Press, 1994) [hereinafter HART, CONCEPT]; H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (Clarendon Press, 1983). For a critique of the Hartian conception in the *Concept of Law* applied to public international law, see, for example, I. Brownlie, *The Rule of Law in International Affairs*, in INTERNATIONAL LAW AT THE FIFTIETH ANNIVERSARY OF THE UNITED NATIONS: THE HAGUE ACADEMY OF INTERNATIONAL LAW 3-8 (Martinus Nijhoff, 1998). *See also* G. Gottlieb, *The Nature of International Law: Toward a Second Concept of Law*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, VOLUME IV, THE STRUCTURE OF THE INTERNATIONAL ENVIRONMENT 331-83 (Cyril E. Black & Richard A. Falk eds., Princeton Univ. Press, 1972).

3. HART, CONCEPT, *supra* note 2, at 41.

4. Sorensen, *supra* note 1, at 559-76.

5. B. Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985).

6. Published as a monography in BARNHOORN ET AL., DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW (Martinus Nijhoff 1995).

7. K.C. Wellens, *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, 25 NETH. Y.B. INT'L L. 6-7 (1994).

8. This conceptual category was developed in political science and receiving meanings linked (to a greater or lesser degree) to one or various treaties. The conventional meaning of "international regimes" was coined by Stephen Krasner: "sets of implicit or

the same way that the most traditional term of "international institutions" or even "institutionalised treaties."[9] Irrespective of the terms employed, they have in common that they operate on the basis of either one or several treaties, and the fact that they create a kind of, more or less developed, institutional structure.[10]

Treaty making processes after the second half of the twentieth century began to systematically use the "technology" of secondary rules to strengthen the functioning and efficacy of international law.[11] In this equally idealistic and formalist stage, prominent politicians and international lawyers carried out multilateral negotiations with the aim of rationalizing the law of treaties and therefore contributing to the progressive development of a legal system on a global scale: the "international legal order." Thus, a group of secondary general rules were codified and developed, which regulated treaty making, treaty interpretation or the solution of conflicts of treaties, among other issues. The most successful legal product of this period is the Vienna Convention on the Law of Treaties (VCLT), of May 23, 1969. However, international lawmaking has not developed general secondary rules with the same intensity as special secondary rules.

Parallel to the process of codification and progressive development of general secondary rules, the first modern international institutions were created. The functioning of these institutions, characterised by specialisation and functionalism, is based on special secondary rules which safeguard the change of (rules of change) and the compliance with (rules of adjudication) their own primary rules. Therefore, they employ a great number of regulatory techniques to make effective substantive segments of international law: mechanisms for the creation and specification of rules, dispute settlement, and monitoring law enforcement, among others. Their functioning is dependent on special secondary

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explicit principles, norms, rules, and decision-making procedures around which actor's expectations converge in a given area of international relations." S.D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 2 (S.D. Krasner ed., Cornell Univ. Press 1983).

9. For other ways of naming this phenomenon, see J. Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Int'l L. 546 (1995) ("continuing treaties"); R.C. Churchill & G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 Am. J. Int'l L. 647, 647-55 (2000) ("autonomous institutional arrangements").

10. For a view from the perspective of international relations that deal with treaties or groups of treaties as the frames of international regimes, see A. CHAYES & A. CHAYES HANDLER, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (Harvard Univ. Press, 1995). Similarly, Alec Stone analyzed the articles published in *International Organization* and *World Politics* in the ten years following Krasner's article and concluded that all the regimes studied in these works were based on one or more treaties. A. Stone Sweet, *What is a Supranational Constitution? An Essay in International Relations Theory*, 56 THE REV. POL., SPECIAL ISSUE ON PUB. L. 448 (1994).

11. *See, e.g.*, A. Marschik, *Too Much Order?: The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System*, 9 EUR. J. INT'L L. 212 (1997).

rules which promote development (rules of change) and compliance (rules of adjudication) with their primary rules.[12]

The practical result is that the predominant secondary rules in modern international law tend, at present, to be special. These secondary rules, contained in the treaties of specialised regimes, are at the service of their own primary rules and therefore of the values that these promote (e.g., trade liberalisation, human rights, intellectual property protection). Significant adverse effects on international law as a system derive from this fact, since there are neither sufficiently developed general secondary rules to deal with these interactions, nor general institutions to strike a balance between the primary rules of international law and, consequently, between the different social values which these promote. This is undoubtedly one of the challenges faced by international law when it comes to functioning as a legal system; the emergence of specialised legal systems within it, in a global scenario which lacks efficient general rules and institutions to balance them.[13]

I. CONFLICTS OF NORMS IN THE LAW OF TREATIES

In this scenario it is particularly important *how* treaties interrelate and what solutions are provided by international law in the event of conflict between them. Treaties and legal developments which occur around them are the essential normative instruments in the functioning of modern international law.[14] The

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12. The following serve as examples: (a) specialised dispute settlement mechanisms (e.g., Law of the Sea Tribunal); (b) special lawmaking mechanisms (e.g., WTO Permanent Trade Negotiations Forum); (c) mechanisms that create acts and authorised interpretations (e.g., Human Rights Commission); (d) regulatory mechanisms based on financial facilities (e.g., refusal or suspension of funding in the IMF); and (e) enforcement mechanisms based on market access (e.g., suspension of trade concessions by the WTO Dispute Settlement Body). For two general studies on international institutional law see H.G. SCHERMERS & N.M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY (Martinus Nijhoff, The Hague/London/Boston, 2004); J. KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (Cambridge Univ. Press, 2004).

13. The negotiation of the Vienna Convention on the Law of treaties between States and International Organisations (Mar. 21, 1986), which has not entered into force, could have been an opportunity to respond to this challenge. The final draft of its provisions did not in any case resolve these problems. On this point, consult its article 30 (application of successive treaties relating the same subject-matter) and article 31 (general rule of interpretation); both inspired by the current text of the Vienna Convention on the Law of the Treaties of 1969. On the previous failed instrument see, for example, P. Manin, *La Convention de Vienne sur le droit des traités entre Etats et Organisations Internationales ou Entre Organisations Internationales*, 32 ANNUAIRE FRANÇAIS DE DROIT INT'L 454-73 (1987); G. Gaja, *A "New" Vienna Convention on Treaties Between States and International Organizations: A Critical Commentary*, 58 BRIT. Y.B. INT'L L. 253-69 (1988); G.E. Nascimento e Silva, *The 1986 Vienna Convention and the Treaty-Making Power of International Organizations*, 29 GER. Y.B. INT'L L. 68-85 (1987).

14. It is worth transcribing the words of Paul Reuter:

conflicts between treaties are therefore an important question.[15] Conventional theory usually focuses on this matter in a way which does not fully match with practice. The rules of conflict in international law determine that for cases of antinomy between two rules, one of them has to be displaced (non-application).[16] The general regime on conflicts between treaties in international law is commonly identified with the *clauses of conflict*, the specialty criterion (*lex specialis*) and the temporal criterion (*lex posterior*). General rules on conflicts between treaties are a central part of the "operating system" of international law, since they provide solutions for the antinomies of one of their basic sources: treaties. This type of rule, in any legal system, permits it to operate as such by resolving its contradictions (antinomies). These rules provide a solution to any conflict between norms arising inside the system.

Nevertheless, both the actual structure of the rules on conflict of treaties, as well as the solutions they provide, are not adapted to the functioning of contemporary international law. These rules do not provide an adequate solution to some specific contradictions and moreover, fail to be effective in practice.[17] In this respect the general rules on conflicts of treaties *per se* have limitations.

The rules for conflicts between treaties relating to the "same subject-matter" (art. 30, VCLT) can be systematized in a particular *universe of cases* resulting from combining clauses of conflict, the temporal criterion, and the specialty criterion. At least two of these cases are difficult to resolve: (1) prior *lex*

> from a purely formal point of view, all treaties appear in relation to one another as independent and self-sufficient entities, like so many monads based on the rule *pacta sunt servanda*. A series of treaties does not, in mathematical terms, constitute an ordered "set" but an "accumulation;" this is the consequence of the nature of international society itself; nor has the creation of international organizations, however universal, changed this fundamental feature.

PAUL REUTER, INTRODUCTION TO THE LAW OF THE TREATIES para. 196 (Pinter, 1989).

15. The fact that international law is broadly based on treaties means that conflict of treaties are, as Binder indicates, an important question for the unity of international law. G. Binder, *The Dialectic of Duplicity: Treaty Conflict and Political Contradiction*, 34 BUFF. L. REV. 355 (1985).

16. Every legal system contains general rules which, in the event of antinomy, expel one of the incompatible rules within some type of legal process. Similarly, in international legal structures, contradictions between treaties do not result in derogation or automatic nullity of one of the rules in conflict. Competence to repeal a rule in a treaty depends on the parties ratifying that treaty and, therefore, on its particular rules and procedures in this regard. Thus, when an international tribunal identifies a conflict between treaties, one of their rules is not derogated but simply not applied according to predetermined criteria. Ian Sinclair stated that the rules of article 30 of the VCLT are not "entirely satisfactory" in many aspects and he maintained the following with respect to general rules on conflicts of treaties. "Indeed, it is their very simplicity which may occasion some concern, given the varying types of situations which they are designed to cover." *See* IAN M. SINCLAIR, THE VIENA CONVENTION OF THE LAW OF THE TREATIES 93-94, 98 (Manchester Univ. Press, 1984).

17. *Id.*

specialis v. general *lex posterior* without clauses of conflict and (2) prior *lex specialis* v. general *lex posterior* with contradictory clauses of conflict. There is no hierarchy between the lex *specialis* criterion and the *lex posterior* criterion. Therefore, there is no single formal solution for treaty antinomies in either of these two cases. If one criterion is "chosen" one treaty is given primacy. Conversely, if the second criterion is chosen, the other treaty is the one granted primacy. Thus, there is a structural problem.[18] There are also, in addition, cases where two treaties are different "same subject-matter." Should it be deemed that, since their subject-matter differs, there is no conflict or, conversely, do they generate antinomies? There do not appear to be clear and definitive solutions in this respect.[19]

In addition to this, there is a practical and no less important problem. Settling conflicts between treaties applying these rules is often politically difficult and, on occasion even unreasonable. An initial motive is the fact that international regimes are usually dynamic; they regularly produce legal acts and tend on occasion to develop new norms. Therefore, to apply the *lex posterior* criterion to these regimes would give primacy to the rules of those with greater normative activity.[20] A second motive is that the institutionalisation of these regimes aims at ensuring the relative permanence of their norms (e.g., constitutional treaties of international organisations) which does not fit with the type of solution provided in case of antinomy by general rules on conflicts between treaties.[21] In this respect, these specialized regimes have been developed by diverse collectives with the aim of promoting their values, purposes and special agendas (trade, human rights, etc.) on a global scale. These collectives have given life in this way, to "transnational communities" which tend to be reluctant to displace the norms governing these regimes in the event of conflict with other treaties.

Relations between treaties are, as a consequence, questions which may lead to high levels of political tension. The rules on conflicts of treaties have a bearing, for example, on the power relationships between international regimes as

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18. See, from the perspective of general legal theory, N. BOBBIO, CONTRIBUCIÓN A LA TEORÍA DEL DERECHO 361-64 (Fernando Torres, Valencia, 1980).

19. *See* S. Ohlhoff & H.L. Schloemann, *Rational Allocation of Disputes and "Constitutionalisation": Forum Choice as an Issue of Competence*, in DISPUTE RESOLUTION IN THE WORLD TRADE ORGANISATION 316, n.52 (James Cameron & Karen Campbell eds., London 1999).

20. In relation to the disconnection between classic theories and the dynamic nature of obligations deriving from these treaties see E. Smith, *Understanding Dynamic Obligations: Arms Control Agreements*, 64 S. CAL. L. REV. 1575, 1590 (1991).

21. General rules on conflicts of treaties encounter problems for example, in resolving contradictions between treaties with constitutional elements (charters of international organizations) or between these and other treaties. Karl defines this phenomenon as the "constitutional problem;" a problem which plunges us, in the author's words, into a new "dimension" of the problem of antinomies. Therefore, two levels with different solutions are distinguished in relation to the antinomy: the internal (law of the organization) and external (general international law) level. *See* W. Karl, *Conflict between Treaties*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 473 (R. Bernhardt ed., North-Holland, 1984).

well as, by extension, between domestic branches of government. The crafting of clauses of conflict creates scenarios in which the above-mentioned tensions have a strong and clear presence.[22] In technical terms, these clauses permit to determine the position of a treaty with respect to another, except when both treaties have contradictory clauses of conflict. These clauses are therefore tools with immense legal power: in the end they predetermine which rule should take precedence in the case of antinomy; a function comparable to that fulfilled by constitutions when they define the relations between different kinds of laws and legal instruments in a given legal system.[23]

These clauses then, provide a tool which does not go unnoticed in treaty negotiations. In fact, to predefine which treaty norm prevails in the case of conflict may ultimately determine the final legal source of authority on a global scale with respect to a specific social question (regime A v. regime B).[24]

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22. It is clear that clauses of conflict have a notably strategic character from a political perspective. For Mus, they should with good reason have more presence in any treaty negotiation. See, J.B. Mus, *Conflicts Between Treaties in International Law*, 29 NETH. INT'L L. REV. 227, 232 (1998).

23. In the literature on this subject some authors recognise in these clauses the capacity to create hierarchy. For Vierdag, for example, the relation between two treaties may be determined "on the basis of some hierarchical order" in the event that one of those treaties incorporate this type of clause. E.W. Vierdag, *The Time of the Conclusion of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 Brit. Y.B. Int'l L. 105 (1988). Degan also approaches the articles of the VCLT in matters of conflict as provisions which establish hierarchy. *See* D.V. DEGAN, SOURCES OF INTERNATIONAL LAW 425 (Martinus Nijhoff, 1997).

24. Negotiations of the Cartagena Protocol on Biosafety (1999) are a clear example of the potential of clauses of conflict and the problems that this can lead to when drafting treaties. The final issue to be defined in the negotiation was the relation of the protocol with WTO law. The first phrase begins: "Recognizing that trade and environment agreements *should be mutually supportive* with a view to achieving sustainable development," and then goes on to include other statements. The Miami Group incorporated the following phrase in the preamble: "Emphasizing that this Protocol *shall not be interpreted as implying a change in the rights and obligations* of a Party under any existing international agreements." In turn European negotiators were able to continue this statement with the phrase: "Understanding that the above recital *is not intended to subordinate this Protocol* to other international agreements." The text goes on to state the following:

> Nothing in this Protocol shall be interpreted as restricting the right of a Party to take action that is more protective of the conservation and sustainable use of biological diversity than that called for in this Protocol, *provided that such action is consistent with the objective and the provisions of this Protocol and is in accordance with that Party's other obligations under international law*

(art. 2.4). These provisions provide an excellent example of the potential complexity and political tension inherent in drafting clauses of treaties. For the relations between this instrument and the WTO see, for example, C. BAIL ET AL., THE CARTAGENA PROTOCOL ON BIOSAFETY: RECONCILING TRADE IN BIOTECHNOLOGY WITH ENVIRONMENT AND DEVELOPMENT? (Royal Inst. Int'l Aff., 2003).

Therefore, this tool enables a treaty to reallocate public power between institutions. In essence, the content of the clauses of conflict may produce hierarchies. Therefore the drafting of such clauses is usually supervised with particular zeal in the treaty making processes. Both international regimes and domestic agencies are particularly alert to such questions, since their competence, field of legal maneuver and decision making power may be affected by the content of these clauses. As a result, opportunity costs in the definition of this type of device in treaty negotiations are increasingly high.[25] The drafting of these clauses is thus a very sensitive issue in political terms.[26]

Specialised international lawmaking processes do not appear to be the appropriate forum for adopting decisions on questions of primacy between treaties. They essentially respond to the special administrative interests and public policies of particular branches of government (e.g., environment, trade, health . . .) and in doing so they inevitably function with a restrictive rationality. Therefore, they lack enough public legitimacy which should reasonably be required when deciding generally on such a relevant issue as the relation between the primary rules of the treaties in which these clauses are incorporated, and those of other treaties in potential conflict. This is all the more so when modern treaties today cover increasingly complex issues which often have relevant impacts on society.

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25. In this regard, some clauses of conflict are drafted containing the following type of model arrangement: "*Understanding* that the above recital is not intended to create a hierarchy between this Convention and other international agreements." Hudec clearly explained some years ago how at times we encounter rules of international law which appear to be legal solutions in which, in reality, no settlement whatsoever has been reached. R.E. Hudec, *International Economic Law: The political Theatre Dimension*, 17 U. PA. J. INT'L ECON. L. 9-15 (1996).

26. The NAFTA provisions for relations between treaties may serve as an additional example of the complexity which, for political reasons, produces this type of provision. Article 103 of NAFTA has in this respect a curious paragraph ("Relations to other Agreements") prior to that containing the general conflict clause in which the parties to NAFTA confirm their obligations *inter se* according to the rules of other treaties: "The Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party" (para. 1). Subsequently the clause of conflict included in the following provision reverses the meaning of the previous provision by determining as follows: "In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement" (para. 2). Similarly, article 104 of NAFTA ("Relation to Environmental and Conservation Agreements") states that in the event of incompatibility between NAFTA and the trade obligations contained in certain environmental agreements incorporated by reference, these obligations shall prevail: (1) "such obligations shall prevail to the extent of the inconsistency, *provided that* [(2)] where a Party has a choice among equally effective and reasonably available means of complying with such obligations, [(3)] the Party chooses the alternative *that is the least inconsistent* with the other provisions of this Agreement." *See* L.B. Sohn, *An Abundance of Riches: GATT and NAFTA Provisions for the Settlement of Disputes*, 1 U.S.-MEX. L.J. 3-4 (1993); F.M. Abbott, *The North American Integration Regime and its Implications for the World Trading System*, in THE EU, THE WTO, AND THE NAFTA: COLLECTED 9 COURSES OF THE ACADEMY OF EUROPEAN LAW 170 (2000).

In short, the application of the rules governing conflicts between treaties and within these, the application of clauses of conflict, may produce dysfunctions in international law. These tools do not efficiently regulate the complex interaction between treaties in the modern practice of international law. They do not provide adequate and functional solutions to contradictions which could emerge. The new realities of public international law exceed and render dysfunctional the traditional tools for correcting antinomies between treaties. Therefore, new formulas for mediating between international regimes and their rules have to be invented.

III. APPLICABLE LAW AND SPECIALISED JURISDICTIONS

This complex scenario also requires referring to questions of international jurisdiction deriving from these treaties. International law is today the basic public tool for global social guidance through norms. Nevertheless, its functioning as a system faces the challenge of specialisation and the unbalanced and irregular institutional growth of its diverse sectors. The debate on fragmentation of international law which essentially tended to turn on the emergence of specialised dispute settlement mechanisms is a clear expression of this phenomenon.[27] Many modern treaties now incorporate rules of adjudication (special secondary norms) which institutionalize specialised global jurisdictions.[28] These rules create dispute settlement mechanisms which have their own particularities.[29] Functionalism and specialisation differentiate them, from a comparative perspective, from the type of functioning proper to a general court such as, for example, the International Court of Justice (ICJ). As a result, they operate in a different manner in relation to (a)

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27. *See, e.g.*, G. Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919-33 (1999); J.I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, RECUEIL DES COURS. COLLECTED COURSES OF THE HAGUE ACADEMIE OF INTERNATIONAL LAW 105-382 (Tome 271, 1998); P-M. Dupuy, *Sur le Maintien ou la Disparition de L'unité de L'ordre Juridique International, Harmonie et Contradictions en Droit International*, in RENCONTRES INTERNATIONALES DE LA FACULTÉ DES SCIENCES JURIDIQUES, POLITIQUES ET SOCIALES DE TUNIS 17-53 (Editions A. Pedone, 1996); R.Y. Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers, Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, 9 ASIL BULLETIN: EDUCATIONAL RESOURCES ON INTERNATIONAL LAW 2-7 (Nov. 1995).

28. For a detailed analysis of the modern jurisdictional machinery of international law see C.F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS (Kluwer L. Int'l, 2003).

29. The practice and literature of public international law are raising legal questions and dilemmas regarding the gradual emergence of international jurisdictions. Guillaume emphasised some time ago the surprising lack of attention paid to this question, compared to the amount of literature dedicated to the question of the *ad hoc* chambers of the International Court of Justice and the risks of divergence in its jurisprudence. G. Guillaume, *The Future of International Judicial Institutions*, 44 Int'l & Comp. L.Q. 861, 861-62 (1995).

the application of general international law and (b) the application of norms of other treaties and international regimes.

The *applicable law* of a dispute settlement mechanism determines the law on which it is required to concentrate when it administers justice. Thus, the applicable law of the International Court of Justice is equivalent to the generally accepted sources of international law; except that the parties submitting a dispute to its jurisdiction agree to this being decided *ex aequo et bono* (art. 38.1-2, ICJ Statute). Conversely, however, the applicable law of specialized dispute settlement mechanisms tends to be predefined in a more restricted way. Due to their functionalist nature, these mechanisms do not generally apply norms which are not expressly included in their applicable law. This phenomenon hinders the correct application of general international law and other treaties in particular. In fact, it not only restricts the degree of application of *compatible* norms of other treaties (residual application) but prevents the application of any *incompatible* treaty or customary norm.

These are relevant questions for the coherence of international law. The way in which the dispute settlement provisions are drafted inevitably has a bearing on the degree of application of the overall norms of international law itself. At the same time it prevents solving antinomies in favour of *external* treaty norms or customary norms contrary to those of the treaty or treaties which the mechanism administers. As a result these mechanisms end up selectively applying the norms of international law. Therefore, the applicable law of specialized mechanisms of adjudication (1) functions in practice as a bottleneck which hinders the application of other treaties and public international law norms, even if those norms are compatible, and (2) always renders their application unfeasible when they are incompatible.

With respect to this last point, rules on conflict of treaties do not offer a functional and realistic solution to those antinomies in which one or both treaties in conflict have their own dispute settlement mechanism. These rules were not designed to resolve the contradictions arising from the institutionalisation of public international law in specialized sectors. In fact, article 5 of the VCLT ("Treaties constituting international organizations and treaties adopted within an international organization") assumes and "legalises" this phenomenon, as it determines that the provisions of the convention – including therefore those of article 30 ("Application of successive treaties relating to the same subject-matter") – will be applied "without prejudice to any relevant rules" of those international organizations. Finally, it is also important to recall that the combined phenomenon of institutionalisation and specialisation in international law clashes with both the traditional practices and doctrines on conflicts of treaties. As a result, concepts and categories with which conflict of treaties have been handled since the mid twentieth century are, at present, inadequate for regulating and administering current treaty interactions.

Specialized dispute settlement mechanisms function in essence as "guardians" of the rules of these regimes. It is therefore difficult to apply general rules on conflicts between treaties to relations between their own norms and those

of other treaties.[30] As a result, the institutionalisation of treaties (international regimes) may end up creating *informal hierarchical structures* (irrespective of whether or not these treaties incorporate clauses of conflict) due to the mere fact of counting on provisions which favour the application of internal norms and prevent granting primacy to external norms in contradiction.[31] Consequently, the legal systems of these international regimes may operate in practice in a relative isolation from each other, separated as "islands" in international law.

Some literature refers to the general *criteria of interpretation* in international law as a channel for specialised dispute settlement mechanisms to incorporate other norms of international law as well as to resolve antinomies in their favour.[32] Nevertheless, the viability of this method is far from clear when attempting to incorporate norms which are not expressly included in their applicable law and it is even less so when attempting to solve conflicts of treaties. In this sense, the criteria for interpretation are not means to resolve conflicts; there is no antinomy when it is possible to apply these criteria to the relation between two norms. In these cases, in summary, there is an "apparent conflict" that can be solved through interpretation under the criteria of the VCLT (art. 31.3.c) or other possible specialised criteria of interpretation.[33] Criteria of interpretation can not solve conflicts between treaties in favour of *external* treaty norms. In this respect the function of interpretation has insurmountable technical limits. Article 31.3.c of the VCLT does not serve to solve cases where there is a real contradiction (e.g., it is obligatory pursuant to norm Y to carry out conduct A, and it is prohibited, pursuant to norm X, to carry out conduct A).

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30. A defining case in this respect is the WTO dispute settlement mechanism. The second paragraph of article 1.1 and Appendix 1º of the Dispute Settlement Understanding contains an initial reference to the applicable law of the mechanism which is complemented by articles 3.2-.3, 3.5, 7.1-.2, 14.2, 17.6 and 19.2. On the applicable law of the dispute settlement mechanism of the WTO see J. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333-337 (1999); Pauwelyn, *supra* note 9, at 535-78; D. Palmeter & P.C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398-413 (1998); G. Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 J. WORLD TRADE 87-152 (1999).

31. On similar lines, Kingsbury maintains from a critical perspective, for the purpose of dispute settlement in the WTO, that the principles related to trade tend to be treated as superior in hierarchical terms to the environmental principles contained in other sectors of international law. *See* B. Kingsbury, *The Tuna-Dolphin Controversy, the World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 29 (1994).

32. A clear example which is usually used to illustrate this is that of the Multilateral Environmental Agreements and WTO law. See G. Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The relationship between the WTO Agreement and MEAs and other Treaties*, 35 J. WORLD TRADE 1089 (2001); J. Cameron, *Dispute Settlement and Conflicting Trade and Environment Regimes*, in TRADE AND ENVIRONMENT: BRIDGING THE GAP 17 (Agata Fijalkowski & James Cameron eds., 1998); D. Esty, *Greening the GATT: Trade, Environment, and the Future*, INST. INT'L ECON., WASH. D.C 205 (1994); Ohlhoff & Schloemann, *supra* note 19, at 326-27.

33. For employing the concept of "apparent conflict" see Karl, *supra* note 21, at 473.

On the other hand, the use of criteria of interpretation as a method for integrating external norms in the functioning of specialised mechanisms situates the external norms in what can be termed as the "backseat" in the operation of interpretation. The operation of interpretation under section c of VCLT article 31.3 requires *taking into account* "any relevant rules of international law applicable in the relations between the parties." The operation therefore, is focused *on* a single norm and only takes "into account" those other norms, "together with the *context*" of the latter. To summarise, the two conflicting norms are not interpreted in a parallel manner nor are they attributed a comparable weight in the operation of interpretation. This has implications for the outcome of the operation. In this situation, when a specialised dispute settlement mechanism applies the VCLT criteria of interpretation, it is applying a rule (art. 31.3.c) which prioritises the norms of the treaty from which interpretation is made (norm X). In the interpretative operation of this norm, any norm external (norm Y) to the international regime in which the mechanism operates is integrated in a weak manner and giving a different "weight" to that given to the interpreted norm (norm X): it has to be "taken into account," together with the *context* of that norm (art. 31.3.c).

Finally, mention should be made of the growing and no less relevant phenomenon of *constitutional interpretation* applied to the charters of international organisations (constitutive treaties as constitutions). By definition, an operation of constitutional interpretation starts by placing the interpreted rule at the peak of the pyramid. Therefore, the treaties which benefit from practices of constitutional interpretation carried out by their own bodies are situated by such bodies, as expected, in a privileged position in relation to other treaties and norms of general international law.[34] This increases the already mentioned difficulty when applying external norms to these regimes and, at the same time, makes it impossible in the event of contradiction.

IV. LEGAL CULTURES AND DEGREES OF OPENNESS

Up to this point, the strictly normative issues and questions arising from the emergence of international regimes in international law have been examined. Finally, some further variables need to be added. Dispute settlement mechanisms are not only subject to and limited by the particular design and structure of their applicable law. At the same time their margin of maneuver in applying

34. Sato refers to the emergence of an interpretive doctrine of the constitutive treaties of international organisations as constitutions, diverted from the interpretative framework of the VCLT and which gives greater weight to the interpretation of the theological element as well as the subsequent practice of the organisation. These patterns make possible the effective functioning of these organisations and give them and evolutionary and dynamic nature based on their own components. T. SATO, EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS: A CRITICAL ANALYSIS OF THE INTERPRETATIVE FRAMEWORK OF THE CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS 231-33, ch. 5 (Kluwer L. Int'l 1996).

international law generally is relatively constrained for social, cultural, and practical reasons. This fact is the product of social interaction between legal operators and their subsequent self-identification with the specific values promoted by the international regime in which the mechanism is incorporated.[35] The particular legal culture and professional attachment of these operators support, and in some measure explain, the manner in which they approach the application of international law, and in particular the relation of their regime with external international norms.

There are a growing number of international legal cultures resulting from legal specialisation which have a bearing on the policies of international adjudication, as well as in a general way, on the functioning of international regimes and in the evolution and development of their systems of norms. The construction of epistemic communities around these regimes (e.g., environment, trade, human rights, etc.) inevitably impacts the manner in which these norms are applied and the degree of relevance attributed to other treaty norms.[36] In this sense, for example, it is particularly important which branch or agency of government controls access to the bodies and decision-making procedures arising from these treaties. It is obvious that policy goals and administrative interests of the heads and officials of domestic agencies responsible for environment, trade or health, to name just examples, are frequently divergent. Therefore, the fact that a particular domestic specialized agency is the one that activates a dispute settlement mechanism (and defines the content of the claims, makes allegations and legal arguments inside its procedures) guide the functioning of that mechanism and, therefore, the type of legal solutions it provides. Different questions always have different answers.

The dispute settlement mechanisms are, in this sense, rather like machinery which produces diverse results depending on the input it receives. It should be borne in mind that the parties having resource to them, restrict and specify in detail the legal question on which they require a pronouncement, report, decision, or judgment. The type of participants in these processes and the competence they exercise, produce "captures" in the adjudication mechanisms and have an effect on the content and orientation of the resulting product.[37] Thus,

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35. Today, an important part of the functioning of international law as a system is virtually in the hands of the professional communities of these international regimes. In fact, some of their participant such as judges or papelists are exercising jurisdiction and therefore undertaking to state the law. Dupuy emphasises for example, the importance of who forms these specialised jurisdictions and what is their training when it comes to preserving the unity of the international legal order. Dupuy, *supra* note 27, at 38-39.

36. On the concept of epistemic communities see P.M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1-36 (1992). Of particular interest, see also T.M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 Am. J. Int'l L. 359; T.M. Franck, *Community Based on Autonomy*, 36 COLUM. J. TRANSNAT'L L. 41-64, ch. 1 (1997).

37. Harperlin mentions in his classic study of bureaucracy in foreign relations that in highly organised administrative systems the question "why did a government adopt a specific action and what calculations were in its mind?," should be substituted for "what were the motives, interests, and sources of power of the various participants in that

these mechanisms encounter further difficulties in applying rules of other treaties, or dealing impartially with the treaty contradictions which may arise. This is particularly important if we assume that international regimes may actually operate at times as a second level playing field in which inter-ministerial disputes are resolved and relations and balances of power between domestic agencies and branches of government are defined and/or redefined.

The degree of attribution of relevance to external norms depends ultimately on various conditioning factors. Each existing dispute settlement mechanism in the global institutional architecture may take into consideration, in a different way and to a different degree, international customary law and the rules of other treaties, including the acts and rules deriving from the latter. Therefore, international regimes in practice *permeate* each other to different degrees and so, on occasion there may be divergent legal outcomes concerning notions of general international law. International regimes have thus different *degrees of openness*.[38] Their norms and bodies as well as the development of social and cultural practices inside them results in variations of permeability among these regimes.

In this respect, the degrees or differences in permeability between these regimes may be defined by analysing and evaluating some factors. Thus, legal analysis has to focus on the combination of a static and a dynamic variable in those cases that specialized regimes incorporate dispute settlement: (1) the structure and design of those rules governing the functioning of the dispute settlement mechanism; and (2) both the regularity in the application of other norms of international law and the comparative weight of those norms in resolving specific disputes within the mechanism (quantitative and qualitative analysis). A feasible general scheme of analysis could be developed using those variables.[39]

In the event of regimes which lack dispute settlement mechanisms or whose mechanisms are inactive, that scheme of analysis would require modulation. However, it may be essentially valid to analyse the degree of openness in any international regime whose bodies adopt acts or decisions applying legal norms. In this respect the comparative and systematic study of the content of international acts and norms deriving from treaties (comparative practice of the law of treaties) is open to a wide range of promising research. In

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government which led to decision X and subsequently the resulting action?" M. H. HARPERLIN ET AL., BUREAUCRATIC POLITICS AND FOREIGN POLICY 312-13 (Brookings Inst., 1974).

38. Marschik distinguishes, for example, between self-contained systems ("completely autonomous legal systems") and open subsystems. *See* Marschik, *supra* note 11, at 232-33.

39. Sorensen touched on these questions of measurement by analysing the existence or non-existence of autonomous or independent "legal orders" (or "subsystems"): in one of his last articles (1983) he asked whether the legal order of the European Community is unique or if conversely there are other cases in which by means of a treaty "new legal orders" have been created which may be considered "autonomous." Thus, to determine questions relative to the autonomy of a legal system of any international organisation, he proposed to analyse (a) lawmaking, (b) the application of law, and (c) dispute settlement. Sorensen ventured, however, that the result of these studies could demonstrate that "in practice" there is "probably" a plurality of "*independent* legal systems." *See* Sorensen, *supra* note 1, at 563.

fact, developing methods of analysis on the degree of openness of international regimes would enable measurement and consequently, comparison. At the same time, it would make possible to identify best practices between international regimes in questions of application of international law; that is, those practices which increase the cross-permeability between these regimes, as well as the relevance of the remaining norms of international law in the functioning of these regimes.

The several specialised legal cultures of international law have, in this regard, a direct impact on how it is applied and developed. International law is a vast discipline covering multiple and substantial fields in continuous growth and development. This fact is particularly important as the legal communities and cultures which converge on each international regime develop their own dynamics. One of the patterns of collective and institutional behaviour inside some of those regimes is an inner tendency to promote the pre-eminence (if not the superior hierarchical position itself) of their particular substantive area of international law in respect to others. This phenomenon usually occurs in sectors which have reached a certain critical mass in terms of evolution, institutional development, legal specificity, technical refinement as well as, obviously, political weight. Having discounted European community law for its obviousness,[40] the fields of international trade law and human rights are perhaps two of the more developed international legal examples, and for this reason they are also the first in which legal "frictions" are being detected.[41]

In fact, this phenomenon is also expressed in the branches of international legal science themselves (professional competition between specialised legal areas).[42] For example, an important part of the human rights practice and literature, understandably, pushes international human rights law to the top of the hierarchy of international law (primacy of human rights). Of course, alongside

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40. For some incisive critical reflections on this process and its "legal conquests" see T. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (Oxford Univ. Press 2003). *See also* K. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF INTERNATIONAL RULE OF LAW IN EUROPE (Oxford Univ. Press 2001).

41. See, among the first works to approach the so-called "linkages" in the literature of economic international law, J.L. Dunoff, *Trade and Recent Developments in Trade Policy and Scholarship – And Their Surprising Political Implications*, 17 NW. J. INT'L L. & BUS. 763, 763-64 (1996-97); J.P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L L. 32 (1998); *Linkage as Phenomenon: An Interdisciplinary Approach*, 19 U. PA. J. INT'L ECON. L. (1998) (consider all of the contributions of volume 19). In volume 19, see in particular S. Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731 (1998).

42. For a useful work on professional competition in the construction of the international market, in the wake of Pierre Bordieu's sociological studies, see Y. Dezalay, *Professional Competition and the Social Construction of Transnational Regulatory Expertise*, in CORPORATE CONTROL AND ACCOUNTABILITY: CHANGING STRUCTURES AND THE DYNAMICS OF REGULATION 203-15 (Joseph McCahery et al., eds., Clarendon Press Oxford 1993); PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS (Y. Dezalay & D. Sugarman eds., Routledge 1995).

this, other thriving international legal cultures are promoting the progressive development of their particular sectors and with them, the values that these entail. International economic law is perhaps the most paradigmatic example.[43] It is worth drawing attention to the fact that a characteristic shared by all these sectors is that they tend to object to formal subordination of their norms to the norms of other sectors.

Finally, it should be emphasised that the law of these international regimes is often subject to patters of *path dependence* in respect of their own practices and specific consolidated legal "*acquis*."[44] It is to be expected that the legal communities operating on the basis of these treaties (including international judges) tend to apply the norms (and social values) of the particular treaty or treaties of which they are responsible, and no others.[45] To summarise, it may be concluded that the application of norms of other treaties within these specialised regimes – the entry of such norms in their legal operations – may be restricted by both their norms and also their social and cultural practices.

V. SELF-CONSTRUCTING LEGAL SYSTEMS

International law faces a complex scenario. The creation of international regimes changes the paradigm on which it is based. Specific treaties operate in practice with the aid of their institutional structures, as autonomous *legal systems* interacting in a horizontal form; therefore, in an equivalent manner to that in which domestic legal systems interrelate (private international law). These systems of international law develop a tendency to *self construction*, certain dynamism and in practice tend to avoid subordination to each other. Their relations are definitely of a *horizontal* nature.[46]

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43. *See* J. Trachtman, *The Revolution of International Economic Law*, 17 U. PA. J. INT'L ECON. L. 31 (1996).

44. The theory of *path dependence* could be applied to other legal phenomena relating to the *precedent* understood in both the strictest and the broadest sense. For the general formulation of this theory see P.A. David, *Clio and the Economics of QWERTY*, 75 THE AM. ECON. REV. 332-37 (Dec. 28-30 1984) (Papers and Proceeding of the Ninety-Seventh Annual Meeting of the American Economic Association). A work in which this theory is noted and connected in particular with the legal precedent is W. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of State Practice*, 17 U. PA. J. INT'L ECON. L. 1062 (1996).

45. The solutions which individuals adopt and choose as a response to problems are often linked to their training, expertise, and the characteristic specificities of the organisations to which they belong. See ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (Little Brown, 1971).

46. Sustaining the horizontal nature of the relations between treaties, unless these contain a contrary provision, see I. Seidl-Hohenveldern, *Hierarchy of Treaties*, in ESSAYS ON THE LAW OF THE TREATIES, A COLLECTION OF ESSAYS IN HONOUR OF BERT VIERLAG 8-9, 12-13, 18 (Klabbers & René Lefeber eds., Martinus Nijhoff Publishers, The Hague 1998). For a different but inspiring concept of horizontality in international law, see R. Falk,

The current panorama of the relation between the multilateral trading system and regional trade agreements (trade regionalism–trade multilateralism) is one of the most interesting cases, in which an attempt is made to control this phenomenon by means of rules. Since its creation, the multilateral trading system has tried to discipline regional trade agreements under it rule-based system. The reason for this is not based solely on conventional economic theories, but also on pure institutional survival.[47] To do so, it uses various norms (art. XXIV, GATT, Understanding on interpretation of the foregoing; art. V, GATS, etc.) and procedures (regional trade committee and dispute settlement system) which attempt to discipline trade regionalism according to specific parameters, apart from the rules on conflicts of treaties.[48] However, the relation between these different treaties, in legal terms, continues to be controversial, unstable and in practice essentially horizontal (legal system A/ legal system B). The NAFTA-WTO relation is a clear example of the legal complexity of the phenomenon, as both have their own jurisdictions and also grant primacy to their own rules through self-reference. The same occurs to a relevant extent with the relation between the law of the IMF and the WTO,[49] or between the latter and the multilateral environmental agreements, to cite others.[50]

In this respect, some international regimes may produce (through their norms) and develop (by means of bodies which apply those norms) their own legal "perspectives." Therefore, these perspectives are potentially divergent in respect of any legal question, including their own legal relations. At times, the provisions of these treaties as well as the specialised practices relating to those provisions make it possible to progressively develop a political process of legal self-construction. This ultimately facilitates the emergence of a variety of *legal perspectives* in international law through international regimes.[51]

International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order, 32 Temp. L.Q. 295 (1959).

47. It was in 1950 that the Canadian economist Jacob Viner used for the first time the terms "trade creation" and "trade diversion" in relation to preferential rules in international trade. *See* J. VINER, THE CUSTOMS UNION ISSUE 43-44 (Carnegie Endowment for International Peace, 1950). Legal literature on international trade began to pay attention to the relation between regionalism and GATT from the 1960s forward. *See* J.H. JACKSON, WORLD TRADE AND THE LAW OF GATT: A LEGAL ANALYSIS OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 576, n.2, 21 (The Boobs-Merrills Company Inc., 1969).

48. Kenneth Abbott underlined that it would not be reasonable in practice to use these rules to resolve conflicts between multilateral and regional organisations given the political intensity and friction which would arise from their application. *See* F.M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 108 (Martinus Nijhoff, 1995).

49. *See, e.g.*, D.E. Siegel, *Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J. INT'L L. 561 (2002).

50. *See, e.g.*, Marceau, *supra* note 32, at 1081-1131.

51. International legal theory tends not to internalise this type of analysis. The conclusions in any case, may be common to those deriving from relations between legal systems. A reference work which may be useful for examining these questions is S. ROMANO, L'ORDINAMENTO GIURIDICO: STUDI SUL CONCETTO, LE FONTI E I CARATTERI DEL DIRITTO (Firenze, 1951). Among the first articles which used a dual approach to study the

The validity and legitimacy of any of the determinations constructed by these regimes, including those that are contradictory, will not be easy to object. There are today no rules and institutions which are capable of resolving these contradictions. This fact produces important challenges both for the practice and general theory of international law. In theory, resolving a conflict between treaties when they belong to different regimes is disjunctive: application of the treaty of regime A or application of the treaty of regime B. In practice however, there may be different solutions according to how the conflict is tackled by one or another: (1) Perspective A: that which is determined by the rules and legal practices of regime A; and (2) Perspective B: that which is determined by the rules of regime B and its legal practices. The solutions which each of these regimes offer to a conflict between its rules may, therefore, be contradictory. In addition there is no general court available with a binding jurisdiction to deal with these conflicts. Therefore, the construction of international specialized legal systems introduces us to a new legal dimension.

The legal systems of these regimes, in the same way as domestic legal systems, participate in a process of self-construction. The law is the most advanced form of public power, and as such, is called to consolidate it. Therefore, the application of external norms within these systems of international law is always dependent on not contradicting their own norms. In this respect, international regimes may come to progressively develop their own hierarchies in practice. The practice of some of these regimes shows how these tend to function, in an implicit manner, on an "informal" hierarchical order at the top of which the treaty or treaties they administer are placed. The remaining rules of international law are de-facto placed beneath and subject to being compatible with them. Furthermore, the practices of one of these regimes, the European Union, have surpassed this boundary and have formalised and made explicit its particular normative hierarchy. The pattern of operation of these regimes is somehow similar to the manner in which domestic law tends to deal with the relation between international law and constitutions.

It is therefore important to bear in mind this phenomenon of "contextual hierarchies" or "polyarchy" (coexistence of several hierarchies) in international law. One of the characteristics of global institutional architecture today is the existence of several international regimes whose systems of norms develop progressively, "manage" the conditions of entry and legal effects of norms from other sectors of international law, and construct their own informal hierarchies.

Each regime administers a section of international law through treaties with a specific *object and purpose* (e.g., IMF, WTO, WHO, etc.). These more or less sophisticated specialised legal systems interact with the remaining regimes in

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relations between international organisations was R.H. Lauwaars, *The Interrelationship Between United Nations Law and the Law of other International Organizations*, 82 MICH. L. REV. 1604 (1984). For a modern study which analyzes, in a continuous and sequential manner, the perspectives of international public law, European community law, and domestic law see, for example, D. ROSSA PHELAN, REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY (Round Hall Sweet & Maxwell 1997).

a horizontal manner, similar to domestic legal systems. The divergence in approach of these number of specialised regimes may give rise to tensions, frictions and conflicts between their norms, acts and decisions, and, in the final instance, between international jurisdictions. Essentially, the systems of norms of these special regimes interact rather like tectonic plates, adrift.

The rules for conflicts between treaties do not provide an adequate solution to the potential tensions, friction, and conflict which may arise in this scenario. In the same way, the current absence of coordination between international jurisdictions does not help. At present there is no horizontal or vertical *coordination* between jurisdictions.[52] The treaties of these regimes do not usually incorporate procedural channels which bind them in order to solve or mitigate these problems (e.g., appeal to a higher general jurisdiction or a higher non-jurisdictional body). As a result, jurisdictional concurrence makes it technically possible, in the event of a dispute between two States, to opt for diverse specialised adjudication mechanisms and therefore alternative applicable law.[53] Furthermore, it facilitates the strategic division of disputes between diverse jurisdictions of international law.[54] At the same time the treaties which regulate these mechanisms of adjudication sometimes also attribute to them exclusivity of forum (coexisting clauses of exclusive jurisdiction) which complicates the panorama (e.g., art. 23.1, WTO Dispute Settlement Understanding; art. 2005, NAFTA[55]). The scenario in short, is becoming complicated and sophisticated with the tactical alternatives of *forum shopping* of public international law.[56]

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52. These are Jennings' comments in this respect: "There is no kind of structured relationship between most of them. There is not even the semblance of any kind of hierarchy or system. They have appeared as need or desire or ambitions promoted yet another one. In this particular respect, contemporary international law is just a disordered medley." R.Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT'L & COMP. L.Q. 5 (1996).

53. The so-called *Sword fish* case illustrates this type of problem. In that case, Chile and the European Communities presented parallel claims both in the Law of the Sea Tribunal and the Dispute Settlement System of the WTO in relation to the prohibition of the unloading of swordfish in Chilean ports. *See Chile–Measures Affecting the Transit and Importation of Swordfish: Request for the Establishment of a Panel by the European Communities*, WT/DS193/2, (Nov. 7, 2000); Constitution of Chamber (Chile/European Community) Order, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, Doc ITLS (Dec. 20, 2000). See the communication notifying the provisional agreement in Arrangement Between the European Communities and Chile Communication from the European Communities, *Chile–Measures Affecting the Transit and Importation of Swordfish*, WT/DS193 /3 (Apr. 6, 2001). For a summary of the case see M.A. Orellana, *The Swordfish Dispute Between the EU and Chile at the ITLOS and the WTO*, 71 NORDIC J. INT'L L. 55 (2002).

54. *See* A.E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 Int'l & Comp. L.Q. 41 (1997) (referring, mockingly, to "salami-slicing of disputes" in international law).

55. Article 2005 of NAFTA allows Parties for example, to choose jurisdictional forum: "disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade*, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining

The respective jurisdictions of these systems of international law, promote the individualised efficacy of their norms. However, while this phenomenon is produced, numerous multilateral treaties lack the jurisdictional structures in question. The non-existence or ineffectiveness of mechanisms of adjudication has direct effect on the justiciability, legal relevance, and efficacy of international law in various sectors. Several phenomena synthesise the present scenario of international law from this perspective: (1) the lack of procedural instruments to coordinate international jurisdictions (horizontal or vertical coordination); (2) the nonexistence or failure of dispute settlement mechanisms in a broad number of sectors; and, as a result, (3) the risk of some specialised jurisdictions becoming global *jurisdictions by default*.[57]

The convergence of the various already institutionalised sectors of international law (international regimes) in a unitary legal system would require changes in international legal structures.[58] Notable among these are, (1) the development of checks and balances in global institutional architecture and (2) the construction of a general institution and a written norm superior to these specialised regimes and their special norms. However, making the first a reality would require new regimes to be created in those areas where they do not exist, as well as reforming and strengthening those which are ineffective; and making the latter, which appears even more difficult, would require a process of global constitutionalisation.[59]

In the absence of changes, the fascinating collective experiment of international law will be further developed without any rational project of institutional design. Essentially, the historical process of constructing a legal system of international law is being not only overlapped but overwhelmed by the

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Party" (art. 2005.1). However, the NAFTA forum is imposed over environmental forums when resolving antinomies between NAFTA and the environmental treaties referred to in its article 104 (art. 2005.3). See a complete legal study on the interaction of the dispute settlement mechanisms of NAFTA and the WTO in David A. Gantz, *Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025 (1999).

56. For a general monograph on these questions see Y. SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (Oxford Univ. Press 2003).

57. James Cameron portrays the resulting scenario. This environmental lawyer points out, for example, that the environmental community should bear in mind that the WTO dispute settlement mechanism may also resolve environmental disputes if the claims are presented in "the language of the WTO." See James Cameron, *supra* note 32, at 19.

58. In this respect it is surprising that the studies on fragmentation being carried out in the International Law Commission opt "to set aside the institutional implications of fragmentation." The study group will present a detailed document to the Commission in 2006 which will consist of a study on the *lex specialis* criterion and the "autonomous regimes" including guidelines to deal with this area of fragmentation. *See* Report of the International Law Commission-Fifty-sixth session, *Chapter X Fragmentation of International Law: Difficulties Arising from the Diversification and the Expansion of International Law*, A/59/10, Supp. No. 10 at para. 302 (May 3-June 4, July 5-August 6, 2004).

59. *See, e.g.*, C.D. Stone, *Defending the Commons*, in GREENING INTERNATIONAL LAW 34-49 (Philippe Sands ed., New York Press, 1994).

parallel construction of various specialised legal systems based on its parts. As a result, today the present state of international law is closer to medieval legal pluralism than a unitary legal system.[60] We live in an era of *international laws*. Systematic visions do not match the plural and complex reality of modern international law. If the tool of international law is to be improved it must be assumed that the paradigm of the system does not stand up. Therefore, in addition to exploring alternative practical reforms, it is important to approach the "general part" of international law as a discipline, with an open and constructive attitude.

60. Pierre Marie Dupuy similarly puts forward the idea of "normative feudalism" in international law. *See* Dupuy, *supra* note 27, at 17-53. For a useful reference work in the comparison see, in particular, P. GROSSI, L'ORDINE GIURIDICO MEDIEVALE (Laterza, Roma-Bari, 1995).