**Main Thesis:** IOs have changed how we conceive of the sources, content, and actors of international law, and this has produced change in how actors comply with and enforce international law. It has also introduced new challenges (vertical, horizontal, and ideological) to the legitimacy of both IOs and IL.

I. IOs and Sources: Shifting Power from State Consent

❒ IOs make it much easier to conclude **treaties**.

❒ Iterated cooperation ❒ Pooling of information and resources ❒ Property rights

❒ Reduced T costs ❒ Expose free riders ❒ Facilitate path-dependency

*Examples—*ILO as an effective treaty machine; ICAO’s development as a venue for counter-terrorism treaties, largely because of its legitimacy as a purveyor of “soft”standards.

❒ Change the “felt needs” of states, creating epistemic communities that lead to treaty making

❒ Rome Statute ❒ WHO Convention on Tobacco Control

❒ Major innovations in how treaties are made—

❒ UN treatymaking conferences, with elaborate procedures and reliance on consensus

❒ Expert bodies, including IO secretariats

❒ Managerial treaty-making, with regularized meetings and opt-in/opt-out procedures

❒ ILO treaty-making with strings attached

🕱 Frustration of treaty-making. *Consider­—*

❒ Aspiration to global membership leads to vague formulations and difficult deals

❒ Involvement of IOs makes treaty-making time-consuming (UNCLOS)

❒ Complicates the decision to initiate treaty-making due to “forum-shifting” efforts

❒ Shortcuts to finding **custom**, that might be seen as more egalitarian/universal

❒ Legislative treaties ❒ Resolutions ❒ Practice of organs

❒ Declarations at conferences (Rio) ❒ Pronouncements of tribunals

❒ Develop new opportunities for customary rules through sustained interaction

❒ IOs provide new venues for finding state practice and opinio juris. *Repeated affirmation in—*

❒ World Bank OPs ❒ IMF conditions ❒ Instructions to UN peacekeepers

❒ Custom now results from a *consciously deliberative* process like treaty-making

❒ **General principles** are revived by judges’ need to fill gaps and avoid findings of *non liquet*

*New sources of law: Law-making by subterfuge*

❒ Collapse of the internal/external distinction, with consequences for domestic jx

❒ Ambiguous with respect to legal effect (ICAO SARPs, WB guidelines, IMF conditions)

❒ Obligations that “harden,” or are followed more effectively

❒ Law that heavily involves non-state actors in a way that questions state consent

❒ Novel forms of enforcement (SARPs) ❒ Sui generis regimes (World Bank; IMF)

❒ De facto stare decisis

❒ IO law may “soften” hard law: bringing principles into conflict, or vague standards

❒ Establish institutions to manage the softness of organization principles (Charter)

❒ Encourage teleological forms of interpretation

*Changes in soft law*: This form is no longer a precursor to hard law, but sometimes a preferable alternative, serving interpretive, amplificatory, or complimentary roles.

II. IOs and the Content of International Law

❒ Reduced the gaps in IL by providing fora for iterated elaboration

❒ Innovated rules that would otherwise be impossible

❒ Privileges and immunities ❒ Duties to report, warn, or negotiate (US at Kyoto)

❒ Common but differentiated responsibilities

❒ IOs represent (and supply) the community that makes possible a hierarchy of values (jc/eo)

❒ Wide participation changes content (VCLT restrictions on absolute discretion)

❒ Gaps in treaties (Genocide convention’s gaps on killing political opponents)[[1]](#footnote-1)

❒ Definition of vague principles in the Charter and elsewhere—

❒ Self-determination ❒ Sovereign equality and the right to participate

❒ Teleological canons of construction, following *Reparations* and *Certain Expenses*

❒ Promotional standards ❒ New rights and responsibilities for NSAs

III. IOs and Changing Law-Makers

❒ International civil servants

❒ Drafting rules (UN peacekeepers; WHO) ❒ Issuing interpretations (ILO; WHO)

❒ Influence/draft judicial decisions (WTO) ❒ Declaring implied powers

❒ Submitting dossiers to the ICK (*Wall*)

❒ Symbiotic relationship between IOs and NGOs, as well as MNCs

❒ Treaty-making conferences ❒ Administrative processes (N&C)

❒ Amicus briefs (WTO) ❒ Technical expertise and feedback

❒ Intertwined legitimacy, each providing a new form of accountability

❒ Proliferation and empowerment of IOs

❒ Increase in IO power (SC on IAEA weapons inspections in Iraq)

❒ Decreasing need for legal personhood: MOPs, Basel Committee, etc.

❒ Transformation of states themselves

❒ IO membership changes how we recognize states (Serbia; Kosovo; Palestine)

❒ States are no longer necessarily the supreme decision-makers over their territory

❒ Disruption of the *Lotus* principle ❒ Attenuated forms of consent

❒ Sovereignty as status ❒ IOs as “sovereignty-strenghtening”

❒ IOs transform the internal structure of the states

❒ Empower or create epistemic communities ❒ New public offices (UNESCO)

❒ Transform civil society (ILO and independent unions)

❒ Transnational networking among judges and regulators

IV. IOs and Changing Notions of Compliance: Persuasion and Socialization

*IOs centralize compliance efforts, and allow a semi-independent body to monitor compliance*.

❒ Coercion ❒ Persuasion ❒ Socialization

❒ Military power ❒ Economic power ❒ Soft power

*New tools to assure compliance—*

❒ Compliance Pull: Dispute settlers provide the needed determinacy, symbolic validation, and coherence needed for legitimacy

❒ Liberal theory: IOs enable national interest groups to pressure their government, as with the stakeholder-driven agenda of the WTO Committee on Trade and Environment.

❒ Transnational legal process: Courts provide the forums for discourse necessary to convince states that compliance is in their self-interest

❒ Softer techniques: WTO and Ozone regimes now rely on techniques to encourage cooperation in pursuit of objectives.

❒ Socialization and acculturation: Ensures a permanent dialogue that facilitates learning and mimicry among states. Facilitate shaming, back-patting, and belonging.

V. New Challenges to the Legitimacy of International law

*Vertical challenges that IOs are “undemocratic” increase to the extent that the IO is involved in generating intrusive rules or standards—*

❒ “Direct” democratic solutions:

❒ Calls for a global parliament (Strauss/Falk) ❒ Build in parliamentary participation

❒ Restraints on self-execution or other parliamentary supremacy over the executive

❒ Focus on rights and freedoms to free discourse

❒ Absence of participatory forums in standard-setting (individuals, NGO, market)

❒ Greater access to forums for dispute-settlement for individuals and firms

❒ More extensive focus on human rights—due process, property, fundamental HR

❒ Principal/agent slippage: collective principals enhance the normal agency costs

❒ Screening of potential agents ❒ Monitoring of agent actions

❒ Punishments/rewards in contracts ❒ Checks and balances

*At least courts cannot be reduced to this narrative*

*Horizontal critiques focus on the relations among states—*

❒ Sovereign equality concerns related to actions of the UNSC

*Ideological criticisms—*

❒ Structure of international civil society (Kingsbury): Tends to appropriate concepts, such as free speech, from the powerful states, subtly limiting the kinds of NGOs allowed to participate, and reserving “harder” forms of enforcement for Western values

❒ Free market and the Washington Consensus ❒ Gender critique

❒ Hegemonic international law ❒ Managerialism

**International Organizations: What Are They? Why Study Them?**

Why Study IOs?

❒ Description: Changing sources, actors, content, and modes of compliance

❒ Theory: Interdisciplinary analysis requires the understanding of institutions

❒ Prescription: Reform requires a similar understanding

Defining International Organizations: *Three elements of a working definition—*

❒ Established by an international agreement between states.

* *Note*: Some IOs have been established by “informal” agreements

❒ At least one organ distinct from member states and capable of so acting

* This does not clearly apply to some organizations, such as the pre-1960 GATT
* Also, it is questionable whether some institutions, like the Global Environmental Facility, are autonomous or the subsidiary organs of another IO.
* *Special Problem of MOPs*: These do not often have a permanent secretariat

❒ Established under international law

* This may be disputed where the claim to P&I is arguably under national law

Common Features of IOs and the Relationship to State Sovereignty:

❒ **Tripartite Structure:** Generally established in the charter. *Includes—*

❒ Plenary Body: Consists of the full membership; broad power to discuss policy; meets infrequently.

❒ Council: Reduced membership; select powers of implementation; meets regularly.

❒ Secretariat: Staffed by [ostensibly] independent civil servants; headed by a secretary or director-general

❒ **Bureaucracy:** IOs are capable of producing other IOs, developing “regime complexes.”

❒ **Relationships:** Interact with a range of transnational actors—NGOs, regulatory networks.

❒ **Voting:** *Two tendencies—*

❒ Non-Unanimity: When casting votes, IOs have departed from the rule of unanimity.

❒ Consensus: A tendency to operate without formally casting votes at all.

*Note that majority voting threatens the concept of consent as the basis of obligation in international law, and that weighted voting threatens sovereign equality. Consent also may be seen as less protective of sovereign consent*.

❒ **Financial arrangements:**

❒ Reliant on the financial support of members, often with ineffective penalties

❒ Obligation to pay is the source of some tension

Actions and Limits of IOs

*IOLM studies four techniques of IO lawmaking—*

❒ Venue for making and amending treaties ❒ “Internal” rules

❒ Authorized action by political organs ❒ Institutionalized dispute settlement

❒ [Implementation and Compliance-seeking] (Chayes and Chayes)

*IOs are not states, or supra-states*: They do not supplant the functions of a state, or generate a new *demos*. They have legal personality, but not plenary powers. They often cannot take binding decisions with direct effect, act without consent, enforce decisions without cooperation, enjoy financial autonomy, or prevent the withdrawal of states.

Why States Act Through IOs (Abbott & Snidal 1998) (*Example—*SC Res. 1373)

The authors identify **centralization** and **independence** as the “key properties” of formal international organizations. These properties give rise to a range of effects, many of which benefit states. *These include*—

❒ Enhanced Efficiency: Following Coase, organization occurs when the transaction costs of direct contracting are too high for efficient interaction.

❒ Shape understandings ❒ Influence terms of state interactions

❒ Elaborate norms ❒ Mediate or resolve state disputes

❒ Legitimacy: Centralization and independence afford special legitimacy to IO actions. This can affect, negatively or positively, the legitimacy of state actions.

**Core Aspects of Centralization and Independence:**

❒ Support for State Interactions:

❒ *Centralization*: A stable negotiating forum—

❒ Enhances effects of iteration and reputation

❒ Enables faster actions ❒ Reinforces accepted norms

❒ Neutral/depoliticized/specialized forum ❒ Partisan forum for coalitions

❒ Strengthen issue linkages by situating them within common structures

**Relationship between structure and state cooperation:** The considerations of centralization often lead to a massive bureaucracy. Specialization occurs naturally, and may be encouraged. The organizational structure then exerts an influence on future international cooperation. They lead to contested institutional links (**forum shopping**), create **vested interests**, and **ossify power relations**.

❒ *Independence*: International organizations—

❒ Initiate conferences ❒ Join epistemic communities ❒ Implement decisions

❒ Operational Activities of IOs:

❒ *Centralization* provides the following benefits—

❒ **Pooling** activities, assets, or risks: These can shape states’ identities (UNESCO science programs), even as they serve state interests in capacity-building

❒ Facilitate joint production

❒ Norm elaboration: The international system does not possess institutions analogous to the domestic legal system for filling gaps in contracts. IOs provide procedures for elaborating the norms within treaties. These can create coordinating equilibria.

❒ *Independence*:

❒ Laundering ❒ Neutral provision of information ❒ Neutral trustee

❒ Neutral allocator ❒ Neutral arbiter (facilitative/binding)

**Beyond the State: IOs as Community Representative and Enforcer**

❒ Express Community Norms and Aspirations: *“IOs often represent deliberate decisions by states to change their mutually constituted environment and, thus, themselves*.*”*

❒ Inclusive bodies ❒ Representative bodies ❒ Independent/expert bodies

❒ Managerial approaches: Good offices, fact-finding, interpretation, mediation, assistance

❒ Facilitate decentralized enforcement:

❒ Increase prospect of continued interaction ❒ Reputational effects of reneging

❒ Credible, neutral monitor of state behavior ❒ Forums to explain suspicious axn

❒ Direct enforcement: National reporting, censure, withholding benefits, Chapter VII

❒ IOs as Managers of Enforcement: IOs authorize and give meaning to retaliation, “thus ensuring that enforcement activities are not excessively disruptive,” (as with laundering).

**Theoretical Frameworks for IOs**

I. Functionalism: Development of IOs is due to changing state needs.

❒ States are the dominant actors in IR ❒ Anarchic pursuit of power + common interest

❒ Respond rationally to developments ❒ States learn from prior experience

**Institutionalism** (Keohane): States (partly through IOs) can modify the conditions of anarchy

❒ Reduce transaction costs ❒ Legitimate different forms of state interaction

❒ Facilitate issue/regime linkages ❒ Increase the symmetry and quality of info

**Functionalist Theory of IOs:** *Three main conclusions—*

❒ State control: IOs are formed/sustained by states, and thus actually or potentially controlled

❒ Technology: Developments, and their impact on states, relate symbiotically to IO growth

❒ Learning: States rationally respond, and constantly innovate. *Consider*—

* Correcting the “birth defects” of the GATT and League of Nations
* *Mitrany*: The process of learning could **undermine the state-centric premise** of functionalism. This holds out the possibility of deeper integration—“peace by pieces.”

*Example: Development of the League of Nations and UN*

[TK]

II. Realism: States rationally pursue power in an anarchic international system

❒ Continued anarchy: IOs have not altered the basic conditions anarchy in IR

❒ Military might: Emphasize the role of the militarily powerful, and hegemonic stability

❒ Significance of an IO is defined by the level of hegemonic power within it (Strange)

❒ High politics: The only IOs that matter deal with security issues

❒ Anti-utopian: No movement toward global governance or federalism

III. Disaggregationists

❒ Marxism: Class-based social forces dominate the structure of IOs. This has led to skepticism (Cuban statements on the UNSC), and engagement elsewhere (UNGA and NIEO).

❒ Epistemic Communities: *Emphasize the role of (quasi-)independent actors—*

❒ Technical bodies (WHO) ❒ Political bodies (Howse on trade elites in the WTO)

❒ Impact of *lawyers* in legal, political, and security bodies (Koskenniemi)

❒ Civil society: *Influence of NGOs on IO activities*—

❒ *Institutionalist enablers* (Slaughter): Help expand the capacity of IOs to fulfill tasks

❒ *Transnational advocacy* (Keck & Sikkink): Reliance on information politics in IOs

❒ Liberal theory: Rise of IOs is due to interest groups within states (Slaughter, Moravcsik)

❒ *Governments*: Focus on gov. institutions, and differentiate between kinds

❒ *Cultural liberalism*: IOs can be explained by a commitment to values (Kratochowil)

❒ *New World Order*: Traditional IOs are being displaced by transnational networks

IV. Critical Theory: *Several variants—*

❒ Third World: Non-Western history opens more options to IOs (Anand)

❒ Neo-colonial: IOs privilege the views of Western states, not universal values (Mutua)

❒ Critical Race Theory: Fear capture by special interests. *At least two versions—*

❒ IOs are no longer credible agents for the international community (Mutua)

❒ IOs are overly representative of transnational elites (Alvarez)

❒ Ideological: Liberals fail to acknowledge the ideological positions of IOs (Marks)

❒ Feminist: IOs replicate the gendered structure of states (Chenkin & Charlesworth)—

❒ Invisibility of women at decision-making levels affects understanding of int’l issues

V. Constructivism: Sociological approach to institutions

❒ Constructed identity: Interests and identity flow from associations and self-perceptions

❒ Anti-materialism: Some give priority to norms, ideas, and ideals

❒ Social learning: Learning is not only a rational, but a social-transformative, process

VI. Legal Responses to these Fields

*Note that this takes place against the background of a positivist approach to international law, as exemplified by Article 38. According to the traditional view, much of the practice and product of IOs is not legally relevant. Some “enlightened positivists”* (Simma) *have begun to move away from this view.*

❒ Tradition of functionalism: International lawyers, since the founding of the UN, have tended to be optimistic about the law’s ability to control anarchy and generate “islands of stability.”

❒ Global Constitutionalism: Lawyers tend to see themselves engaged in a “project” of internationalism against sovereignty.

❒ Anti-Liberal tendency: Traditional IL is built on concepts of “territorial integrity” and “sovereign equality” that discourage disaggregation.

**Mid-Twentieth-Century Developments:**

❒ Yale School: Looked beyond the Article 38 sources to embrace “authoritative decision-making processes.” (McDougal & Lasswell). Value-based inquiry informed by social science. But accused of being too deferential to geopolitical realities and U.S. interests.

❒ Liberalism: Lawyers beginning to pierce the veil of the nation-state.

❒ Critical Theory (Koskenniemi & Kennedy): Challenge the idea that law is distinguishable from politics.

**Modern Legal Thought—Two Optics for IOs** (*See generally* Keohane)

❒ Instrumentalism: IO activity is the product of rational, unitary actors acting strategically

❒ Normative: Activities of IOs shape the identities of all actors involved.

**Interpretation and the UN Charter**

I. Constitutional Interpretation and its Discontents

*Why call for “constitutional” interpretation?* The development of IOs has contributed to a shift in the international system away from anarchy. It is unclear what IOs represent in this new environment, and they have contributed to a *redefinition of sovereignty*.

**Inadequacy of domestic analogies to the UN Charter­**

❒ Purposes: Much more specific and concrete (art. 1) than constitutions

❒ Powers: There is nothing like “legislative,” “judicial,” or “executive” authority:

❒ UNSC cannot directly execute the laws in member states

❒ GA is deliberative, not legislative ❒ ICJ cannot issue binding judgments

*Closer look at the ICJ—*

❒ ICJ has always rejected the possibility of checking UNSC (*Lockerbie*; *but see Tadic*)

❒ Never found an action of any UN organ to be devoid of legal effect

❒ The ICJ has also rejected any “political question” doctrine (*US-Iran*; *Nicaragua*)

❒ Non-Democratic: Despite preambular language, UN is not representative like parliament. Nor does the Charter, a realpolitik document, give special considerations to rights.

**A Functionalist Response: What is the UN Charter for?**

Arguably, the U.S. and other parties wanted a **more effective anti-aggression device**. The UN charter is a “correction” of a particular experience that *some* of the drafters (i.e. US) had. The United States had never joined the LON, and perhaps it regretted not intervening more forcefully in the LON drafting. *Some corrections* (*“learning”*):

❒ Near-universal participation ❒ No express withdrawal clause

❒ Differentiated separation of powers: UNSC has power for collective security; GA has purse

❒ Law-enforcement in the UNSC. Voting structure makes it a *duty to show up*.

❒ Legal ban on the use of force (art. 2(4)) ❒ Departures from unanimity rule

❒ Functionalist, specialized agencies are brought into the orbit of the UN

*Limitations—*

❒ The UN was supposed to have a standing force (arts. 43-47), but this never materialized

❒ Human rights are only vaguely mentioned, with only general obligations (arts. 55-56)

*Alternative theories of the UN Charter—*

❒ Consent: Whatever states consented to and can glean from the Charter is its purpose

❒ Minority protection: The Charter *should be* intended to shelter vulnerable states

❒ Participation: *“We the peoples”*—the Charter protects international civil discourse

❒ Teleological: The Charter is designed to achieve the goals of the organization

❒ Rights-based: Interpretation should be shaped to protect human rights

II. Who Interprets a Charter? (*UN Charter is the primary example here*)

❒ ICJ: World Court may decide on the interpretation of any organizational charter. *Two ways—*

❒ *Contentious cases*: Brought *ad hoc* or under the optional clause (art. 36(2)).

❒ *Advisory*: All UN system organizations, except UPU, can request advisory opinions.

🕱 Note that there is **no way to ensure binding authority**. Contentious cases are binding only between the parties before the court (i.e. states). And advisory opinions are not formally binding.

❒ Express authorization: Some charters empower an organ to interpret. *Possibilities*—

❒ Plenary bodies (FAO, IMO) ❒ Limited bodies (ICAO Council)

❒ Executive organs (IMF Board of Governors) ❒ Alt. dispute resolution (ILO)

❒ Adjudicative fora within IOs (WTO DSB, EU, regional human rights systems)

**Interpretation in Absence of Express Authorization:** *Three theories—*

❒ **Presumption of Legality:** Indicated by the S.F. statement. (Sohn). *Four elements—*

❒ Interpretation by an organ ❒ Generally acceptable

❒ In theory, this applies only to decisions taken by consensus or unanimously

❒ All elements of an organization potentially participate, including unchallenged action by the organization, and unchallenged action by members with respect to the organization.

*Codification*: VCLT-IOs seems to codify this approach. It includes “established practice of the organization” as part of the “rules of the organization,” which in turn define fundamental issues, such as the capacity to enter into treaties.

❒ Self-Help: No organ is entitled to interpret, and the members can judge for themselves in good faith according to the customary rules of treaty interpretation.

* *Interpretive argument*: VCLT art. 31 provides for “ordinary meaning” as the basis for interpretation. The Charter omits a familiar clause providing for an explicit method of authoritative interpretation.
* *Lotus*: “restrictions upon the independence of states cannot … be presumed.”
* *Negotiating History* (VCLT art. 32): San Francisco saw disputes over this question. Some suggested the GA have the authority. Belgium sought to have disputes to UNSC actions submitted to the ICJ. This was rejected, as was a later proposal to have a committee decide on the appropriate interpreting organ.
* *Residual State Power*: Each UN member is ultimately free to ignore bad interpretations

❒ Recourse to ICJ: Some sources are used to say that this is/should be mandatory—

* *Dynamic Interpretation*: Art. 92 recognizes the ICJ as the UN’s “principal judicial organ”
* *Principle of Effectiveness*: Authoritative interpretation of the charter is necessary to permit the UN to operate as intended, and interpretation is an essentially “legal” task to which only the ICJ is suited.
* *Dealing with Article 59* (no *res judicata*): (1) Art. 59 does not address the precedential value of decisions; (2) the general obligation to comply with treaties in good faith obliges the security council to abide by the ruling and to enforce the judgment under art. 94.

III. How to Interpret a Charter

*The methods* (this is speaking broadly and abstracting from class discussion):

❒ Textualism (VCLT art. 31) ❒ Original purpose (art. 32)

❒ Teleological, goal-oriented, or “dynamic” interpretation

❒ [Architecturalism (Tribe): this could actually be about teleology or original purpose]

*The tools*: ❒ Customary rules of treaty interpretation ❒ Institutional practice

❒ Implied powers (*principle of effectiveness*) ❒ Intent (*teleology*)

**Customary Rules of Treaty Interpretation** (VCLT art. 31): *Consider all—*

❒ Reading in good faith ❒ Ordinary meaning

❒ Context (preambles, annexes, related agreements, instruments accepted by all parties)

❒ In light of the object and purpose of the treaty

❒ Subsequent agreements ❒ Subsequent practice ❒ Special meaning

❒ “any relevant rules of international law applicable in the relations between the parties”

*“Supplementary means” include—*

❒ Preparatory work of the treaty ❒ “circumstances of its conclusion”

When to Resort to Supplementary Means (art. 32)

❒ To “confirm” the meaning derived from VCLT art. 31

❒ Determine the meaning where the art. 31 interpretation is *either—*

❒ Leaves the meaning ambiguous ❒ Leads to a manifestly unreasonable result

*This is often cited to say that the VCLT prefers text to original purpose* (R3FRL).

Limits of the Vienna Convention:

❒ *Wide ambit for supplementary means*: Despite the language of the VCLT, interpreters have broad license to use supplementary means. First, ambiguity is easy to find. Second, the confimatory role opens some space.

❒ *Trouble with ‘ordinary meaning’*: UN Charter is characterized by “open texture” (Schachter). Determining ordinary meaning is thus contingent on ‘canons,’ which may compete.

*Example—‘Gap Filling’ and the UN Charter*:

Some provisions are read to be exhaustive, such the article 42 power of the UNSC to authorize the use of force. Others are not read to include an “only”; article 43 is generally not thought be the only way in which forces may be made available to the UN. Why the inconsistency? One interpretive method might be to consider the “architecture” of the Charter as a whole (Tribe). This leads to the following:

* Article 42 is limited by the specific role carved out for the UNSC in the Charter
* The expansive notion around article 43 is related to the “principle of effectiveness.”

Obviously, this grants considerable discretion to the interpreter.

**“Subsequent Practice”: The Role of Institutional Practice**

*General rule*: Institutional practice may be evidence of the meaning of a provision, at least as long as the practice is within the purposes of the organization[, and so long as the practice is generally used to fill gaps]. (*Expenses*, *Tadic*). *Theories—*

* *Working legal culture*: The need for an “open dialogue” with other institutional participants drives actors to consider prior actions as precedents. (Koskenniemi).
* *Contemporary expectations*: Organs are charged with implementing the charter, and practice is better evidence of what the members’ original delegation meant. (Gordon).

*Critical view*: “Subsequent practice” requires the practice of all parties, as in a contract. The practice of a UN organ does not necessarily reflect the wishes of all the parties. (*Certain Expenses*, Spender dissenting).

Problems with Relying on Institutional Practice

❒ *Variation*: Organizations, officials, and judges vary on their willingness to rely

❒ *Limiting principles*: The limiting principles of this practice are vague in two senses—

❒ Purpose: Conformity with the purpose of an organization is a malleable criterion

❒ Gap-Filling: The identification of gaps is a controversial issue (*see Reparations*)

❒ *Idealist critique*: The use of institutional practice prizes expedience over the rule of law

❒ *Realist critique*: Skeptical that a disputed practice will bind all members for very long

❒ *Application of the rule*: Two problems—

❒ Inaction: Practices may be uncontested for a variety of irrelevant meanings

❒ Opposition: What, exactly, does it mean to oppose a practice?

*Example*—*Security Council: It seems so far that a verbal protest is not sufficient to undermine the interpretive effect of institutional practice in this realm. The GA continually opposed the UNSC’s arms embargo of Bosnia-Herzegovina. Moreover, UNSC authorizations of force in Haiti, Kurdistan, Somalia, etc., have been read as important institutional “precedents.” (Teson; Simma).*

**The Doctrine of Implied Powers: The Principle of Effectiveness**

*General Rule*:“Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as essential to the performance of its duties.”(*Reparations*).[[2]](#footnote-2) *Several approaches—*

❒ *Functional necessity*: Power is required to carry out an expressly conferred power

❒ *Essential to purpose*: The doctrine is “essential” for a charter purpose (*Certain Expenses*)

❒ *Ultra-broad*: Might be used to imply powers that are merely desirable

“Ripple” effects of the finding of implied powers

❒ *Empowerment of organs*: UNSG seized the power to bring claims after *Reparations,* expanding the relative power of that office. (*See also* SC powers over terrorism in 1373).

❒ *Kompetenz-Kompetenz*: The ability of a court to decide on the implied powers of an organization opened a window for the ICTY to establish review of UNSC (*Tadic*)

❒ *Drafting*: Express charter limitations become an important response to expanding power

❒ *Objection*: The specter of implied powers makes it more important to object to actions

**Intent, Originalism, and Dynamic/Teleological Interpretation**

*Recall that Vienna rules seem to privilege text over intent. But the argument over its role continues. Three kinds of intent are at issue—*

❒ Original intent of the framers (*traveaux*)

❒ Membership intent at the time of dispute (*this tends to merge with institutional practice*)

❒ “Presumed” intent of the Charter gleaned from the sources of treaty interpretation

Critiques of Original Intent

*Note*: Current ICJ practice is to **play down the importance of original intent arguments**, and, consequently, of *traveaux*. Concepts may be found to be “evolutionary,” and treaties are to be interpreted in light of the evolving structure of international law. (*Namibia*, 1971).

❒ *Nature of the treaty*: Intention is not as important for the Charter, where parties are not fixed, and nature of the treaty is unusual (*Certain Expenses*, Spender dissenting)

❒ *North/South*: Resort to *traveaux* advantages rich states with archival records, as well as the resources to participate in such conferences.

❒ *Indeterminacy*: There is a lack of established rules for keeping the *traveaux*.

❒ *Volume*: The record is so vast that it cannot reflect what was in the minds of states at the point of ratification, much less accession.

❒ *Teleological critique* (*Competence*, Alvarez dissenting): “the increasing **dynamism of international life** makes it essential that the texts should continue to be in harmony with the new conditions of social life.”

Judge Alvarez’s Vision for Teleological Interpretation

*Main thesis*: IO constitutions are not “to be interpreted literally, but *primarily with regard to their purposes*. … The text must not be slavishly followed. If necessary, it must be vivified so as to harmonize it with the new conditions of international life.” (*Competence*).

This view remains an extreme one, and many are skeptical. Some do favor techniques of constitutional or statutory interpretation, recognizing the distinctness of IO constitutions.

IV. Why Engage in Charter Interpretation?

*Idea*:As Joseph Weiler has suggested, the judicial proclivity for interpretation is associated with some kind of legitimacy. *Each of these forms is problematic—*

❒ Democratic: Perceptions of real participation in governance

❒ Formal: Results of institutions or systems that are produced by democratic process

❒ Social: Connected to the guarantee of shared values within a political culture

*Forms of interpretation*:

❒ Consent ❒ Minority ptxn ❒ Participation ❒ Teleological ❒ Rights

*Sources of differentiation*:

❒ Forum (judicial/non-judicial) ❒ Tools (availability of *traveaux*)

❒ Purpose (technical/security) ❒ Types of disputes ❒ Historical context

**Conformity:** “What is striking, however, is that amidst all this diversity of actors there is such a degree of relative conformity. Even organizations like the IMF … resort to many of the same constitutional tools and arguments that are canvassed here and are used by the ICJ.” (Alvarez).

V. Case Study: Counter-Terrorism

**SC Res 1373 and the Redefinition of Self-Defense**

*Proposition*: The resolution redefines the traditional notion of self-defense by:

❒ Equating terrorist violence by a non-state actor with an “armed attack”

❒ Noting that a state’s assistance to or harboring of terrorists may make them liable to attack

❒ Indicating a continuing right to respond

*Effects of the resolution—*

❒ Lawmaking potential: The rationale was used later to justify the invasion of Afghanistan

❒ Presumption of legality: Establishes terrorism as a threat to int’l peace and security, establishing a role for the Security Council under Chapter VII.

❒ Effects on actors: *Two aspects—*

❒ *States*: The provisions penetrate deep into the internal law of states

❒ *Non-state actors*: Can this directly regulate them? Maybe. A teleological interpretation of the Charter might get you there, as might a thought about implied powers.

❒ Integrating norms: Brings criminal prosecution, self-defense, multilateral actions, and financial incapacitation to bear on terrorism. Also highlights the importance of various anti-terrorism conventions.

**SC 1441 and the Recourse to Force in Iraq**

*Proposition*: Iraq is in “material breach” of its obligations under previous resolutions. *Is this a faithful use of the term in VCLT art. 60(2)? Material breach entitles the other parties by unanimous agreement to suspend/terminate the treaty, in whole or in part, between themselves and the bad state, or altogether.*  *Problems—*

❒ Remedy: *What are we suspending here? Arguably, article 2(4).*

❒ Unanimous agreement: *You probably don’t have unanimous agreement here. Options*:

❒ Analogize the SC Res to a treaty—the Security Council is the other party (or mbrs are)

❒ The parties to the Charter *unanimously* delegate authority to the SC to do these things.

❒ In ICJ jurisprudence, UN organs are often analogized to the parties.

❒ Argue that the United States is “specially affected”

*Note also* the lawmaking force of the annex to 1441, which establishes detailed procedures for weapons inspections.

**Democratic Deficit**

I. Rise of the Democratic Deficit Critique

**Main Thesis:** Eric Stein (*Integration and Democracy*, 2001) argues that the rise of democratic/legitimacy critiques in international organization can be connected to the increasing level of *integration* of the relevant institution. *Two aspects of integration*—

❒ Normative-Institutional factors

❒ Field, scope of competence, and resources

❒ Composition of organs (government-appointed/elected individuals)

❒ Procedures (voting formula: Stein’s view is that consensus seems to be less integrative)

❒ Whether cooperative and non-rule directed, constituting a forum for exchange

❒ Whether rule-oriented, authorized to propose rules, impose obligations, “direct effect”

❒ Whether rule-enforcing: reports, monitoring, dispute settlement, publicity, adjudication

❒ Empirical-Socialfactors

❒ Political, economic, and cultural impact of the measures adopted

❒ Level of common interest sufficient to overcome cultural differences, or a level of support or acquiescence by individual stakeholders to uphold the transfer of sovereign power

**Conclusions:**

* Technocratic organizations (WHO in 2001) are largely immune from such critiques. But as the organization moves toward majority-vote procedures and broad competence, the legitimacy critique rears its head.
* Courts and similar bodies are often the “vanguard” of integration. (WTO, NAFTA). But this raises questions of conformity with national constitutions and linkages to areas outside the organization’s competence. *“Where norm-making facilities are not keeping pace, disproportionate reliance on nonelected adjudicatory bodies fans the democracy-legitimacy discourse.”* (Early EC, now in WHO).

II. Causes for Concern

*Why are we so concerned? Four reasons—*

❒ Tyranny of the majority: “Sovereign” states worry about the liberty effect of governance

❒ Technocracy: Experts tend to disagree with each other, and privilege insights from their areas of competence.

❒ Constitutionalism: The rise of rights-respecting democracies from below is being challenged by the increasing amount of international regulation being imposed from above.

❒ NGOs: These are issue-specific, opaque organizations, and they become powerful as a substitute for global participation. We should worry about this. (Anderson, Spiro).

**“Tyranny of the Majority” in the UN Finance Regime:**

*Rule*: The GA approves budgetary arrangements, and costs are borne by members (art. 17). This is done by a 2/3 vote (art. 18; practice). This is a *binding obligation to pay*. (*Certain Expenses*). Countries more than a certain amount in debt lose their vote (art. 19) automatically (practice).

* Late 1990s saw an intense debate within Congress on U.S. funding to the UN and the country’s ability to control the organization. Context of peacekeeping and family planning programs.

**Legitimacy Critiques at the WTO:**

*Stein*: The WTO saw legitimacy critiques at two levels—

❒ National-Constitutional: Sovereignty, judicial supremacy, due process.

❒ International: Power, participation, and transparency

*Note that these critiques tend to be blended in any assault on the organization. (Seattle Coalition sign-on letter). The Seattle Coalition, for example, wants a stronger role for national restraint on trade, such as environmental protection and anti-child soldering, while at the same time arguing for a greater role of international norms*.

Clinton’s response to fears about WTO are telling—

❒ WTO is not self-executing. Only Congress can change the law. *But it might be very expensive to keep laws that violate the agreement*.

❒ U.S. cannot be outvoted in the WTO because it operates by consensus. *But the consensus rule is not in the agreement; it’s political. There are provisions in the WTO for things like 2/3 vote. In addition, you can’t always break consensus. It’s* expensive *to do so. Breaking consensus could mean undoing many years of work.*

❒ DSU states that the body cannot add or subtract from rights; it can only interpret. *Bullshit*.

III. Possible Remedies to the Democratic Deficit

*General lines of thought—*

❒ Global Parliament & Cosmopolitan Democracy (Falk & Strauss)

* Idea is to develop a directly elected assembly, perhaps starting with a largely advisory power and limited membership, maybe even in one issue area.
* The goal would be to give citizens a chance to “participate directly in the making of global law.”

❒ “Civic Republican” approach:

❒ Institutional balance ❒ Broad deliberation ❒ Consensus

❒ Open access to policymaking ❒ Individual standing to litigate

*Can this approach perform the essential functions that a democracy does?*

*Levels for improvement (not mutually exclusive)—*

❒ National level: At the extreme, insist on states as “masters” of the org. (Moravcsik)

❒ *Participation in negotiation*:Members of the legislature/private sector should aid in the negotiation and amendment of the treaty, as well as domestic implementation.

❒ *Legislative kill switch*: The legislature should be allowed to withdraw from the treaty fter a certain time. This idea was floated in the context of WTO, *but it wouldn’t work*. (Dole Commission).

❒ *Information-sharing*: Ample information should flow from the delegation to the legislature. Common sessions and other agreements between IO and legislature.

❒ *Judicial role*: The state’s domestic courts should interpret domestic law in light of the state’s obligations under the treaty and the rules of the IO.

*Example—U.S.-WTO:* In signing onto the WTO, the executive agreed to keep the top leaders in both houses informed about the goings-on of the organization. Also, to address federalism concerns, the executive bound itself to consult with states when state-level measures are challenged as protectionist at the WTO. Obviously, this is not required by international law.

❒ International level: Often coincides with a broader-based view of relevant actors

❒ *Transparency*: Open sessions and documents available online (Weiler).

❒ *Consultation*: Standing consultative body composed of members of nat’l legislatures

❒ *Broad participation*: Decisions should not be taken in a clublike form (Keohane & Nye)

❒ *NGOs*: Civil society should be given adequate and fair access to the institution

❒ *Citizen complaints*: Inspection panel (World Bank) and ombudsman (UNSC)

❒ *Remedies for low-integration IOs*: Measures should focus on transparency, openness to the outside world, accountable and effective management, and policy results that gain the constituency’s acceptance in terms of empirical-social legitimacy.

❒ *EU features*: Include phased development, use of institutional powers, ombudsman, procedures and precedent of the judiciary, consultation, good governance measures.

❒ *Separation of Powers*: At higher levels of integration, dispersion of the organization’s central power should be sought through reliance on regional and local authorities.

❒ *Subsidiarity*: IO should only act insofar as the objective cannot be sufficiently achieved by member states.

❒ *Human rights*: IOs should “explore the ways of protecting the core of fundamental human rights within the confines of their competence.”

**G.R. Shell on the WTO:** The proposed procedural-democratic reforms are a mere “palliative,” and do nothing to solve the two major problems of the WTO:

* Overreliance on states to represent the public interest
* Overcommitment to economic theory

He suggests a civic republican reform that includes greater participation for a wider range of actors, and linkages across issues. A broader response might be to stop the integration altogether.

**Global Regulation: IOs, Institutional Law and Legal Personality**

*“IO organs ‘legislate’ on behalf of the collective outside the positivist box. Neither the process by which IO norms emerge nor the norms ultimately produced fit very well within the predominant positivist framework.”*

*How do we account for the normative ripples of IO law?*

❒ Path-dependencies ❒ Mimicry ❒ Learning ❒ Epistemic communities

I. Shaky Treaty Basis for IO Powers

**Main Thesis:** “It is not clear … that the GA’s powers over the budget or the UN’s capacity to bring international claims can be seen as being derived from treaty,” and appear to actually derive from the **institutional practice of the organization itself** (Alvarez). *Elements*—

❒ Institutional practice ❒ State acquiescence ❒ Judicial opinion

*Broader claims—*

❒ *Customary Law and IO Practice*: Other IOs have used the *Reparations* case as a license for their own powers. This might indicate that some general rights emerging from legal personhood form a kind of customary law established by IO practice.

❒ *Personality of Informal Organizations*: MOPs/COPs, *inter alia*, might develop their own rights to legal personality through the same dynamic.

❒ *Extra-regime effects*: The “legislation” of general IO legal personality arises from a question specific to the UN regime. If this is so, it makes it harder to say that an IO can only generate regime-specific rules.

II. Limits of Enumerated Powers

**Main Thesis:** IOs do not need to be expressly granted specific powers in order to act.

❒ *Original intent*: “Interstitial” areas of the charter, filled by the intention of the parties

❒ *Teleological*: Principle of effectiveness/doctrine of implied powers

*How implied powers develop—*

❒ Interaction of institutional organs (political/executive/judicial/secretariat)

❒ States’ reactions to these

❒ Actions of other IOs, “who piggy-back on UN precedents”

*Effects*: Note that implied powers often strengthen relatively weak institutional players.

* *Reparations*: Grants the UNSG a new power to espouse claims.
* *Certain Expenses*: This gave the UNSG the assurance that “he indeed presides over an entity that is capable of acting in many respects like a state,” including the power to tax.
* These cases were only the beginning of the SG’s expansive role.

III. (No) Distinction Between External and Internal Rulemaking

**Main Thesis:** Many decisions of IOs have both external and internal normative impacts, affect both internal administrative law and more “substantive” rules.

*Effects of the Power of the Purse* (e.g., Certain Expenses):

❒ Principles of charter interpretation

❒ Principle of effectiveness/implied powers ❒ Presumption of legality

❒ Teleological methods, and reluctance to resort to the *traveaux*

❒ Practice of the organization (peacekeeping)

❒ Affirmed the legality of peacekeeping missions authorized under Uniting for Peace

❒ Legitimated peacekeeping (*requiring consent of the state*)

❒ Distinguished from peace-enforcement

❒ Established autonomy of GA vis-à-vis UNSC, and of UN vis-à-vis members

❒ Matters relating to IO financing

❒ Legitimation of the power to tax

❒ Widespread adoption of the capacity to pay formula in the UN system

IV. Case Study: The Development of International Legal Personality

*Holding*: The United Nations is an international legal person. *Two aspects—*

❒ Objective Personality: Extends beyond UN members to non-member states

❒ Limited (Functional): The decision indicates the UN has only the *degree of personality* that is necessary to fulfill the tasks accorded. Indicates a test for **functional**, not strict, necessity.

**The Court’s reasoning:**

❒ Necessity: Personality was necessary to achieve the purposes of the chater

❒ Members’ intent: Members wanted to create an independent entity

❒ Organizational Practice: UN had concluded treaties with states

*Notable features*: ❒ It didn’t have to reach this question at all (see dissents)

❒ *Traveaux* might have helped, but the court didn’t go there

❒ Ability to *espouse* seemed beyond strict necessity (Hackworth dissent)

**Effects—The Lasting (and Broad) Ripples of *Reparations***

*Two common propositions, neither strictly supported by the decision*:

❒ General Principle of Law: Many judges conclude that IO legal personality emerges from the operation of general principles, not from the intent of the drafters.

❒ Functional Necessity: This test is seen as generally applicable to all IOs

*Lingering questions—*

❒ Other Actors: Should legal personality accrue to MOPs? Corporations? UN subsidiaries?

❒ Agent: [Court develops an expansive scope of “agent.”]

❒ Extent of Objective Personhood: Should it be limited to IOs with universal membership?

❒ International liability ❒ Application of CIL

❒ Why? Does LP emerge from treaty or custom? General principles?

*Note the extent to which this opens the door to “external” lawmaking, to IOs as practitioners and treatymakers.*

**Global Regulation: The Legal Impact of the Political Organs**

I. Understanding the General Assembly: Powers and Functions

**GA Resolutions and Lawmaking:** *Traditional Understandings—*

❒ Interpret the Charter ❒ State practice ❒ Opinio Juris ❒ SP/OJ

❒ Evidence of general principles ❒ Evidence of CIL

*Evidentiary Questions* ❒ Vote (formal/consensus; which states dissented)

❒ History (Sixth Committee involved? What statements?)

❒ Consistency with other evidence of SP/OJ

❒ Text and title of the resolution (declaration?)

❒ Subject matter of the resolution

*Broader Look at the Normative Impact of the GA—*

❒ Empowering/disempowering states and “states in being”

❒ Empowering/disempowering non-state actors

❒ Maker of “internal” law ❒ Progressive development of CIL ❒ Devise linkages

❒ Convene, modernize, interpret and enforce treaties, including the UN Charter

❒ Information supplier ❒ Quasi-judge

*Example—Sex Trafficking Resolutions*

❒ Identifies treaties (linkages): Trafficking, ILO, IHRL

❒ Interpreting CEDAW as relevant to sex trafficking and gender violence

❒ Form of slavery, which is an int’l crime ❒ Rights of the child/child labor

❒ Forced labor (ILO mechanisms) ❒ Organized crime

❒ Organizers and intermediaries are criminals, and *extraterritorial jx is invited*

❒ Anti-corruption measures ❒ WHO ❒ Migration ❒ Non-state actors

❒ Institutional: Complaints to CEDAW Committee can be about sex trafficking

❒ Responsibility to protect?

**General Assembly and Interactions with Other Organs—Peace and Security**

*Uniting for Peace*: Establishes a procedure by which the UNSC can call a special session by a majority vote. In that session, the GA may recommend that Members take aggressive measures to “maintain or restore international peace and security.” This is clever.

*The impacts*—

❒ The emergency session procedure has been used—Suez, Hungary, Congo, Bangladesh, Namibia, and Palestine.

❒ Now UFP is generally a backdrop that might spur the Council into action.

II. Development of Law Through the Political Organs of the UN (Higgins, revisited)

**Main Thesis:** The work of the UN political bodies provide the most dynamic lawmaking activities of the UN, clearly going beyond “internal” lawmaking.

**Statehood and Membership:** While Article 4, by its terms, rejects “automatic universality,” and leaves discretion to the membership, the UN is heading toward universal membership.

❒ Legalism: Increasing reliance on the traditional requirements for “statehood” leads to a growing list of members.

❒ Politics: The desire for influence leads UN to—

❒ Avoid expulsion (Iraq, Libya) ❒ Allow succession (Russia)

❒ Use recognition as a stand-in for formal statehood criteria (Slovenia, Croatia, Bos.-Herz.)

*Problem of State Succession—Three Theories*:

❒ Continuity (Russia) ❒ Clean slate (Slovenia, Croatia, Bos.-Herz.)

❒ Hybrid approach (Serbia):

Serbia claimed to succeed FRY, but this was disputed by U.S. and EU, who wanted to make this contingent on withdrawal of forces, etc. UNSC and GA passed resolutions that the claim “has not been generally accepted.” This was subject to competing interpretations, and led to Serbia continuing to run its mission and participate in committees, but not being allowed to participate in the GA. The incident demonstrates the **interplay between law and politics** and provides an institutional precedent for a novel membership problem.

**Participation by Non-State Actors:** The UN empowers non-state actors by providing them entrée into decision-making. The trend is toward greater participation, and this participation in turn legitimates the UN. *Developments*:

❒ Privileges and Immunities: Those invited to the GA, including the PLO, get P&I. (custom?)

🕱 Continuing issues: The right to reply or invitations to the UNSC have been disputed

**Human Rights and the Domaine Reserve:** The Article 2(7) concept of domestic jurisdiction is particularly susceptible to development and restriction. Higgins saw that this would be limited by law in important ways (p. 157), but even those questions are now in play.

*Ways the General Assembly Affects Domestic Jurisdiction—*

❒ Resolutions (*see above*) ❒ Operational activities

❒ Institutions for ongoing monitoring and study (Committee on Apartheid in 1962)

❒ Reporting obligations imposed on the secretary-general

❒ Quasi-judicial action in the form of condemnatory resolutions

❒ Global conferences that produce new policy agendas and principles of soft law (such as the precautionary principle in environmental law after Rio 1992).

**Security Council, Human Rights Enforcement, and Article 2(7):**

❒ Repeated (and selective) condemnation of states ❒ Focus on vulnerable groups

❒ Encouraging the efforts of other organs

❒ Progressive development of human rights, such as the actions in Haiti and domestic election monitoring, which indicate a right to “democratic governance” (Franck).

❒ Redefinition of the *trigger* for Chapter VII: human rights as a component of P&S (Haiti)

❒ Legitimation of new institutions, such as criminal courts, “smart sanctions”

❒ Quasi-judicial capacity: Imposing a settlement on Libya, forcing it to transfer nationals for trial in the wake of bombings. Placing Iraqi sovereign rights “in receivership” (Res. 687).

**Global Regulation: The Security Council and Political Power**

*Main Thesis*: The ripples of SC actions are difficult to contain. *Reasons—*

❒ Legitimacy/fairness: treat like cases alike ❒ Legalistic/institutional precedent

❒ *Presumption of Legality*: attached to legitimacy ❒ Path-dependence ❒ Learning

*Modes for examining Security Council’s legitimating authority* (Ratner)[[3]](#footnote-3)—

❒ Declarative ❒ Interpretative ❒ Promotional ❒ Enforcement

I. Declarative Activities: Pronouncing on the legality of actions

*Note: Very few of these activities can be said to be strictly required by the Council’s need to secure the peace, and some may be unwarranted*. *Examples—*

❒ “Illegal racist regime” (Southern Rhodesia) ❒ “Illegal occupation” (S.A. in Namibia)

❒ Violations of IHL (use of chemical weapons in Iran-Iraq War)

❒ Violators of IHL will be held “individually responsible” (Somalia)

❒ “Free and fair” elections (Cambodia) ❒ “Legitimate” government (Kuwait 1990)

❒ Financial liability for damage in Gulf War (SC Res. 687, arguably stepping out of bounds)

II. Interpretative Efforts: give “meaning to the Charter’s open-textured provisions” (Ratner)

❒ *Expansion of Binding Authority*: The UNSC has authorized binding measures, including peace operations, under the grant of authority in arts. 24-25 of the Charter. The ICJ has supported the reading that this is a *separate* grant of authority from Chapter VII (e.g. art. 48) (*See Namibia*).

❒ Administration of territory beyond art. 78 ❒ Delegation of enforcement functions

❒ *Reinterpretation of Peace and Security*:

❒ IHRL (e.g. Haiti) ❒ Human security (e.g. AIDS) ❒ Proliferation (Res. 1540)

III. Promotional Functions: authorized by Chapter VI

❒ *Proposal of legal remedies*, such as establishing a new regime or encouraging ratification

❒ Affirm, strengthen, or undermine existing rules of international law

* S.C. Res. 1483 arguably displaces/interprets/modifies the traditional occupation regime.

IV. Enforcement: broad grant to “restore” or “maintain” the peace

❒ Enforcement of ICJ decisions (art. 94) is *rarely used* ❒ Force settlements

❒ Creation of war crimes tribunals: *Could involve the following—*

❒ Article 29: But this is about “subsidiary” organs, which implies they are not independent

❒ Article 41: A broad interpretation of non-forcible measures. *Must engage Chapter VII*.

❒ Arts. 24-25: Could work if this is not an enforcement action. (*See Namibia*)

*Effects of Enforcement Decisions—*

❒ If not precedents, then reliable guides to future action

❒ *Presumption of Legality*: Opponents must show that the once-permissible action is illegal

❒ Noting “exceptional nature” might not contain the precedent (Res. 940 on Haiti coup)

❒ Duties to cooperate owing to frequent enforcement, as in counter-terrorism (Alvarez 195)

❒ Hardening of treaty provisions (1373) ❒ General law for generalized threats (1373; 1540)

❒ Problems of conflict (1373 and due process) ❒ Define terms

V. Legitimacy of the Security Council

*Suggestion*: The Security Council is vulnerable to the critique of “hegemonic international law.” It devalues formal and de facto equality, preferring patron-client relationships, in which the weak pledge loyalty in exchange for economic security. (Vagts). *Hegemons—*

❒ Avoid limiting scope of axn by treaty ❒ Disregard CIL when convenient

❒ Prefer indeterminate rules ❒ Frequently project military force/interventions

**De facto legislation:** The general law for generalized threats, promulgated by the Security Council, establishes institutions that are ideal vehicles for HIL—the CTC (1373), sanctions committee (1267), and proliferation (1540). *Consider—*

❒ Procedures privilege the powerful and wealthy states.

❒ General lack of transparency ❒ States may object to listings, but few resources

❒ There’s also a kind of extortion effect here, as the “smart sanctions” purport to replace a blunderbuss state sanctions regime that was hostile to the right to life.

❒ Exclusive control is retained by the Council, allowing it to contextualize the sanctions regimes among a broader array of issues and enforcement tools over which to bargain.

❒ International legal black holes: The CTC, the 1267 committee, and other monitoring bodies seem to operate outside the rest of international law. Not only do they reject IHRL, but, as noted, S.C. Res. 1373 incorporated some provisions from anti-terrorism conventions, but largely not the ones relating to due process.

❒ Legitimation of repression: The flexibility built into the SC’s “capacity-building” approach specifically does not ask about human rights, nor does it define key terms, like “terrorism.”

❒ Lack of reciprocity ❒ No acknowledgment of legal restraint

❒ Justify new projections of force with characteristically indeterminate language:

❒ “Terrorist violence” may be an armed attack

❒ Assistance to (harboring of, etc.) terrorists may make a state responsible for violating 2(4)

❒ Right to respond in self-defense does not cease when the threat becomes clandestine

❒ Carte blanche to powerful interests (e.g., S.C. Res. 1483 on the occupation of Iraq)

**The Limits of Global Hegemony:** The new hegemonic international law faces “limits that unilateral HIL does not.” *Consider*—

❒ The U.S. must worry about maintaining the SC’s legitimacy to gain future assistance

❒ Council-generate HIL is law—public, adopted through proper procedures, etc.

❒ Complex, possibly precluding various power disparities that would have been worse

**Global Regulation: WTO Soft Law**

I. Lawmaking Habits of the WTO (Alvarez)

*Generally*, WTO has not used its legislative authority to produce “soft” decisions. (Alvarez 232). It prefers to modify commitments through multi-year trade rounds. *However—*

❒ Decisions (GATT art. IV:1): The Ministerial Conference may take “decisions” by consensus

❒ Declarations: At the Doha Round, the 142 countries involved issued two “declarations,” one of which (the Doha Declaration) deals substantively with IP rights. The legal status of these is ambiguous (Charnovitz). *They could amount to—*

❒ Merely political commitments (like G-7 declarations)

❒ Binding decisions, perhaps subject to interpretation and enforcement under DSM

❒ “Secondary law” emerging from “constitutive process of decision-making”

II. WTO “Soft Law” (Lang & Scott)

**Main Thesis:** Much of the real governance work of the WTO occurs in its committees. For example, some 285 complaints were brought to the committees in the period surveyed, and nearly one-third were settled or partly settled as a result.

❒ Information Exchange: Discussion, contestation, elaboration, and justification

❒ Presentations on regulatory issues/challenges ❒ Exchange with states/other IOs

❒ WTO as a producer of knowledge and statistics about the global economy

❒ Catalyze cooperation between members states (SPS Committee on “specific” concerns)

❒ Sensitize members to the external impact of their regulation (*id.*)

❒ Prelude to the provision of technical assistance

❒ Harmonization: SPS requirement to use international standards, coupled with transparency requirements, creates a role for SPSC as an interlocutor for the process of harmonization

❒ Norm Elaboration

❒ GATS requires negotiations to produce rules on safeguards, subsidies, procurement, and domestic regulation. Takes place in working groups. (*Not very successful*).

❒ Committees clarify ambiguities in legal provisions[[4]](#footnote-4) (GATS committees)

❒ Committees develop relationships with international regulatory fora (*id.*)

❒ Recommended practices/guidelines on consistency, notification, etc. (SPS)

❒ Interpretive Communities tend to emerge when various actors repeatedly engage each other over long-term, complex issues.

🕱 *Alvarez*: We also see the “softening” of hard law, as in risk-assessment/equivalence (600)

**Evaluation:**

❒ Transgovernmental Networks: Conduits for policy ideas and encourage standard-setting

❒ Global Administrative Law: Provides at least the prospect for addressing legitimacy gaps

❒ Enhance state accountability through complaints and reason-giving

❒ Reflexivity: “critical self-awareness about its own role,” reshaping its own norms

🕱 Cannot look systematically at consequences

🕱 Managerialist: See socialization into expert communities, and deference to them

**Global Regulation: Legalization of the WHO**

*Background*: The “old story” of the WHO was not working. In the past, there were many attempts to manage the conflict between health and trade—bills of health, international sanitary regulations. The old regime of the WHO had the following failings:

❒ Antiquated focus on borders ❒ Keyed to wrong diseases

❒ All-or-nothing approach to emergency ❒ Caps on measures against travel/trade

None of these worked. States quickly lost interest, and focused on capacity-building.

I. Legalization of the WHO after SARS (Fidler)

❒ Redefinition of health threat: *Two main innovations—*

❒ Moves beyond infectious diseases ❒ Includes chem/radiological (WMD)

❒ Obligation to develop and maintain the capacity to detect, report, and respond

❒ Obligation to notify of “events potentially constituting a … emergency of int’l concern.”

❒ *Soft law*: a “decision instrument” helps “guide” members in recognizing an event

❒ Allows the WHO to consider information from non-governmental sources (as in SARS)

❒ WHO may determine independently the existence of a health emergency

❒ WHO may issue temporary recommendations for emergencies, and “standing” recs.

❒ Prohibits measures against world traffic that are not authorized by WHO or other treaty

❒ Empowers WHO to request the cessation of excessive/inappropriate measures

*Experts*: Much of this empowers the anonymous committee of experts (Emergency Committee) which has the ear of the Director-General.

*Adoption of the IHR—*

❒ Majority vote by members (WHA—general health people)

❒ Opt-out process

II. WHO Code on Marketing of Breast-Milk Substitutes(1981)

*Published as a recommendation under article 23 of the WHO constitution. The code groew out of a battle between NGOs and industry*. *Relevant points—*

❒ NGOs catalyzed by IOs:

❒ UN Report: In 1972, UN published a declaration on the decline in breast-feeding in developing countries. The report was followed by an accusatory article by NGOs that accused manufacturers of substitutes of selling poor quality products, encouraging illiterate mothers to adopt modern forms of feeding, and used sales personnel dressed as nurses.

❒ WHO and UNICEF: A meeting convened by these two IOs “only succeeded in establishing *a broader network of NGOs* committed to pursuing the boycott” globally.

❒ NGO influence on markets: NGO coalition INFACT waged a battle against Nestle. Led to a boycott in the U.S.

❒ NGO pressure on IOs: *At least partly in response to NGO pressure—*

❒ WHA eventually recommended that DG draft a code, then adopted nearly unanimously

❒ Nestle agreed to abide by the code in exchange for a drop of the boycott

❒ Ongoing interpretative role for IOs: UNICEF and WHO agreed to provide “clarifying technical advice on one of the provisions of the code.”

**Global Regulation: The IMF as ‘Regulator’**

I. Conditionality: Practice and Problems

*Main Idea*: “many countries have reshaped their economic and social policies to conform with conditions that the IMF has attached to its loans to states in need of economic assistance.” (JA)

**Basis of Authority for Conditionality:**

*Article V(3)(b)*: “The Fund shall adopt policies on the use of its general resources … that will assist members to solve their balance of payments problems in a manner consistent with the provisions of this Agreement *and that will establish* ***adequate safeguards*** *for the temporary use of the general resources of the fund*.”

*Kaldermis*: IMF conditions that aim to liberalize and deregulate FDIA and capital markets, or to privatize state assets, are illegal under the Articles. *Premises—*

❒ IMF remand capital transfers to *member control* (article VI(3)).[[5]](#footnote-5)

❒ The IMF is bound to respect this area of member control (*generally* arts. I, V(3)(b)(i))

❒ Thus, the IMF cannot *regulate* capital transactions

❒ The FDI conditions are regulation: the IMF is a lender of last resort

*Responses*: ❒ Broad purpose: Art. II(ii) indicates a broad role for the organization

❒ General obligations: Art. IV(1) on “orderly economic growth”

❒ Consent: This is not *regulation*.

**Content of the Conditions:**

*Background*:Began in 1950, giving access beyond the IMF “gold tranche” on the condition that a borrowing state enact certain adjustment programs. First guidelines in 1979, as macro-economic factors to evaluate programs. But by 1997, the Fund had embraced *good governance* concerns. *Often include the following conditions*—

❒ Polices to avoid bribery, corruption, fraud ❒ Overhaul of finance institutions

❒ Harmonize practice with OECD securities ❒ Transform labor laws

❒ Require legislatures to restrain from quantitative restrictions on trade

II. Legitimacy Critiques of Conditionality

❒ Coercive nature of bargaining ❒ Voting structure empowers G7

❒ Capture by Washington Consensus interests ❒ Anti-democratic tendencies

❒ Dilute accountability, leading to corruption ❒ Undermine ICESCR obligations (Arg.)

*Note*: This is not a one-way street. Commitment to the IMF might empower governments against strong domestic opposition. It’s not as if the government is always trying to be accountable and rights-respecting, and the IMF is simply getting in the way.

III. Ongoing Pressure on the IMF: *Two main ideas—*

❒ More scrutiny on the powerful states (*how?*) ❒ Pressure to revise the voting scheme

**Global Regulation: World Bank**

I. World Bank Guidelines as Soft Law: Overview *Main characteristics—*

❒ Intended primarily for internal use ❒ Not the product of any explicit provision

❒ No general normative intent—they were meant to guide bank decision-making

❒ Adopted by internal bank staff ❒ Notice and comment procedures

❒ More precise with respect to intended binding force. *Two main types—*

❒ Operational standards: Mandatory for bank staff and others

❒ Operational procedures: Persuasive authority

*Note that it is difficult to shoehorn these into traditional sources of law. They may be incorporated into treaties or generate custom, but to the extent they embody legal material themselves, there is no appropriate category.*

*Wide range of schemes for enforcement and compliance—*

❒ Contract/Treaty: Incorporation of OS into loan and credit agreements with states

* Like the IMF, the Bank may place conditions on loans consistent with OP

❒ Inspection Panel: Receives complaints from those harmed by Bank activities and enforces those on the Bank’s staff. (*Executive Director can also start an investigation*)

*Enforcement methods*: ❒ Withhold money ❒ Internal audits

❒ Policy dialogue ❒ Effects on other banks

❒ Cross-fertilization/mimicry ❒ Gen. principles (*informed consent*; *env. imp.?*)

❒ Develops CIL by influencing state practices and through incorporation into local law

❒ Integrating treaty obligations, or assisting with interpretation (*what is corruption?*). Thus the bank *strengthens compliance with soft and hard law produced by it and elsewhere—*

❒ UN Conv. on Biological Diversity ❒ Conv. on ptxn of world cultural heritage

❒ FAO pesticide guidelines ❒ Global Programme of Axn to Prot. Marine Env.

**Legalization of Standards:** “The adoption of an internal “disclosure policy” that made the policies accessible to the public at large and the creation of the Inspection Panel … transformed the bank’s guidelines effectively into law, at least in terms of general perceptions.” (JA; BK).

II. Broader Effects of World Bank Operational Standards (*connect with thesis*)

❒ Actors: *Two major effects on non-state actors—*

❒ *Indigenous peoples*: Entitled to “informed participation” in Bank projects. This both empowers them, and secures them rights against the host state.

❒ *Governing IOs*: Raises questions about how standards apply to the Bank itself

❒ Sources and Content: *Several comments—*

❒ Denser and different inter-institutional web of hard and soft law

❒ Emerge from a process of “iteration, elaboration, and application” that involves a much broader set of actors than traditionally envisioned.

❒ Affect other institutional developments—policies of other IOs, UN treaty norms, national legislation (Environmental Assessment Policy), institutional learning

III. Legitimacy Critiques of the Bank

❒ Mission Creep: “Good governance” activities violate its charter and interfere w/ states

❒ Under-legalization: Some argue that the bank has been too lax. It has not incorporated CIHRL directly into its standards, and borrowers may use the bank as legitimating device for unpopular action.

❒ Extra-Legality? Empowerment of local groups can go beyond local law.

IV. World Bank and Indigenous Peoples (*See generally* Kingsbury)

*A project that “affects indigenous peoples” requires—*

❒ Screening by the Bank ❒ Social assessment ❒ Informed consultation

❒ Preparation of a plan ❒ Disclosure of the plan 🕱 [*operations often fall short*]

**Direct Effects on International Law** (as described by Kingsbury, not Alvarez):

❒ Constrain Bank staff in design, appraisal and supervision

❒ Inspection Panel may affect the “normative quality” of OP, thus shaping preferences/values

❒ Legally binding conditions incorporated into loan or guarantee agreements

❒ WB standards might become national legal requirements

❒ NGOs may seize on these as indications on what is right or fair. (*Project-affected persons*)

❒ *Indirect*: May set a benchmark for national or international review bodies

*New kind of law for the modern administrative age*: Inspection Panels have to convince states to comply, and it is not always clear they can do this. This suggests Lavel’s idea of ongoing dialogue with the state.

**Critique of Article 38:** The Bank’s OP are not well-captured by art. 38. *Three major points—*

❒ Justice: Trad. sources might not take account of the “agency of indigenous peoples.”

❒ Problem of IOs: The impact of IOs might be captured by expanding the notion of CIL or general principles of law to include institutional law generated by IOs. But then we must ask whether these categories of law (CIL; GP) are binding on IOs.[[6]](#footnote-6)

❒ Diffusion: OPs are part of a “diffuse normative process”

V. The Bank and Investor Protection

**Main Idea:** The World Bank’s rules contribute to “a growing and interlocking set of international regimes and institutions intended to protect the foreign investor and promote foreign investment around the world” (JA). *Components—*

❒ ICSID Convention: States agree to submit disputes arising “directly” out of an investment

❒ Multilateral Guarantee Agency: Issues co-insurance and re-insurance to investors for non-commercial risks. Also disseminates information and provides “technical assistance”

❒ International Finance Corporation: Includes detailed technical advice on regulations, and *benchmarking* for countries on pro-business environment*.*

*Consider the role of the World Bank in light of the complimentary work of the IMF and of BITs.*

VI. World Bank and Corruption (*see supplement*). *What law is being made* (Deming)*—*

❒ *Definitions*: Bank definitions of corruption have diffused to regional institutions

❒ Cross-debarment ❒ Networking ❒ Procedures and standards for proof

**Global Regulation: ICAO**

*Background*: In 1906, you had an attempt to draft international attempts to draft rules for states. It wasn’t clear that territorial sovereignty extends to airspace. The basic idea was that there was no sovereign right to airspace *except for self-defense*. Then we had WWI. By 1919, the Paris Convention recognized *complete and exclusive sovereignty* over airspace above its territory. This is now codified in Chicago Convention, art. 1.

I. Purpose: What Is ICAO For? (*article 44*)

❒ Safety: Not just for its own sake, but also for economic reasons

❒ Economic: Note the emphasis on “unreasonable competition.” *Not a free market?*

❒ Trade concerns: Non-discrimination (arts. 44, 15)

❒ Military: Airlines are a strategic industry, thus there is a background military concern at work

❒ Development: An idea that each state should have its own national airline (44(e))

❒ Security: Peace and safe operation—indicates a concern about hijacking, etc. (44(b))

*ICAO furthers these purposes by providing technical assistance, promulgating SARPS, and acting as a treaty-negotiating forum. There is no doubt that ICAO’s mission creep has moved to include counter-terrorism (below).*

**Basic Structure:**

❒ Assembly (plenary) ❒ Council (states of chief importance; contributors; geography)

**ICAO as a Treaty-Maker:**

Several conventions[[7]](#footnote-7) have emerged from the ICAO Legal Committee (open to all members) there remain f*ew rules*. Article 5 grants broad overflight rights, and other conventions deal with air traffic. But the treaty framework leaves much to be filled in by SARPS.

II. ICAO as Standard-Setter (*note the aspect of harmonization—Abbott & Snidal*)

**Thesis:** Debates over the binding nature of the SARPS miss the point. The purposeful ambiguity with respect to the nature of ICAO standards and recommendations has encouraged states to participate and has proved to be a more effective approach to regulation. (Burgenthal).

**Available Topics for SARPS** (art. 37)

❒ Comm systems ❒ Airports ❒ Air traffic ❒ Licensing ❒ Airworthiness

❒ Meteorological ❒ Logs ❒ Maps/charts ❒ Customs/immigration procedures

❒ Aircraft in distress and investigation of accidents

*Procedure*: SARPS appear as annexes, which are adopted by the vote of two-thirds of the Council, subject to being overridden by the majority of member states upon submission.

* A majority of member states has never disapproved an Annex or amendments
* Kirgis explains this in light of the nonpolitical nature of the SARPS and the careful preparation and consultation. More cynical explanations are possible.

*Preparation of SARPS includes—*

❒ Prep. by Air Navigation Commission ❒ Meetings by other bodies (political & technical)

❒ Studies by the secretariat/states ❒ consultations ❒ Full review by ANC

**Compliance with SARPS:**

*A State must notify ICAO of departures from SARPS when (art. 38)—*

❒ Impracticable to comply in all respects ❒ Impracticable to bring its regs into full accord

❒ Deems it necessary to adopt regulations or practices differing in any particular respect[[8]](#footnote-8)

❒ For amendments, must notify of failure to comply within 60 days.

*Not all discrepancies have been notified to ICAO, and it no longer presumes compliance*. *This might be subsequent practice interpreting the treaty. But the language is quite clear.*

**Standards vs. Recommendations, and their binding nature:**

*The charter doesn’t distinguish, but the* traveaux *do, and the Assembly has distinguished them—*

❒ Standard: Necessary for the safety or regularity of international air navigation. “In the event of impossibility of compliance, notification is *compulsory* under Article 38.”

❒ Recommended Practice: Recognized as desirable in the interest of safety, regularity, or efficiency. “Contracting States will endeavor to conform.”

*Note the Importance of Article 12: Rules of the Air (see Annex 2 for the rules)*

❒ *Chicago Convention rules/annexes are binding over the high seas*

❒ Otherwise, states undertake to keep regulations “uniform, to the greatest possible extent.”

**Case Study in Standard-Making: Response to 9/11** (*Declaration on Misuse*)

❒ Attacks violated int’l law, including arts. 4/44 ❒ Urges implementation of SARPS

❒ Urged implementation of security conventions

❒ Council revised Annex 17 (*note that security is not specially mentioned in art. 37*)

❒ Directed Council to convene a high-level conference on aviation security

❒ Approved a Plan of Action for member states with regular ICAO “security audits”

❒ Urged criminal accountability (*consistent with article 4 on misuse?*)

III. Beyond Standards: ICAO Amendment Power

❒ Requires 2/3 of Assembly ❒ Comes into force in respect of ratifying states

❒ Assembly must specify preconditions for entry into force

❒ Art. 94(b): May specify that a non-ratifying member is kicked out

*Notable amendments—*

❒ Increased size of Council: Though these amendments have not been ratified by all parties, no state protested, and they have all been allowed to vote in the larger Council.

❒ Expulsion (art. 93 bis): A state expelled from UN, or recommended by GA for expulsion from specialized agencies, shall cease to be an ICAO member.

❒ Shoot-Downs (art. 3 bis): Arguably represents CIL. U.S. has not ratified. *Includes—*

❒ Every state must refrain from using weapons against civil aircraft in flight

❒ States may require landing (or other stuff) if there is *reasonable grounds* for suspicion

❒ Every state will punish the refusal to comply with the above orders

❒ Each state will take “appropriate measures” to prevent the misuse of aircraft

IV. ICAO as a Dispute Settler (art. 84)

*ICAO Council Rules for the Settlement of Differences—*

❒ Application will include a *memorial—*

❒ Statement of facts ❒ Data ❒ Statement of law ❒ Relief desired

❒ Statement that negotiations had taken place but were unsuccessful

❒ If respondent questions jx, then he files a *preliminary objection*, suspending merits

❒ Preference for Negotiations: The Council may at any time invite parties to negotiate

❒ Council may set time limit ❒ May render assistance ❒ Record solution

❒ Council’s decision will be in writing and contain reasons

*ICJ Decision on Council Jurisdiction*: The ICJ goes to great pains to keep this case before the Council. The application of non-Chicago treaties does not upset jx, nor does the fact that India says the treaty was suspended. It looks like it gives ICAO jurisdiction to *decide* whether the treaty was suspended. This also reflects a broad tendency to say that VCLT art. 60 cannot give a unilateral right to suspend, because that would put the state as a judge in its own cause.

**Dispute Settlement under the Transit Agreement:** *Elements—*

❒ “Injustice or hardship” (equity, not law) ❒ Consultation fails

❒ Council makes recommendations to the states concerned

❒ Should the states fail to follow the recommendations, they may be suspended by 2/3 vote

**Real Effect of Dispute Settlement**

❒ Restrictions on airline (art. 87) ❒ Restrictions on voting (art. 88)

❒ Specter of formal decisions is often enough to force negotiations (U.S.-Cuba)

❒ *Forum-shopping*: The Noise Wars case could have been brought in the WTO.[[9]](#footnote-9)

❒ *Alternatives—Fact-finding and blame-allocating*: The shoot-down cases show that ICAO can be effective by wrapping conclusions of law inside conclusions of fact.

V. Conclusion: Enforcement and Broader Normative Effects

❒ Safety/security audits ❒ Council reports infractions to members/Assembly (54)

❒ Duty to notify of departures (38) ❒ Incorporation of SARPS into nat’l or industry practice

❒ Incorporation into other treaties ❒ Restriction on flights (87) ❒ No vote (88)

❒ Settlement of disputes ❒ Equity under the Transit Agreement

*Broader normative effects—*

❒ Boundary determinations: How far will ICAO go into development, trade, health?

❒ Inter-institutional: ICAO’s existence encourages certain kinds of institutions at the national level. *IOs help create the state*.

❒ Soft law: Develops guidelines, including inter-IO guidelines (on diseases with WHO)

❒ Managerial regimes: Ongoing auditing and discussion is a form of “soft enforcement”

❒ Technocratization: ICAO is not a mere coordination game, includes high-politics stuff

❒ Shadow of a court: Provisions create an incentive for negotiated settlements

**Emerging Global Administrative Law & the Legitimacy Defecit**

I. Descriptive: The Emerging Practice of Global Administration (Lobel; Kingsbury)

*Lobel*: The modern administrative state is characterized by changes in the nature of law, the actors, the organization, and the lawmaking/adjudicative approaches. *Consider—*

Nature of law: ❒ Decentralized ❒ Coordination ❒ Flexible/adaptable

❒ Diversity ❒ Contextualized variances

Organization: ❒ Horizontal network (not top-down) ❒ Informal

Key actors: ❒ Multiple levels of government ❒ Public/private

❒ Decentralization ❒ Subsidiarity

Lawmaking: ❒ Dynamic ❒ Experimental ❒ Iterative/learning

❒ Promotes innovation

Adjudication: ❒ Ongoing benchmarking, rather than reactive

*Emergence of Global Administration* (KKS): “Rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties.” Subjects include states, but also individuals, firms, and NGOs. *Includes—*

❒ Administration by formal IOs ❒ Collective action by transnat’l networks

❒ Distributed admin by nat’l regulators ❒ Hybrid intergovernmental-private agreements

❒ Private institutions with regulatory functions

*Examples—*

❒ Security Council resolutions ❒ Codex Alimentarius ❒ ICAO SARPs

❒ IO “best practices” ❒ ILO recommendations ❒ IAEA standards

❒ FAO food additives regime ❒ UNEP prior consent ❒ WTO soft law

❒ WHO code for milk substitutes ❒ World Bank OPs ❒ IMF conditionality

*We might also include the stuff that goes along with UN treaty-making conferences, treaty-making by experts, managerial treaty-making, and treaty-making with strings attached.*

**Challenges to the Principle of Consent:**

❒ Time-inconsistent preferences ❒ Mission creep ❒ Effect on NSAs

❒ Sometimes there isn’t consent ❒ No possibility of exit ❒ Consent by whom?

❒ Unintended consequences

II. Emerging Principles of Global Administrative Law

❒ Participation ❒ Transparency ❒ Reason-giving ❒ Review

❒ Substantive: proportionality, means-ends, least restrictive means, legitimate expectations

❒ Restricted immunity for IOs/officials ❒ [reflexivity]

*Directions for application—*

❒ Domestic institutions as checks on global administration

❒ Internal global mechanisms for participation and accountability

❒ Global disciplines on distributed administration

III. Kingsbury & Cassini on IOs and GAL:

❒ Emergency Powers ❒ Human rights ❒ Field offices

❒ Public-private partnerships ❒ Non-treaty normative instruments\

**Treaty-Making: General Techniques**

❒ Procedures for negotiation, adoption, implementation, interpretation, amendment

❒ Content ❒ Actors involved ❒ Interplay with sources ❒ Compliance

❒ Statues now tend to assume they have a right to participate ❒ More NSAs involved

❒ More states involved: harder to reach agreement, vaguer provisions, package deals

❒ More treaties and negotiations ❒ More ambitious ❒ Constructive ambiguity

❒ More treaty follow-up ❒ Affects state power ❒ More information

*NTI Brief*: We see ICAO more and more becoming a successful forum for counter-terrorism conventions. This is at least in part for its ability to de-politicized conflicts. But industry involvement is starting to cause problems in this forum, which suggests the problems (for states) and advantages to IOs. Also note the integrative effect. NTI says the new amendments will support 1540 *and PSI*, a U.S. initiative deliberately set up outside treaty and SC.

I. IOs as Initiators of Treaty Negotiations: *Many ways for IOs to become involved—*

❒ Pre-initiation studies (UNEP; UNESCO)

❒ Formal procedures leading to reliable conclusion (ILO) ❒ Ad hoc negotiations (UNGA)

❒ Gradualism/declarations (GA; OECD; UNCTAD) ❒ Only end in a treaty (ILO)

❒ Negotiations begin w/o drafts (UNCLOS) ❒ Organ/expert/secretariat drafts

❒ Heavy basis in state practice (UNCITRAL; ILC) ❒ Start with drafting (ILO)

**Expanding the diversity of actors involved:**

❒ “Democratizing” effect: small states are more likely to have an impact on treaties

❒ Non-state actors are more likely to become involved for *the following reasons—*

❒ Access to documents ❒ Observer status ❒ Facilitates business lobbying

❒ Development of an “international civil service” (secretariat) with its own influence

❒ Power to become active in treaty-making is generally assumed as “implied power”

❒ Licenses the “independent expert” ❒ Leads to a wider diversity of treaties

**Venue Becomes a Crucial Aspect:** *The forum affects the following—*

❒ In-depth and lengthy examination by experts (ILC) ❒ Superficial/political (assemblies)

❒ Use of technical experts (ICAO Legal Committee) ❒ Combined approach (ILO)

❒ Connected with dispute settlement (WTO) ❒ Other supervision (ILO)

❒ Soft law and soft enforcement (OECD) ❒ Regional mechanisms

❒ Desired level of transparency/participation

❒ Suggested linkage (i.e. WTO=trade)

**IO Effects on the Role of State Power:**

❒ Decrease the salience of traditional state power: treaty-making does not require the suggestion of a powerful state (i.e. Trinidad with Rome Statute, Poland with CRC)

❒ Increase the proportionate power of NGOs (land mines) ❒ Role of experts

❒ Condition the use of power: treaty-making without IO endorsement is difficult

❒ IOs as vehicles for the assertion of state power. *Western states were able to steer the following treaties to the preferred forum, but had to accept tradeoffs—*

❒ ICAO for counter-terror: Limited criminalization to acts that relate to aviation.

❒ WTO for IP: Involved costly negotiations to steer away from WIPO

❒ IAEA for proliferation

❒ OECD for [aborted] MAI: Preference to forgo global reach in favor of depth

**Increased Availability of Information:**

❒ More information spurs treaty-making (*better data from VCPOL led to Montreal Protocol*)

❒ Supply of information, including IO history, will affect the choice of venue

**IOs Also Hinder Negotiations, or Provide Ways to Kill Treaties:**

❒ Decision not to conclude a treaty (UNCITRAL; ILC is becoming this way)

❒ IOs may hinder the initiation of negotiations

II. UN Treaty-Making Conferences:

*Modern rules of procedure are the creature of IOs. The UN Draft Standard Rules of Procedure (1985), which are heavily followed, are based on the LON rules. These rules, however, bear no relevance to nineteenth-century rules. Today’s common practice covers the following—*

❒ Manner of adoption ❒ Duty to abide ❒ Invitations ❒ Credentials

❒ Quorums, suspension, adjournment ❒ Open/closed meetings

❒ Submission of and voting on proposals ❒ Discretion of legal counsel

❒ Amendments/motions ❒ Voting ❒ Languages ❒ Committees

*Sabel argues that this uniformity constitutions binding rules of custom for conferences.*

*Why did the Rome Conference succeed (where UNCLOS nearly failed) (Lee)?*

❒ Anticipation of contentious issues and preparation of middle-ground papers

❒ Clear division of work btw. formal/informal meetings ❒ Use of interest groups

❒ Informal meetings for serious negotiation ❒ Avoidance of open-ended neg.

❒ Designation of competent persons to negotiate issues ❒ Options and alternatives

❒ Channeling the results from specific negotiations into general session to allow for package deals and trade-offs.

III. Treaty-Making by Experts (ILC etc.)

**Main idea:** Expert bodies, such as UNCITRAL, UNIDROIT, and the ILC, have come to embrace “soft” instruments in lieu of hard treaty-making, sometimes with considerably more success.

❒ These “harmonization” devices are often seen as “neutral” (UNIDROIT Principles of International Commercial Contracts)

❒ Draft treaties may exert pre-enactment force (e.g., ILC on the continental shelf)

❒ Provide tools for tribunals, such as BIT disputes, that have a need for law (ASR)

*Where treaties do not obtain widespread ratification, this may not be total failure—*

❒ May generate common state and institutional practice (VCLT for IOs)

❒ Some parts of the treaty may become custom/GP (VC on Representation, art. 23 on ptxn)

IV. Managerial Treaty-Making (i.e. “framework conventions”)

**Main idea:** Modern treaties may provide for a framework that includes continuing gatherings to develop normative context or supervise implementation. Treatymaking changes from a one-shot endeavor to a **comprehensive action plan**, involving continuing assessment and management, and ongoing reliance on institutional arrangements.

*Characteristics (often of environmental agreements)—*

❒ Aspiring to universal participation ❒ Initially vague and unthreatening terms

❒ Rely on decision-making rules that encourage consensus and discourage reservations

*Innovations in institutional form—*

❒ Standing monitoring bodies (IHRL): These bodies generally have “expert” members, combining *quasi-dispute settlement* with *ongoing interpretation* and *soft enforcement*.

❒ MOPs (arms control): Meetings revise and extend agreements. *Consider—*

❒ *UN auspices*: Generally, these provide, or have been interpreted as providing, that the UN organs will convene periodic meetings supervised by UN staff.

❒ These develop a “symbiotic” relationship with the host organ (Szaz)

❒ Complex formula (environmental): Establishes a tripartite structure of a MOP, an expert body, and a secretariat (usually of an existing IO). Often vague about legal personality and privileges and immunities.

**Evaluation of Managerial Treaty-Making:**

*Defenses—*

❒ “Deepen” faster ❒ Community pressure ❒ Information diffusion

❒ Lack of dispute settlement allows violating states to be treated as developing capacity

❒ Focus on (scientific) consensus helps develop concern ❒ Credible commitments

❒ Regular interaction ❒ Create an external demand for effective domestic action

*Criticism—*

❒ Ignore the wider community of agents and factors ❒ Hegemonic power

❒ Lack of autonomy in institutions ❒ Consensus sucks

V. Treaty-Making with Strings Attached (ILO)

**Main Idea:** Some IOs adopt treaties with intention to secure ratification or implementation.

*ILO “strings” include—*

❒ All member states must bring conventions before the competent authority for ratification

❒ Inform DG of efforts to do so ❒ Inform DG of ratification

❒ Take any necessary efforts to “make effective” ❒ Ongoing reporting in case of failure

❒ Secretariat argues that reservations are impermissible due to “special considerations”

❒ Annual report on measures to give effect ❒ Protocols are often easier to adopt

❒ Workers may make “representations” to secure “effective observance” of conventions

❒ ILO may adopt “recommendations” with 2/3 votes, must be brought to domestic authorities

*This represents an “end-run” around traditional theories of consent, and constrains discretion in implementation. ILO procedures also encourage peer pressure and complimentary efforts at standard-setting. Other IO “strings” are listed at JA 336 (UPU, UNESCO).*

**Treaty-Making: The ILO**

*Institutional Creativity at the ILO—*

❒ Development of evidentiary standards ❒ Blending findings of law with fact

❒ Informal stare decisis ❒ Fund. Freedoms ❒ Expansion of law: subj. matter & sources

❒ Recommendations ❒ Interpretation ❒ Procedures under the Declaration

I. ILO: Purpose and Structure

❒ Elevate labor standards for economic competition ❒ Political effort to prevent unrest

❒ Humanitarian focus on vulnerable groups ❒ Freedom of association

❒ Declaration of Philadelphia suggests a connection to human rights, esp. expression

*Tripartite structure with tripartite membership—*

❒ General Conference: Four delegates to each country—two govt., one labor, one employer

* The NG reps must be the *most representative* of their community. Originally, the Soviets tried to get away with sending puppets. This got fixed (Poland), but it took some time.
* Delegates may vote independently (art. 4(1))
* If one NG delegate is not nominated, the other may not vote (art. 4(3))

❒ Governing Body *composed of 56 persons—*

❒ 28 govt. (10 from states of “chief industrial importance”)

❒ NG reps are selected by other NG reps from their sectors

❒ International Labor Office, “controlled by the Governing Body” (see art. 10)

II. ILO Treaty-Making Power

*Choosing to start a treaty at the ILO kicks off a standard set of procedures:*

❒ Secretariat prepares a preliminary report—

❒ Relevant law and practice ❒ Draft provisions ❒ Questionnaire for states

❒ Upon replies, secretariat prepares a second report on questions for the Conference

❒ First reading of the treaty within a tripartite committee

❒ Drafting sub-committee of three representatives, reporters, and conference legal adviser

❒ Report of the sub-committee is adopted by the committee and by the Conference

❒ Office prepares the text of the draft Convention based on the report, circulates

❒ Second reading occurs within the Conference, each clause considered separately

❒ Provisions are submitted to a conference drafting committee (President, ILO DG, Legal Adviser, staff), which reviews the text and adds final provisions

❒ Text is presented for a final vote in the Conference

❒ Representatives (2 govt., 1 labor, 1 industry) ❒ Assured independence from gov.

❒ Two-thirds majority required for adoption

🕱 Note the “strings attached” to ILO conventions, above

**Recommendations and Their Effects on Treaties:** *Recommendation may—*

❒ Spell out more detail of the convention ❒ Interpret the convention

❒ Address something not yet the subject of treaty ❒ Declare principles of law

❒ Enforcement: warn members of what the ILO will regard as minimum obligations

*Strings attached to Recommendations—*

❒ Must present to domestic authorities ❒ Inform DG of measures ❒ Reporting

❒ Produced with same procedures as treaties, and thus treated as “legislation” (Maupain)

*Note that recommendations apply to everybody. Thus the lack of ratification works both ways*.

**No Reservations Allowed** (Memo by the Labor Office, 1951)

❒ Tripartite membership ❒ Charter obliges submission to natl governments

❒ Right for workers to invoke ❒ Special procedure for flexibility

*Where does the Office get off doing this? The Charter says that disputes should be submitted to the ICJ. But states have by and large found this procedure to be useful.*

*Flexibility Clause*: Article 19(3) provides for provisions that make “due regard” to the special circumstances of countries (specifically mentions climatic and development). Many treaties have this clause. *Is it just like a reservation?*

❒ Must consult with the organization ❒ Fit the categories ❒ ILO will decide

*The Escape Hatch for Federalist States*: Article 19(7) affords a tremendous amount of discretion to federal states.

III. ILO as a Standard-Setter

**Main Idea:** The International Labor Office is empowered to issue “opinions” on legal matters, including the above question on reservations. More recent opinions include a 1998 notice that identified eight ILO rights conventions as “fundamental.” *Important points—*

* The ILO has time and again refused to say that its opinions are authoritative, and has largely refused to give opinions where it is being asked to be a de facto dispute settler.
* This restraint is probably what has led to the Office’s credibility as a standard setter despite no constitutional mandate. (McMahon)

IV. ILO as Dispute Settler

*Five mechanisms—*

❒ Ordinary supervision: reports on un-ratified (19) and ratified (22) conventions

❒ DG summarizes reports (23) ❒ Reports must be shared with labor/employers (23)

❒ Technical examination by the Committee of Experts, which may *make comments* that may be aimed at persuading governments to enter into further compliance. These requests are not fully publicized, and informally communicated to the state (*informal direct requests*). The Committee sometimes engages in *direct contacts* as well.

❒ Recently, we have seen the blurring of lines between direct contacts and technical assistance

*Note the procedures and principles for direct contacts, set out at 528-29.*

*Keys to the success of direct contact missions—*

❒ Timely reporting (*doesn’t happen*) ❒ Threat of public exposure

❒ Independence of the Committee ❒ Relationship between ILO & gov. specialists

❒ Complaints (arts. 26-33)

❒ Any member may complain w/r/t treaties both have ratified, or GB may initiate

❒ Office may refer the complaint to the government before acting

❒ Office appoints a Commission of Inquiry ❒ Obligation to share information

❒ Committee report contains findings *of fact* and recommendations

❒ DG sends report to governments and publishes it

❒ Three months to state whether or not the state accepts the recommendations

❒ Continuing disputes may be referred to ICJ, whose decision is final

*Notes on the Poland decision—*

* Commission of Inquiry decided itself on the witnesses it wished to hear, and that it would reserve the right not to hear some of Poland’s witnesses. Also allows for non-public.
* Commission adopted, *ad hoc*, rules for evidence, stare decisis, and burden of proof
* Integrate soft law: minimum standards of treatment for prisoners

❒ Representations (arts. 24-25)

❒ Upon representation by employer/labor rep, GB may communicate the representation to the government, and may invite a response (24)

❒ [Sometimes a Committee of Inquiry may be appointed under art. 26]

❒ Upon an unsatisfactory statement, the GB may publish the representation (25)

❒ Freedom of Association

*Origin*: In 1950, amid fears that the basic conventions on Freedom of Association would not be widely ratified, the Governing Body established a Fact-Finding and Conciliation Commission. The nine members would be “independent.” *But with respect to states not party to either convention, consent must be obtained*.

The Committee on Freedom of Association, originally established to vet complaints, became a quasi-judicial body and considered complaints on their merits, making recommendations.[[10]](#footnote-10) No state challenged the CFA. *It has innovated its own procedures—*

❒ DG receives complaint and seeks supporting info in a month to decide if substantiated

❒ Materials are forwarded to govt. ❒ Case may continue w/o govt. cooperation

❒ When governments do cooperate, direct contact procedures are often used

❒ Reports are published in the ILO Bulletin

❒ Procedures under the Declaration of Fundamental Rights (Helfer)

❒ Annual performance review of all countries that have not joined the eight treaties

❒ “Global Report” addressing one of the protected rights in depth

*By referring to the idea that “states have already freely subscribed” to these values, the DG creates a space to sharpen and specify the commitments. This allows the Declaration to expand the powers of the ILO, in what some have called a constitutional moment.*

*Two points (Helfer)—*

* The monitoring reduces the advantage of not ratifying, and makes it harder to cheat
* Mechanisms have also reinforced the argument that labor standards attract FDI/trade

**Treaty-Making: Are IOs Helping?**

I. Facilitating Cooperation (*drawing on Keohane’s institutionalist work*)

❒ Enabling iteration ❒ Access to information ❒ Reducing transaction costs

❒ Self-enforcing behavior ❒ Property rights ❒ Issue linkage

❒ Monitoring ❒ Mediating disputes ❒ Impose sanctions

**Iteration and Information:** *IOs promote iteration more than ad hoc conferences by—*

❒ Previously established rules/procedures, either within IOs or as general guidelines

❒ “Shadow of the future”: institutional precedents constitutionalize balances among states

❒ “Knowledge assets” of IOs, embodied in the secretariat

❒ Experience facilitates institutional learning from past conferences

❒ “Entrepreneurial leadership” to propose topics, mobilize collaborators, shape the agenda, build consensus, and broker compromises (Sandholtz on the EC; Rome; UNCLOS)

❒ Sometimes assume substantive responsibility for text other than final clauses, as with the Genocide Convention, drafted in large part by secretariat at direction of ECOSOC

❒ Small-group settings, like expert bodies further promote iteration—

❒ Few repeat players ❒ Common backgrounds ❒ Long tenure

❒ Ability to process large amounts of information, often provided by IO staff

❒ Managerial formats likewise create stable venues for iterative discourse

❒ ILO strings attached to treaties attempt to maximize iterative discourse:

❒ Near-mandatory treaty-making ❒ Regular procedures ❒ Autonomy

❒ Supervisory provisions generate a ton of interaction and information

**Reduction of Transaction Costs:**

❒ Previously established rules/procedures ❒ Assistance of standing secretariats

❒ COPs, treaty bodies, IOs reduce costs associated with interpretation and supervision

❒ Plenary bodies provide for informal consultations between negotiations

❒ Dispute settlers offer a venue to which to defer contentious questions

❒ IOs allow pooling of risks, assets, or activities ❒ Benefits increase with scale/nesting

**Self-Enforcing Behavior** (*equilibrium; compliance is maintained by self-interested behavior*)

❒ Path-dependencies: *e.g., election assistance creates a cottage industry of private businesses, think tanks, and UN professionals.*

❒ Technocratic and politicized legitimation (ILC texts; ICAO decisions)

* IOs create an interpretive community that makes it less likely that parties will renege
* Lawyers form a principal IC: Debates over Kosovo, Iraq show some uniformity over the permissible interpretive tools and relevant principles
* Specifically, constitutional discourse in IOs is a particular form of communication
* WHO Tobacco Convention, in coordination with the World Bank, shows how the legitimating resources of multiple institutions can be merged.

❒ Mechanisms for laundering (ICAO on counter-terrorism)

**Creation of Property Rights:** *Forms of property rights—*

❒ Intellectual property (TRIPS) ❒ Rights to do business (WTO) ❒ Investors (ICSID)

❒ Claims vs. other states (MEAs) ❒ Right to participate “new sov.” (Chayes and Chayes)

*For these reasons, treaty negotiations in IOs might be highly legalistic. They take notice of existing property rights, as well as make predictions about the likelihood of outcomes before dispute settlers.*

*The density of existing institutions requires careful consideration of—*

❒ Forum ❒ Savings clauses ❒ Conflicts with other regimes ❒ Flexibility

**Issue Linkage:** *Facilitates package deals/side payments. Typology* (Lebron)*—*

❒ Normative ❒ Coherence ❒ Consequentialist ❒ Tactical ❒ Effectiveness

IOs affect the possibility of issue linkage through defining their institutional mandate—

❒ World Bank/sustainable development ❒ WTO/anti-competition, TRIPS, etc.

❒ WHO/Tobacco Framework links health, environment, trade, development

*Note that path-dependencies may solidify redefinitions of the mandate.*

II. IOs Impeding Treaty-making: *Many IO strengths may become weaknesses—*

❒ Actors: States may wish to avoid a wide range of actors involved

❒ Mulitalateralism: Some treaties (BITs) are best negotiated bilaterally

❒ Information: States may prefer to negotiate in forums where they can control information

❒ Clustering of Issues may force the making of unworkable package deals

* The MAI failed in part because of its efforts to: (1) link with the investor-state dispute mechanisms of BITs, and (2) its applicability between OECD members. This made powerful states reluctant to incorporate environmental or labor issues in to the treaty, a linkage that was seen as crucial to its success.

❒ Inefficiency: Number of actors and procedures may increase legitimacy at expense of speed

❒ IO Secretariats may lack the capabilities necessary for “entrepreneurial leadership”—

❒ Initial grant of authority ❒ Knowledge and resources ❒ Charisma

❒ External conditions that favor IO action

❒ Bureaucratic tendencies:

❒ Ineffectiveness ❒ Low accountability ❒ Repressive ❒ Corruption

❒ “Independence” leads to treaties that are incompatible with state interests

❒ Ritualized practices ❒ Inattentiveness to context ❒ Path dependent (“lessons”)

❒ Professionalism insulates them from important domestic pressures

❒ Politicization: See the challenges to the legitimacy of WTO bureaucracy

*Problems and Path-dependencies the WHO Framework Convention on Tobacco*: The WHO nearly undermined the treaty by insisting that states work by region, instead of by common interest. The large number of delegates and vocal NGOs made things worse. And negotiations were characterized by health ministries, thus not accurately reflecting domestic preferences. Finally, we should not be surprised that the standards finally incorporated were those already in place in the United States.

III. IOs and the Content of Treaties (Simma’s Critique)

*Simma notes three “strains” in modern treaty-making—*

❒ Politicized treaties that replace hard obligation with soft programs and declarations

❒ Peripheral topics ❒ Few ratifications ❒ Displacing customary law

**Simma’s Thesis:** These strains emerge because of a tendency to ignore the continued importance of state consent. *Consider—*

❒ For most multilateral treaties, the text is done before it is clear consent may be obtained

❒ Negotiations are not just called off ❒ Treaties tend to define a weak/fluid consensus

❒ Deliberate ambiguities reflect the lack of common ground among states

❒ Provisions often exclude the possibility of real sanction, or provide an easy way out

❒ “Dynamic” interpretative methods undermine the original bargain

*How IOs exacerbate this problem—*

❒ “Treaty machines” (ILO; GA) ❒ Promotional treaties (ILO Equal Remuneration)

❒ Consensus (UN conferences; MEAs) ❒ Reliance on reporting obligations

❒ “Dynamic” interpretation is inspired by the approach of the ICJ

❒ Ready-made UN conferences

**Critique: Ratification/Compliance as a Measure of Effectiveness:** *Possible measures—*

❒ High rates of ratification in a reasonable period of time —*mixed results*

* *ILO*: Some ILO treaties are not ratified at all or by very few, while eight conventions have more than 100 ratifications. Efforts to secure ratification from states like U.S., have largely failed, in part due to the federal/state clause
* *Expert Bodies*: Note the high rate of failure for ILC treaties

❒ Time from conclusion to entry into force

* Vienna Convention took a long time to enter into force. But note that it, like the ILC rules on LOS and the ASR, had a strong pre-enactment effect on states.

❒ Compliance: Open-ended obligations complicate efforts to find compliance. *Four factors—*

❒ Activity involved (number of actors, incentives, role of business, concentration)

❒ Characteristics (equity, precision, provisions for technical assistance, monitoring)

❒ Int’l environment (major conference, media, NGOs, number of parties, IOs)

❒ Factors involving the country

*Remember that it is hard to gauge the effect of a treaty by comparing provisions to national law. Convention on the Trade of Endangered Species, for example, merely replicates some local regulatory systems.*

*Conclusion*: It is difficult to assess Simma’s critique on the basis of success or failure. Institutional mechanisms may be responsible for compliance, or they may reflect existing equilibria. *Further points—*

* Simma’s basis of comparison is not clear. Was there a golden age of reciprocal treaties?
* Meaningful studies of compliance and implementation are notoriously difficult
* The aspiration toward universal participation advances prospects for harmonization
* IOs have encouraged a much more diverse range of states (and other actors) to participate

**Critique: “Peripheral Topics”**

*Main idea*: Alvarez simply thinks this is not true. It is the case that the ILC was dealing with less central topics, but that organization has lost its place as the primary expert body.

**Critique: The Argument from Imprecision Misses the Point**

❒ IO treaties encourage repeated, iterative play

* ILO structures for monitoring, and the supplementation of Conventions with more specific recommendations (Equal Remuneration and Recommendation 90)

❒ “Intent” of the parties is not frozen at the time of drafting

* Design of many organizations suggests a desire for ongoing interpretation
* “Controlled instability”: The point of a treaty might not be to establish a single, well-defined set of norms (Raustiala and Victor)

❒ Changing face of enforcement—tit-for-tat retaliation is not the dominant mode

IV. Codified Custom and the Role of IOs

**Main Idea:** IOs do not displace custom, but facilitate the emergence of *codified custom* as a new form of law. It emerges from a more structured lawmaking method that satisfies states’ need for rapid, clear, and deliberative processes for rule-making. (Charney).

❒ Enhances the possibility that treaties will bind non-parties (VCLT; *North Sea Cont. Shelf*)

❒ Involvement of IOs enhances the “legitimacy of codified custom claims”

V. Case Study: Anti-Corruption in the WTO (Abbott)

*Why did anti-corruption fail there?*

❒ Complexity of the regime ❒ Bureaucracy ❒ No norm entrepreneur

❒ Reciprocity: Negotiations are tit-for-tat. Because the gains from anti-corruption are hard to quantify, it’s difficult to come up with a value for an exchange.

❒ DSB: After Uruguay Round, negotiators are reluctant to add anything to WTO that would not be subject to dispute settlement

❒ Linkage ❒ Few NGOs ❒ No history of initiative by the secretariat

❒ Transparency and Government Procurement Working Group: Forced to talk about anti-corruption as a market access issue, which misses some of the point.

**Dispute Settlement, Generally**

*Affecting*: ❒ Regime law ❒ General IL ❒ Other sources ❒ Nat’l law

I. Overview: Institutional Factors for Thinking about Courts

❒ Jurisdiction

❒ Temporal and Spatial: *Bound by time and borders* (ICTR) *or nearly unlimited* (ICC)

❒ Rationae personae: *Only states* (ICJ), *individuals* (ICC), *amicus briefs* (WTO, ICSID)

❒ Rationae materiae: *All questions of international law* (ICJ)*, specific* (ICC)

❒ Choice of law

❒ Both national and int’l law (ICSID) ❒ Only international law (WTO; ICC)

❒ Remedies

❒ May restrict or expand the general remedies in the articles on state responsibility

❒ *Provisional measures*: May or may not be binding, and some courts can’t do this at all

❒ Only damages ❒ Only prospective relief

❒ Authorize a limited kind of countermeasure (WTO)

❒ Binding nature: *Several important points—*

❒ Advisory jurisdiction, because it relates to a general question, may have broader impact

❒ Advisory cases may have fewer procedural protections (*Namibia*)

❒ The rule of narrowness might not apply to advisory cases (*But see Kosovo*)

❒ *Lex specialis*: Sometimes the judicial remedy is the only remedy available (WTO DSB)

*When will a court generate “new” law—*

❒ Reason-giving: When a court must explain itself, it tends to make more law (ECJ has been accused of reasoning to the lowest common denominator, as in *Kadi*)

❒ Rules vs. standards ❒ Judicial sensibility ❒ International procedural law

❒ Availability of review ❒ Purpose of the body ❒ Subject matter

❒ Volume of cases ❒ Screening by gov’t ❒ Rules of interpretation

❒ State responsibility ❒ Kompetenz-kompetenz ❒ Direct effect/supremacy

❒ Pedigree of the adjudicator within the institutional context

❒ Point of law at issue ❒ Reaction of the parties to the underlying dispute

*Discretion*: Alvarez’s discussion of the “margin of appreciation” as Janus-faced is one of the most interesting examples. It allows the judges to change their interpretations over time.

*Example—Nuclear Weapons (WHO)*: Note that the ICJ could have kicked out the case on grounds of discretion. It didn’t, and it *made more law this way*. It suggested four major ideas:

❒ Specialty ❒ Logic of UN system ❒ Limits on imp. powers ❒ WHO practice

II. The Process of Institutionalized Judicial Settlement

*Joel Trachtman identifies six steps in the context of the WTO—*

❒ Which law ❒ Giving meaning ❒ Construing rules ❒ Filling gaps

❒ Resolving conflicts between two or more rules ❒ Accommodation

III. Emerging Problems

❒ Fragmentation (*Charney suggests this is overstated w/r/t general rules*)

❒ Forum-shopping, either within regimes (UNCLOS) or broadly (HRC vs. IACHR)

❒ Faced with conflicts, holdings might get increasingly narrow (*Nicaragua*)

**Dispute Settlement: ICJ Advisory Jurisdiction**

I. Rules and Procedure

*You must have a legal question. Who may request an advisory opinion (art. 96)—*

❒ Security Council ❒ GA ❒ UN organs “within the scope of their activities”

❒ Written request with “exact statement of the question” and supporting docs (art 65)

❒ Notice and opportunity to submit a statement

❒ Shall be “guided by the provisions … which apply in contentious cases to the extent to which [the Court] deems them to be applicable” (art. 68).

*In the rules of the court, they may be applicable when “the request for advisory opinion relates to a legal question actually pending between two or more States.”* Namibia *shows how high a bar this really is*.

❒ ICJ rules state that the article 38 regime also applies in advisory opinions

II. Jurisdiction and the WHO Opinion

*Two ways to kill an advisory opinion*: ❒ No jurisdiction ❒ Discretion

*WHO, Nuclear Weapons, and the meaning of “scope of their activities”*—

❒ Principle of specialty: The limits of IO powers are a function of the common interests entrusted to them. This may include express powers, and implied powers construed narrowly by “necessary implication” from the charter.

❒ Logic of the Charter system: Responsibilities restricted to the sphere of “health” cannot encroach on the responsibilities of other parts for the United Nations

❒ Implied powers: Seems to push back toward a strict necessity test

❒ *Note that ICJ justifies this finding by referring to WHO practice*

*Namibia and the Merits of Advisory Cases—*

❒ Note that it’s somehow possible that the GA acquires the powers of the LON, but that it also might have any powers not specifically precluded by the Treaty of Versailles (para 96)

❒ The mandate is analogized to a treaty, allowing the court to import VCLT material breach rules. At the same time, the court says GA can unilaterally declare suspension of the treaty (*contra* India-Pakistan ICAO decision), because GA is supervisory in function.

**Kadi and Security Council Review** (*very brief*)

Possible Checks on the Security Council

❒ Judicial review might be asserted by the **ICJ**—

* *Lockerbie*, by not rejecting jurisdiction on the merits, leaves open the possibility that the ICJ might examine the legality of Security Council measures under relevant treaties. That hint was enough to make the parties come to settlement.
* *Certain Expenses* and *Namibia* find the ICJ examining the products of both the SC and the GA. They never strike down things, but they do make determinations that what these bodies did was legitimate. But to some that sounds like judicial review. Now note that some might say that the court cannot exercise JR because it’s advisory only.

❒ Judicial review by other **international courts**—

* *Kadi* demonstrates this, and has given rise to cases in the ECtHR and elsewhere
* In *Tadic*, the ICTY asserted the legality of the SC’s decision to set up its own tribunal

❒ **National** courts

* *Paulson* indicates that complaints may be filed in national courts after *Kadi*. Following the example of the ECJ, they may target national implementing legislation instead of going after the Security Council directly.
* Challenges post-*Kadi* pending elsewhere, and the SC and secretariat have shown concern

*Political checks—*

❒ Voting in the Security Council—need 9 votes, and the P5

❒ Checks by GA, Secretary-General, other IOs

❒ GA may criticize the SC. (Article 12 does not restrain the GA in this respect, since the ICJ has decided it’s more or less a dead letter, and the GA has done so in practice)

❒ SG can issue reports that are critical of the effects of SC action

❒ In principle, other IOs could stop cooperating

❒ Civil disobedience

❒ States could stop listening or showing up

❒ Use exceptions liberally and perhaps without reporting their use

*Note that the SC has been loath to impose “secondary sanctions” when members do not implement the primary ones.*

Security Council’s Reaction to Kadi: We saw that the SC has tried to develop more substantial procedures, both right before *Kadi* (1822) and soon afterward. The newest one includes an “ombudsman.” *Will this satisfy the court?* Probably not, if the goal is a human rights-friendly court system.

**Dispute Settlement at the WTO**

*Enforcing*: ❒ Quantitative restrictions ❒ MFN ❒ National treatment

I. WTO Dispute Settlement: Overview and Procedures

❒ Encourages direct negotiation ❒ Prohibits other forms of binding arbitration

❒ Panel system: three trade experts issue report, which shall be adopted in 60 days or appealed

❒ Panelists appointed from a list ❒ Individual capacity

❒ AB decision must be complied with in 30 days, or a “reasonable time” less than 15 months

❒ Substantive questions may only be considered by the panel

❒ Remedies

❒ Compensation by agreement of parties ❒ Authorized retaliation

*Explaining the expansive adjudicatory powers of the WTO—*

❒ Delegated gap-filling: The parties moved some determinations downstream. States can still preclude lawmaking by not bringing complaints, and they can reassert some authority through decision-making or by blocking the adoption of panel reports. (Trachtman)

❒ Rules and standards: The choice to leave a contract to be “completed” by dispute settlement is similar to choosing a standard over a rule.

❒ Reducing protectionism (McGinnis & Movsesian): Leaving non-discrimination to the DSB shelters decision-making from interest-group influence and “democratic” tendencies.

II. Case Study: India—Quantitative Restrictions

❒ Institutional balance: Consideration by BOP committee did not preclude DSB action

* Panels and committees have “different functions.”
* However, Panel *should take into account the conclusions and deliberations* of BOPC

❒ Inter-institutional dialogue: India challenged Panel’s use of IMF report without verifying.

* It was important for AB that the Panel also “considered other data”
* *Note that the DSU anticipates the establishment of an “expert review group*.*”* That’s not what happened here.

*Note that the AB has never reversed a Panel’s fact-finding, in large part due to the deferential standard of review*.

III. Case Study: China—Entertainment

*Holding*: China’s refusal to dismantle state trading companies for entertainment and cultural enterprises is inconsistent with its Accession Protocol, and the state companies are not “necessary” to protect public morals. *Main implications—*

* Institution-building: This essentially requires China to find a new (and more costly) way of regulating incoming entertainment. It could set up a censorship bureau, which will require it to give reasons for the first time. Some think this will lead to stricter rules; others think it will undermine the regime through transparency.
* This case is *not about protectionism*: China is not trying to protect local producers. One explanation for this move is that international standards are beginning to work as burden-shifters: if you’re outside the standards, you have to show you’re within the GATT.
* U.S. discretion: Pressed on “necessary,” not public morals, b/c of its gambling issues

**Immunity of IOs and Officials**

Problem of Conflicting Interests: *“On the one hand there is the interest of the international organization having a guarantee that it will be able to perform its tasks independently and free from interference under all circumstances; on the other there is the interest of the other party in having its dispute with an international organization dealt with and decided by an independent and impartial judicial body.”* (*AS v. Iran-U.S. Claims Tribunal*)

I. Overview

❒ Functional ❒ Absolute ❒ Relative

*Sources of Privileges and Immunities*—

❒ Constituent instruments ❒ General multilateral agreements ❒ HQ and host agreements

❒ Customary law, esp. where state is not a member of the IO ❒ National legislation

II. General Rules of Law

❒ Functional Immunity for IOs in CIL: “an international organization is in principle not subject to the jurisdiction of the courts of the host State in respect of *all disputes which are immediately connected with the performance of the tasks entrusted* to the organization in question.” (*AS v. Iran-US Claims Tribunal*, Dutch Supreme Ct.)[[11]](#footnote-11)

❒ Relative Immunity in U.S. law: The same immunity as governments, except to the extent that it is waived. (IOIA 1945).

III. Immunity of the United Nations

*Which is it?* Until recently, the Secretariat claimed that UN had absolute immunity, as opposed to sovereign immunity (1984). In the U.S., the UN gets **absolute immunity** by the last in time rule, as the General Convention comes later than the Charter and IOIA. *Relevant rules—*

❒ Functional:  *Necessary for the fulfillment of its purposes* (art 105(1))

❒ Absolute: *Immunity from every form of process except as expressly waived* (Gen. Conv.)

❒ Relative under relevant domestic rules (*e.g.*, IOIA interpreted by *OSS Nokalva*)

❒ Inviolability: The HQ agreement does not mention immunity, but it is concerned with inviolability, which in this case extends to service of process (US-UN)

❒ Representatives: *Necessary for the independent exercise of their functions* (105(2)). The general convention indicates some broader immunity for MS reps and staff.

IV. Immunity of Other Organizations

❒ Some have functional immunity similar to the UN (WTO art. VIII(2))

❒ World Bank: *You can get the Bank into court if (need all)—*

❒ Court of competent jx ❒ Where Bank has members, agent, or issued securities

🕱 *Not* brought by Bank Members, or persons deriving claims from such members

🕱 Property is immune from attachment before a final judgment

*Why can private contractors sue the Bank? Refinancing.*

**Immunity of International Organizations in U.S. Courts:**

❒ Relative (non-commercial) immunity: The most recent cases to interpret the IOIA suggest that this was modified by the FSIA of 1976, thus carving out a commercial exception. (*OSS*).

❒ Absolute immunity: Earlier interpretations (*Atkinson*) froze the immunity at 1945 levels

🕱 UN gets absolute immunity under the General Convention, ratified 1970

*Restrictive understanding of waiver—*

In *Mendaro*, the Court construes the Bank’s waiver narrowly, extending only to what it needs to do business. The court does note the bank administrative procedure for employment disputes, but it expressly says this is not a reason for its holding, *contra* the developments in Europe.

V. Modern Changes to IO Immunity (Reinisch)

❒ Emergence of the commercial exception

❒ Idea of a right of access to a tribunal

* *Consortium X* (Swiss): ECHR art. 6 provides not only a fair trial, but right of access
* UDHR art. 10 (*See* Brussels Appeals Ct., 1969)
* *Effect of Awards* (ICJ): It would “[...] hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals [...] that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.”

**Obligation to Provide Alternative Dispute Settlement:**

*Main idea*: While it is clear that national courts do not provide a strict form of control, … it appears that recent tendencies of national courts, supported by the case law of human rights bodies such as the ECHR, may increasingly lead to a form of indirect control, assessing not only the availability of administrative tribunals but also the adequacy of the legal protection granted by such alternatives. (Reinisch)

❒ Reasonable Alternative Means (*Waite & Kennedy*, ECHR): Whether reasonable means are available is a *factor* in deciding whether immunity is allowed

❒ *Variance in the standards of review—*

❒ Lenient: German court seemed to be rather lenient towards ILOAT, which has procedural defects, including the lack of oral argument, reappointment of judges, no appeal.

❒ Strict: French court was unwilling to find immunity for the African Development Bank, which had no internal system of dispute settlement.

❒ *Growing pressure for a court-like procedure?* The Western European Union’s ADR did not satisfy the court in *Siedler* because it did not have a fully independent and impartial review.

*Note*: Reinisch’s article also indicates that some ADR tribunals are insulating themselves by taking cases that they don’t have explicit power to hear, such as contractors.

VI. The Next *Mendero* Case

❒ CIL: R3FRL indicates that gender discrimination is prohibited by custom. Maybe CIL demands that the court take Mendero’s case if she has no forum, or if she’s denied justice.

❒ IOIA suggests restrictive immunity ❒ Revive a functional test to get there?

❒ How broadly do you construe waiver? ❒ Duty to waive? Constructive waiver?

*After* Kadi*, courts will be more skeptical of IO actions*.

**Accountability and Responsibility**

I. Grant and Keohane on Accountability

**Main Thesis:** Accountability is only one way of constraining power, and it can be thought of in different ways. Many IOs exhibit several of these mechanisms.[[12]](#footnote-12)

*Two general modes of accountability, with seven mechanisms—*

❒ Participation: Those affected hold the actor accountable

❒ Market ❒ Peer ❒ Public reputational effects

❒ Delegation: Those entrusting the organization with power wield the accountability

❒ Hierarchical ❒ Fiscal ❒ Supervisory ❒ Legal

*Resources necessary for accountability—*

❒ Standards: May include standards of both efficiency and justice

❒ Sanctions: “Decentralized sanctions are quite feasible where incentives are strong”

❒ Information: This might be the hardest to achieve

*Critique of democracy* (critique of Falk and Strauss): There is no global *demos*, no “juridical public on a global level,” no sociological public, and only a very small minority of people identify with others on a global basis.

*Adequacy of Principal-Agent Theory*: Grant and Keohane ask whether these institutions are really agents. It seems that they are sometimes more like trustees; agents of *independence*, not merely centralization (Abbott and Snidal).

II. Legal Responsibility

**Thesis:** Generally, there is little practice on the responsibility of IOs. Nor is it clear that sates want IOs to be responsible. *Consider—*

❒ Money: IOs barely get by on their own budgets, so a finding of liability goes straight to states

❒ IO functions: Think about independence, pooling, and laundering

*Mechanisms tend to avoid domestic courts, due to a perceived lack of neutrality—*

❒ Peacekeepers: UN practice, and application of Geneva principles, establishes responsibility

❒ Employees: IOs are responsible to employees; usually handled internally

❒ Private contracts: Contracts generally provide for arbitration

**Institut de Droit International Principles:**

*Main idea*: IOs are legal persons and thus responsible. States are generally not. *Exceptions to member state immunity—*

❒ Rules of the IO ❒ Implied or express consent ❒ IO acts as an “agent”

❒ Abuse of right [Alvarez finds this the most interesting; *see* ILC art. 60]

*ILC versions of the IDI state responsibility rules—*

❒ Aid/assistance: requires knowledge and dual wrongfulness

❒ Direction and control: requires knowledge and dual wrongfulness

❒ Coercion: requires knowledge

❒ Abuse of right (art. 60): If a state “seeks to avoid complying with one of its own obligations … prompting the organization to commit an act that, if committed by the state, would have constituted a breach.” *Does not require dual wrongfulness*

❒ Acceptance ❒ Estoppel

*Problems with Aid and Assistance*:

UK wants this to require knowledge, deliberate intent, direct causation, and significant contribution, as well as dual wrongfulness. And they want to distinguish this from criminal responsibility, where all the law actually is.

*Problem of lack of primary rules*: What if Argentina helps the IMF kill a bunch of people? If there’s no primary rule, is the state off the hook? *Two responses­*

❒ Get rid of dual criminality (AR) ❒ Chuck A&A, and use abuse of right (JA)

*Alvarez’s Criticisms of the Project—*

❒ Personality: Applies to every IO with legal personality (art. 2). But all IOs are not created equal, nor are they treated equally by states, nor is there an equivalent of sovereign equality

❒ Primary rules: There are no primary rules governing IOs. *Consider—*

❒ What does it mean for IOs to be bound by human rights?

❒ What is this trying to accomplish? What kind of liability for what acts/omissions?

❒ What kind of omission is an IO responsible for?

❒ State practice: There is very little to codify here in terms of practice

❒ Lack of general principles of international law: Crawford could rely on VCLT. *Consider—*

❒ *Internal rules*: VCLT could be relied upon to state that internal laws were irrelevant. Originally ILC transposed this into internal rules, without the same backing. Trouble is, organizational rules *are* international law. (See art. 31—irrelevance)[[13]](#footnote-13)

❒ *Excuses*: Self-defense is ridiculous. In the case of necessity, it is worth asking what this means. Is failure to pay an OK excuse? It isn’t for states, but IOs are different.

❒ States’ willingness: States did not generally seek out this project

❒ Many rules might not be *intended* to apply to IOs

❒ Misuse: Fear when states use the provisions to take countermeasures against IOs

1. Still, the GC developed into a constitutive instrument of the international community, again due to IOs. [↑](#footnote-ref-1)
2. Note how broad the *Reparations* case itself was. The organization was not only able to bring a claim against members for damages suffered itself, but also to claim damages against non-members on behalf of individuals. [↑](#footnote-ref-2)
3. Only the latter two—promotion and enforcement—are authorized by the Charter. [↑](#footnote-ref-3)
4. The most interesting example in Lang and Scott is the question of the difference between “liberalization of the financial services trade” and “capital account liberalization.” The discussion was inconclusive, but it established three precedents: (1) most members agreed there was a difference; (2) established that many members were reluctant to commit to the second; (3) provided a venue to call in outside experts for guidance, in this case the IMF. [↑](#footnote-ref-4)
5. This is in “direct contrast” to the restrictions on member control of “current transactions” in art. VIII. [↑](#footnote-ref-5)
6. The dispute settlement provisions of the EBRD’s standard terms indicates that custom and general principles may be applicable to IOs, and that the practice of IFIs might form customary legal obligations. (Kingsbury). [↑](#footnote-ref-6)
7. Note that many of these deal with national security—seizure, terrorism, plastic explosives. [↑](#footnote-ref-7)
8. This clause says “from an established international standard.” Broader than SARPS? [↑](#footnote-ref-8)
9. Note also that this case has an interesting discussion of diplomatic protection. [↑](#footnote-ref-9)
10. Helfer notes that “as a formal matter, the CFA derived its authority to monitor compliance with these ungratified treaties form the ILO constitution, which references freedom of association in its preamble.” [↑](#footnote-ref-10)
11. It might be fun to argue about this. You could say that the translation service is necessary to the functioning of the tribunal, and thus dismiss suits by jilted translators. Most courts decide this way. But it might be fun to say that, no, the dispute in question is not about *translation*, per se. [↑](#footnote-ref-11)
12. The authors distinguish accountability as *ex post* from checks and balances, *ex ante*, at 30. [↑](#footnote-ref-12)
13. Note that art. 31 is arguably about the obligations of cessation and reparation, replicating a similar art. 32 in DASR. The more general irrelevance of internal rules is intentionally missing in the final draft (see para. 5 to comments on draft article 4). [↑](#footnote-ref-13)