Treaty law-making and non-treaty law-making: the evolving structure of the international legal order: comment

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Comment by Laurence Boisson de Chazournes

At a time of great turmoil for the international community, there is an evermore crucial need to stress the importance of the rule of law in international relations. Besides its core functions of ensuring stability and predictability, law contributes to the elaboration of common understandings and agreements between the members of the international community. Treaties have traditionally been seen as among the main vehicles for the rule of law to play these functions. A challenging question at the beginning of this twenty-first century is whether this is still the case and if not, what the reasons are. At first glance, it would appear that treaties can cover any issue or area of international law. This might be true, although other sources of international law may be more suited for allowing law to develop itself and play its role. General principles as exemplified by Thomas Franck constitute important instruments to this end.¹ In other circumstances, because of the issues at stake, treaties might not be of great help for regulating behaviours. This might be the case if one takes into account the addressees of international norms as well as the changes that are brought by the globalisation process.

* The author wishes to thank Olivia Bennaim-Selvi and Gionata Buzzini from the University of Geneva for their assistance and comments in the course of the preparation of this contribution.

In order to apprehend the suitability of treaty law-making in today's world, my comments will follow a spatial perspective, or to be more precise, will unfold around various spatial perspectives. They will first be placed against a horizontal perspective, then a vertical one, to conclude with a multi-dimensional perspective. These various perspectives will help to assess whether and why a subject matter is eligible or not for treaty law-making. These comments are placed in an evolutionary context, taking into consideration the ever increasing number of subjects and actors in the international arena.

1. Treaty-making in a Horizontal Perspective: No a priori Exclusion of Subject-matters to be Dealt with by a Treaty

What is meant by horizontal approach is the classical inter-state system based upon the principle of sovereign equality. Treaties fit well in such perspective. They aim at regulating conduct among States for ensuring peaceful relationship among them. They can also seek to regulate matters which fall under their respective jurisdiction or control for the sake of coordination, harmonisation or behaviour modelling. In this perspective, there is a priori no issue or subject-matter which cannot be dealt with by a treaty. The reasons for not having a treaty deal with a topic are not structural so to say, but of a strategic nature. Various reasons might bring States not to go along the treaty-path. They will be introduced in turn.

The reason for States not to negotiate a treaty can be linked to the nature of the activities to be regulated. As an example, international economic and financial matters in some of their aspects are not the most suited for treaty regulation. This seems to be the case with respect to monetary questions, as for example issues of foreign exchange regulations, which so far have remained outside the scope of treaty-making.

One should also note in this respect the difficulties encountered by the International Law Commission (ILC) when dealing with an issue of economic nature, which, in the end, was supposed to entail the adoption of a treaty. The works of the ILC on the topic of the most favoured nation clause are quite illustrative in this respect. Indeed, several problems were encountered by the ILC while labouring on the most fa-

voured nation clause as an aspect of its work on the “general law of treaties.” Amongst the various inconveniences the ILC came across in drafting articles intended to be included in a treaty – to present a few – was the fact that although the most favoured nation clause played its most important role within the field of international trade, the ILC had to try to encompass all possible areas of application of the clause within its scope. Also, the ILC found itself confronted to issues pertaining to subject matters like economics (and more particularly instances of international trade regarding notably the existence of State commercial companies or the application of the clause between countries with different economic systems) that were much more suited for other international organisations to deal with. It was thus being torn between the need to take into account all relevant contemporary developments necessary for codification and the risk of impeding on other organisations’ work. In addition (and although the ILC envisaged the following problem as inherent to the subject matter at hand), the planned for implementation of articles relating to the most favoured nation clause would often mean having to refer to conflict of laws rules, rendering the whole implementation issue much more complicated. It all resulted in the fact that the General Assembly noted the complexity of codification of the international law on most favoured nation clauses and considered that additional time should be given to Governments for thorough study of draft articles and for determining their respective positions on the most appropriate agenda for future work. Consequently, thirty-seven years after the ILC first decided to place on its programme this topic as part of its work on the general law of treaties, nothing could lead to believe that States have come closer to considering that the draft articles produced by the ILC should be adopted as a convention.

Another reason for not following a treaty-path is due to the fact that, in some cases, it makes more sense to enshrine good practices and behaviour modelling provisions in a non-binding document. The example given by Thomas Franck in relation to the UNDRO Draft Convention on Expediting the Delivery of Emergency Relief and the UNITAR’s

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3 *Ibid.*, (par. 60 and seq.).
Model Rules for Disaster Relief Operations\(^7\) are good ones, if one takes into account the sad fate of the former in comparison to the latter's.

In the environmental area, good practices enshrined in soft law instruments\(^8\) are often resorted to as means for inducing countries to adopt more environment-friendly behaviours. Quite often, they are elaborated in view of complementing treaty-based requirements phrased in general terms and precluding the use of “best available techniques” or “best environmental practice.”\(^9\) They are supposed to be implemented in a flexible way depending on the countries’ situation. They are also of an evolutionary nature, that is to say that they should be updated in light of the evolution of knowledge and technologies in a given area. Their encompassing in a treaty would make their formulation more tedious and their implementation rather rigid with no margin for manoeuvre in their updating. This being said, one should note that use is made in some multilateral environmental agreements of treaty-based procedures allowing for flexibility. Such is the case, for example, of the Montreal Protocol on Substances that Deplete the Ozone Layer, which provides for innovative methods for updating controlled substances listed in its Annexes, as well as for amending its content through the adjustments,\(^10\) a procedure that plans for modifications through consensus and, if no consensus can be reached, through a two-thirds majority vote of the parties.

In other circumstances, States might show no political willingness to negotiate a treaty (often referred to in such circumstances as a hard law instrument to display its mandatory nature). The disarmament and arms control negotiations, especially those dealing with compliance

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mechanisms, are quite illustrative. Some States are giving preference to the establishment of these mechanisms through a soft law instrument. In this respect, the United States have greatly backed the adoption of a compliance and fact-finding mechanism in the amended Protocol II to the 1980 Convention on Conventional Weapons, in order to receive complaints relating to the inadequate use of land mines. This proposal was however not agreed upon by the other States. In another instance relating to unexploded remnants of war and more particularly the discussions regarding the adoption of a new protocol, one of the essential issues was to determine the legal shape and nature of the instrument to be adopted. Some States, amongst them the United States in this case, ruled against the adoption of a legally binding instrument. Nevertheless, an international treaty was adopted on November 28, 2003.

There can also be a fear that the customary process could be interrupted or even undermined by unsuccessful treaty negotiation as well as a low level of ratifications. As stressed by Thomas Franck, the case of the ILC’s Articles on State responsibility is quite illustrative in this respect. The ILC did not ask the UN General Assembly to convene a codification conference for the adoption of a multilateral convention on the basis of these articles. This can be explained by the fear that a handful of powerful States could provoke damaging results by emptying this

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15 Thomas Franck, op. cit.
carefully prepared and balanced text of its main features.\textsuperscript{16} Also, a simple restatement (as it presently stands) can more easily produce customary international law "without anyone noticing it", especially if international adjudicating bodies begin to refer to it (as it has already been done, for example, by the International Court of Justice in the \textit{Gabčíkovo-Nagymaros Project case}\textsuperscript{17}).

The state of the Conventions on state succession which were an outcome of the ILC's work is also to be borne in mind. Indeed, these Conventions have given rise to a number of criticisms. The first part of the ILC's work on the subject led to the adoption, in 1978, of one Convention, the Vienna Convention on succession of states in respect of treaties. This Convention entered into force in 1996 and has currently been ratified by only 17 States. The rest of the ILC's work on state succession was the source of violent protest. It nevertheless gave birth to another Convention in 1982, the Vienna Convention on succession of states in respect of State property, archives and debts. The latter, however, only obtained a limited number of ratifications and it appears improbable that it will ever attain the necessary number of ratifications and accessions for its entry into force.

When the first Convention mentioned and the principles held in the second found application in the context of the Yugoslavian crisis, it was because of the alleged "codificatory" nature of these instruments and thus their customary nature.\textsuperscript{18} Noteworthy is the case relating to the application of the Convention on the prevention and punishment of the crime of genocide between Bosnia and Herzegovina and Serbia and Montenegro, which was brought before the ICJ.\textsuperscript{19} This case is particularly interesting as it provides an instance where parties (and judges in individual and dissenting opinions) argued the codificatory nature of article 34 of the 1978 ILC's Convention on state succession, dealing

\begin{itemize}
  \item \textsuperscript{16} On this point, see the comments made by Alain Pellet, in this volume, p.409-415.
  \item \textsuperscript{17} \textit{Gabcikovo-Nagymaros Project} (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, 7.
  \item \textsuperscript{18} \textit{B. Stern, La succession d'états}, R.C.A.D.I., Tome 262, 1996, 176 and seq., 224-231, and 362 and seq.
\end{itemize}
with the automatic succession of States with respect to a treaty. Although at this stage this case is disappointing in terms of the Court's developments (or lack of) with respect to state succession issues relating to the application of treaties, it nevertheless demonstrates that, where articles of the Convention were to be found as codifying customary law, the principles contained therein would find application, or, more broadly speaking, that the ILC's Convention does codify to some extent customary law. However, the low level of the number of parties to it and the scarce application of its principles in State practice might be arguments against the acknowledgement of its codificatory nature. In the context of another case brought before the ICJ, the Gabčíkovo-Nagymaros Project case, the issue of whether or not Article 34 of the 1978 Convention reflects the state of customary international law was also discussed by the parties to the dispute. The Court chose however not to enter into the discussion.

2. Treaty-making in a Vertical Perspective: the Inadequacy of a Treaty Format in the day-to-day Life of an International Organisation

International law has been creative since the 1940s with the establishment of new legal and social features named international organisations. Treaties surely play a crucial role in the establishment of these organisations, of which they are constitutive elements, in as much as a treaty determines the existence of a fully-fledged international organisation. The ILC's works on the responsibility of international organisations are interesting in this respect as the Commission had to agree on a definition for the notion of "international organisation," which states as follows:

"[An international organization] refers to an organization established by a treaty or other instrument of international law and possessing its own international legal personality [distinct from that of

20 For developments on this case in relation to State succession issues, see B. Stern, op. cit., 176 and seq.
21 Gabčíkovo-Nagymaros Project, op. cit., para. 119-123.
its members]. In addition to States, international organizations may include as members, entities other than States.”

International institutions such as the Organisation for Security and Cooperation in Europe (OSCE) or the Global Environmental Facility (GEF) lack a treaty base. This raises obstacles to their quest for being legally autonomous, although one may consider that the former has already gained such standing in practice.

Once the organisations have been created, treaties lose their first hand role in the international organisations’ development: The vertical approach metaphor refers to the fact that international organisations form legal orders built upon constitutive agreements. In its Advisory Opinion on the legality of the use by a state of nuclear weapons in armed conflict, the Court specified that:

“[...] the constituent instruments of international organisations are [...] treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.”

The legal fabric of the international organisations’ legal orders is made of various instruments, be they treaties, resolutions, recommendations and so on. Because of the verticality of these orders, there is a need for regulating instruments which do not rely on a classical inter-state treaty approach (also referred to as a horizontal approach). In this context, it

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23 The definition is the one contained in article 2 of the Draft Articles on Responsibility of International Organisations provisionally adopted so far by the Commission. For the full text of the draft articles, see the Reports of the ILC on the work of its fifty-fifth session (Doc. A/58/10).


26 Ibid., par. 19.
is interesting to look at instruments of a quasi-administrative kind, which are rather specific as to their nature and effects. They are documents produced or promulgated by the organisations' Secretariats for internal purposes. They also produce legal and policy effects outside the organisation. This is due to the international nature per se of international organisations. Noteworthy is the fact that such instruments could never achieve their purpose through a treaty format as their enactment is mostly due to the hierarchical nature of the organisation and the ensuing "chain of command".

The Case of the World Bank (WB) Operational Standards

The WB operational standards were originally developed for internal use by the Bank to guide its staff in its activities and to increase the quality of its work. They were seen as internal soft law documents to be used by the staff involved in operational activities. They have progressively gained a new status, being increasingly considered as a benchmark for assessing the Bank's conduct in its relations with its partners, who are the borrowers as well as the people who are the ultimate beneficiaries of the projects financed by the institution. Hence, the Bank has developed a practice of asking for their respect and implementation through their incorporation in loan and credit agreements negotiated between the Bank and the borrowers. A nexus is thereby established between standards elaborated within an organisation and treaties negotiated between an international institution and a borrowing country. The Bank has even put in place a compliance mechanism with investigatory powers, i.e. the Inspection Panel, to ensure respect for the WB operational standards. This Panel was granted the competence to receive and, subject to the approval of the Bank's Board, investigate complaints from groups of individuals whose rights or interests have been or are likely to be directly or adversely affected by the Bank's failure to comply with these standards. What is even more interesting is


29 Ibid., par. 12.
that, for a long time, these standards were not formally adopted by the executive organ of the Bank, i.e. the Board. The Management is in fact their main author. However, because of the external effect of these standards, a practice was gradually put in place allowing the Board to be involved in their adoption, acknowledging thereby their role in the international order.

The Case of the UN Secretary-General Bulletin

Reference can be made to the UN Secretary-General Bulletin of 6 August 1999, which sets out the rules and principles of international humanitarian law applicable to UN forces. The aforementioned bulletin can be regarded as a kind of “administrative act” producing “internal” legal effects on UN troops. It was promulgated by the Secretary-General in his capacity of commander of the UN forces. However, at the same time, this bulletin produces “external” legal effects on States participating to UN operations, and also on States where UN operations are deployed.

Admittedly, the main intention of the Secretary-General was to identify existing law, by reference to the major conventions on international humanitarian law codifying customary law. Nevertheless, the promulgation of this bulletin has also been a legislative exercise in many respects. For example, the bulletin blurs the distinction between international and non international armed conflicts as far as applicable rules are concerned, so contributing to the current trend towards the development of a unique body of law governing international and non international conflicts.

The powers of the Secretary-General as commander of UN forces operations have enabled the clarification and development of existing law by the adoption of a non-conventional instrument that remains binding, at least internally, i.e. on the UN forces led by the Secretary-General. However, this possibility does not seem to exist in relation to

other issues of international humanitarian law, such as the development of a consistent body of law applicable in case of internal disturbances.

The Case of the Operational Guidelines of the World Heritage Committee

One can find yet another example in The Operational Guidelines of the World Heritage Committee,\(^3\) that concern the implementation of the World Heritage Convention adopted by the General conference of UNESCO in 1972. The Guidelines are elaborated by the World Heritage Committee\(^2\) and are a sort of "administrative act" that should guide the Committee in taking decisions under the Convention. For example, they specify the criteria permitting to assess whether a cultural or natural property is of "outstanding universal value" and can therefore be placed in the World Heritage List. Being internal documents, they nevertheless produce external effects, merely by shaping the criteria to be referred to by States parties to the discussions with the Committee and by influencing the decisions taken by the Committee.

3. A Multidimensional Perspective: an Evolving Role for Treaty-making in a Globalised World

Needless to recall that globalisation takes place in an environment of varying dimensions. It generates law that is no more only horizontal or vertical in nature, but rather appears as a spider web, multi-dimensional, filled with diversity.

It is worth recalling some of the legal and policy features of globalisation — that is to say deregulation, the weakening of the concept of territorial sovereignty's relevance and the diversity of actors involved in international activities (States, international organisations, NGOs, individuals) — in order to understand the evolving role of law-making through treaty. Globalisation also possesses dynamic features: fluidity, flexibility and various temporalities (in the sense that law has to adapt

\(^3\) The text of the Operational Guidelines can be found on the UNESCO's website, at: <http://whc.unesco.org/nwhc/pages/doc/main.htm>.

itself to the diverse features of time). In such context, the treaty is no more the written instrument “by definition” for regulating international relations. An important place is left to usage and practice.

It is interesting to note that, already since the 1970s, in some areas such as commercial law and investment law, usages and practices of private actors gained an international status. In this respect, one can observe the references made to the lex petrolea in the Arbitral award in the Aminoil Case:

“The Government of Kuwait makes a financial claim against the Aminoil based on an allegation according to which the Company was said to have failed in respect of certain usages applicable to the technological operation of the undertaking. These usages make up a body of rules of “good oil-field practice.”

The Tribunal goes on to examine whether these “good practices” were followed. Further, it is mentioned that:

“These precedents, it was claimed, had generated a customary rule valid for the oil industry – a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria [...] The Tribunal cannot share this view, for reasons of fact, as of law.”

The reasons given by the Tribunal for rejecting Kuwait’s argument on this point was, with regard to reason of fact, linked essentially to the lack of publicity that preceding contracts would entail and the fact that, in this particular case, all relations between the parties were severed, contrary to usual practices in this field. With respect to law, the Tribunal considered that for precedents to be used in such a way as to constitute a customary rule, they would need to constitute an expression of the opinio juris, which the Tribunal found it did not.

The commercial area and the conventions adopted under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) in particular are also noteworthy. For instance, the 1980

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34 Ibid., para. 155-156.
35 For the texts of the Conventions, see the UNCITRAL’s website at: <http://www.uncitral.org/en-index.htm>.
36 On the subject of the treaty being the vehicle for a public/private partnership but in another field of practice than commercial trade, one can cite an example drawn from the 1990 agreement establishing the European Bank for Reconstruction and Development. Indeed, Article 2 of the agreement provides
United Nations Convention on contracts for the international sale of goods holds several references to commercial usages. Its article 8 par. 3 for example, establishes that:

“In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.”

Further, article 9 provides that:

“the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves (par. 1). The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned (par. 2).”

One can also cite article 13 par. 2 of the 1995 United Nations Convention on independent guarantees and stand-by letters of credit, which mentions that:

“regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.”

In turn, article 11 par. 3 of the United Nations Convention on the assignment of receivables in international trade, adopted in 2001, provides that:

“In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, implicitly to have made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type

that in order “to fulfil on a long-term basis its purpose”, it will “promote, through private and other interested investors the establishment, improvement and expansion of productive, competitive and private sector activity, in particular small and medium-sized enterprises”.

37 In this convention, reference could also be made to article 4, 18 par. 3, 32 par. 2 or 55.

38 Article 8 par. 1 which refers to article 7 par. 2 of the convention; article 14 par. 1 or article 16 par. 1 are also good examples of references to usage and private practice.
of assignment or to the assignment of the particular category of receivables.”

As above mentioned, the globalisation process is spreading to all fields of international regulation, thus bringing with it its characteristics. The field of information technology is a good example to demonstrate the interactions among various actors, be they public or private.

The current developments in the field of the so-called “lex electronica” are quite filled with practices developed by non-state actors. In this case, it is doubtful whether treaty-law can satisfy the need to elaborate promptly global, highly technical regulations in a constantly evolving field. Instead, some principles are being established in a progressive manner by arbitrators, particularly by on-line dispute settlement organisms that are currently being created, and others through professional associations dealing with domain names and other issues.

Another characteristic of globalisation is co-regulation in the sense that instruments deriving from various actors should be perceived as creating mutual connections and interplay. As an example, treaty negotiation may occur after practices have been developed by practitioners and professionals. The treaty will aim at encapsulating the main legal features of a regime, while making reference to practices and usages as well as acknowledging the role played by normalisation organisms. In other words, regulation in the context of globalisation is somewhat based on the concept of public/private partnership with the treaty being the vehicle for “public issues” and inducing reference to operators’ practices.

Globalisation also means various actors coming together, in particular through the international association of public and private actors. As such, the Global Compact is a particularly contemporary and noteworthy example.

The Global Compact was born from an initiative launched by the UN Secretary-General in 1999, in view to enable the implementation, by participating private entities, of several universally acknowledged prin-

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40 For more information on the Global Compact, see its website, at: <http://www.unglobalcompact.org>.

41 United Nations’ Secretary-General Kofi Annan first suggested the idea of the Global Compact during the World Economic Forum of 1999.
Evolving Structure

477

principles, ranging from environmental issues to human rights and emanating from treaties and customary law.\textsuperscript{42} The idea is having internationally operating private actors engaging themselves by promising to respect the said international law principles and participating to various initiatives aiming at dealing with globalisation issues. This initiative aims to give a "social and human face to globalisation."\textsuperscript{43} The Global Compact is particular in that it is perceived and described not as an institution based on a hierarchical premise, but as a network, permitting the cooperation and implication of these various types of actors, most notably the important private companies and a few United Nations agencies, and also workers' representatives, civil society's organisations and academic institutions.

The Global Compact offers two main features that make it particularly attractive as a complement as well as an alternative to treaty-making. Firstly, the mere fact that it enables, through the construction of a workable "network", the integration, at an international level – and what is more, through and with the United Nations – of private entities and the said United Nations. Secondly, through this initiative, the United Nations aims at promoting and implementing what is recognized as extremely important principles of international law through a mechanism that revolves around an application of these principles by the private entities that have committed to them, instead of using traditional tools of normative development.\textsuperscript{44} The network thus also enables the development and implementation of principles forged in inter-State fora by non-state actors.

Finally, a parallel should be drawn with domestic law. We know that domestic law encounters many difficulties in acting authoritatively on autopoietic systems, \textit{i.e.} self-regulating systems. This factor, as well as the failure and the undesired results of some authoritative public policies, partially explain the emergence, at the domestic level, of "reflexive

\textsuperscript{42} On the development of the Global Compact and its implications, see Frédérique Hagner, Le Global Compact: l'implication d'une multiplicité d'acteurs dans la mise en œuvre du droit international, \textit{R. Mehdél/L. Boisson de Chazournes} (eds), Une société internationale en mutation: quels acteurs pour une nouvelle gouvernance?, Bruylant (forthcoming).

\textsuperscript{43} \textit{Ibid.}

\textsuperscript{44} \textit{Ibid.}
law", that is a form of law that tries to associate private actors in the elaboration and implementation of legal rules.\footnote{Charles-Albert Morand, Le droit néo-moderne des politiques publiques, L.G.D.J., 1999, 132 et seq.}

A relevant example in this context is Switzerland’s regulation in financial areas and in the field of money laundering specifically. In this area, the regulation regarding banking supervision is particularly interesting. Although the supervision is based on well-developed legal standards, numerous elements of the said supervision also emanate from other technical standards deriving from sophisticated means of self-regulation. The Swiss Bankers Association (SBA) is particularly noteworthy as an example of a financial authority derived from self-regulation. Indeed, the SBA, founded in Basel in 1912, is the leading professional organisation of the Swiss financial centre, whose main purpose is to maintain and promote the best possible framework conditions for the Swiss financial centre both nationally and internationally. The normative framework is essentially constituted of different kinds of recommendations, guidelines or even conventions. The most important convention of the genre is the Agreement on the Swiss Banks’ Code of Conduct with regard to the exercise of due diligence (CDB 98),\footnote{Agreement on the Swiss Banks’ Code of Conduct with regard to the exercise of due diligence of 28 January 1998 (CDB 98). For more information on the Code of Conduct, see the Swiss Bankers Association’s website, at: \url{http://www.swissbanking.org/en/home/allgemein.htm}} binding the Swiss Bankers Association and the signatory banks. The CDB creates an important parallel with the national legislation on money laundering as it particularly aims at materialising the financial intermediary’s duties of due diligence provided for in the money laundering Act\footnote{See articles 3-8 of the Swiss Federal Act on the Fight Against Money Laundering in the Financial Sector (MLA), RS 955.0 and article 1 CDB.} and even more specifically – and for example – the “know-your-customer” rule. Although the CDB remains a document issued by the SBA in the context of self-regulation, it must be considered as an obligatory requirement under the Swiss money laundering legislation. Another interesting aspect of the self-regulating system is that the SBA does not only draw up the various conventions and guidelines, but also monitors the banks’ compliance with the codes of conduct.\footnote{Compliance with suggested guidelines is however not mandatory, hence the SBA leaves such compliance to banks’ discretion.}
In doing so, the ASB acts in strong collaboration with the Federal Banking Commission.\footnote{The Federal Banking Commission (FBC) is, at the national level, the single surveillance authority instituted by law.}

International law is moving in a similar direction, by increasingly incorporating or referring to means of self-regulation to develop itself. The question then becomes: are treaties adequate instruments to produce reflexive law? I submit that they may be, but probably, at least in some cases, only in combination with other instruments. The treaty-making power may have to be remodelled by closely associating private parties to the process. In this context and in a more general perspective, transparency and accountability should be emphasised so that the processes are known and the involved actors can be held accountable. This reveals the need for developing a "constitutional approach" (i.e. a truly rule-based system) for international law. It would help identify stronger standards, rules and criteria that can strengthen the legitimacy of law-making and decision-making processes at the international level. Such an approach would also lead to the development of legal and policy mechanisms for promoting and safeguarding public interest values to be respected by all subjects and actors of the international order.\footnote{On this perspective, see Daniel Thürer, The Emergence of Non-governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State, in R. Hoffmann (ed), Non-state Actors as New Subjects of International Law, 1999, 53 et seq.}