



The legal operating system of global capitalism

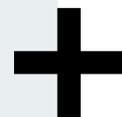
Karen J. Alter

Norman Dwight Harris Professor of International Relations

Northwestern University

Who I am as a scholar

I believe it is the occupational responsibility of political scientists to pay attention to distribution (who wins, loses, and is left out)



Trained in Political Economy at MIT (Polisci Phd 1996)

Phd research focused on legal topic (Establishing the Supremacy of European Union Law)

I am deeply interdisciplinary- polisci, law, history, sociology

Qualitative methods, using field work

A cutting-edge dinosaur who also speaks legalese

What I am known for as a scholar

Being an
IR/IL scholar

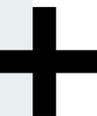
European
Union legal
Politics

Comparative
international
courts

International
regime
complexity

Backlash
politics

Global
capitalism
and law



Outline

1

Categories of
International Law:
A Primer

2

Alter/Meyer
argument about
how legal form
matters

3

What it means
that a “regime
complex”
regulates the
global economy



What I will say today that is unconventional

With respect to global economic law, the traditional categories of domestic/international law are misleading.

- Dom/int'l binary obscures how global economic law works
- The traditional public/private law binary also doesn't work

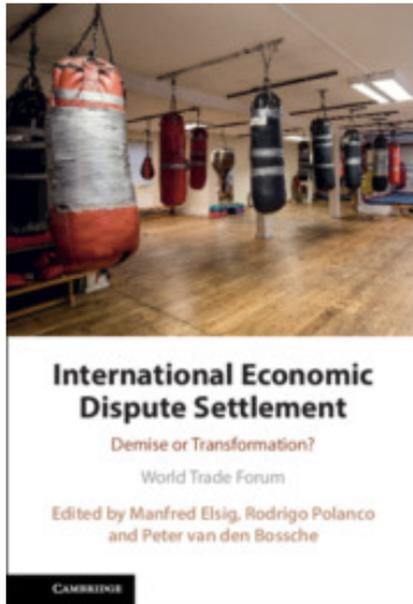
Global economic law is the encompassing category of the laws that regulate the global economy

Global economic law operates as an international regime complex



1

Categories of International Law: A Primer



International Journal of Constitutional Law

From colonial to multilateral international law: A global capitalism and law investigation FREE

Karen J Alter ✉

International Journal of Constitutional Law, Volume 19, Issue 3, July 2021, Pages 798–864, <https://doi.org/10.1093/icon/moab082>

Published: 30 September 2021

2 - Contracting v. Multilateralism in Global Economic Governance

Before, During and After the WTO

Published online by Cambridge University Press: **07 August 2021**

By [Karen J. Alter](#)

Edited by [Manfred Elsig](#), [Rodrigo Polanco](#) and [Peter van den Bossche](#) [Show author details](#) ▾

A couple of terms I will use

Legalized = an agreement that is written in the form of law

- Legally binding, and recognized as such by the legal community
- May or may not be enforceable in practice

Legalization is attractive because law is internationally portable

Judicialized- when a legal agreement is truly enforceable, then bargaining and politics takes place in the shadow of law

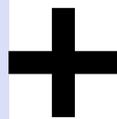
Mnookin, R., & Kornhauser, L. (1979). **Bargaining in the Shadow of the Law: The Case of Divorce.** *Yale Law Journal*, 88, 950-997.





1

Categories of International Law: A Primer

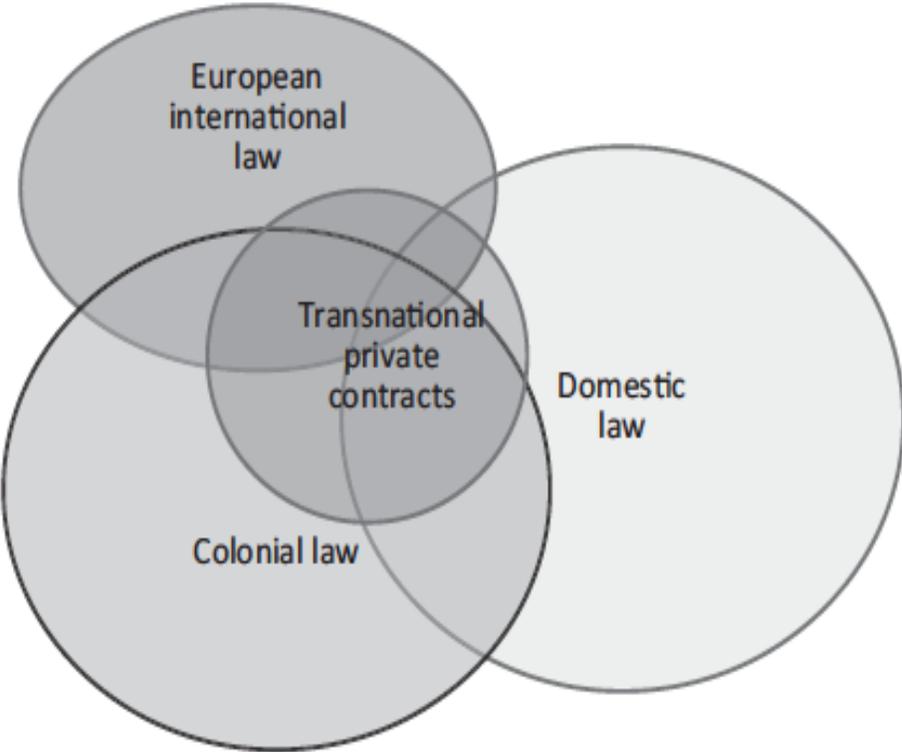


Domestic law is
always “hard”

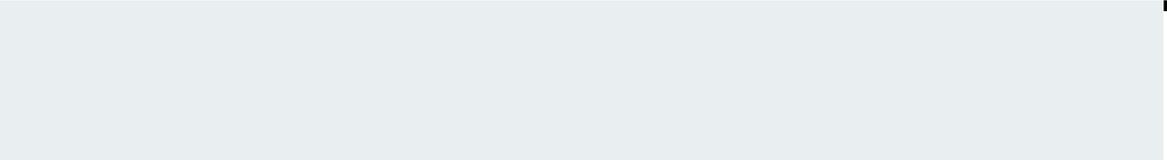
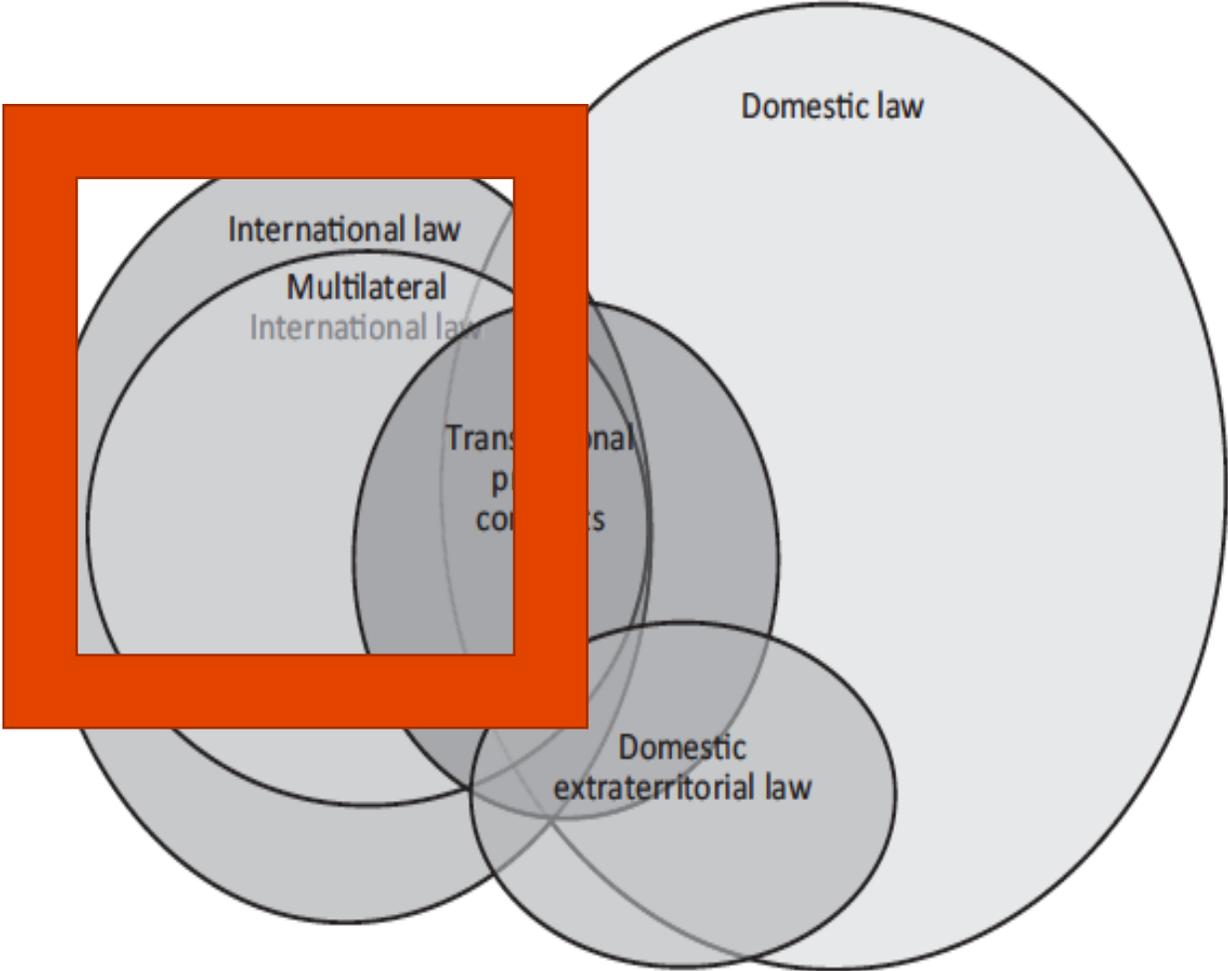
IL can be soft or
hard. I am focusing
on hard law.

Global Economic Law: A Hard Law Primer

Colonial era



Multilateral era



International Law Today:

ICJ Statute Article 38

This is a western view

Treaties- Bi-lateral, minilateral, multilateral

Customary International Law (CIL)

General Principles of International Law

As interpreted by international adjudicators

ICJ, ECtHR, CJEU,
WTO AB, Int'l
Arbitration

UNSC, EU

+ International actors can generate binding rules & laws



The IL World According to China (aka Authoritarian Int'l Law)

Treaties- Bi-lateral, minilateral, multilateral

~~Customary International Law (CIL)~~

~~General Principles of International Law~~

~~As interpreted by international adjudicators~~

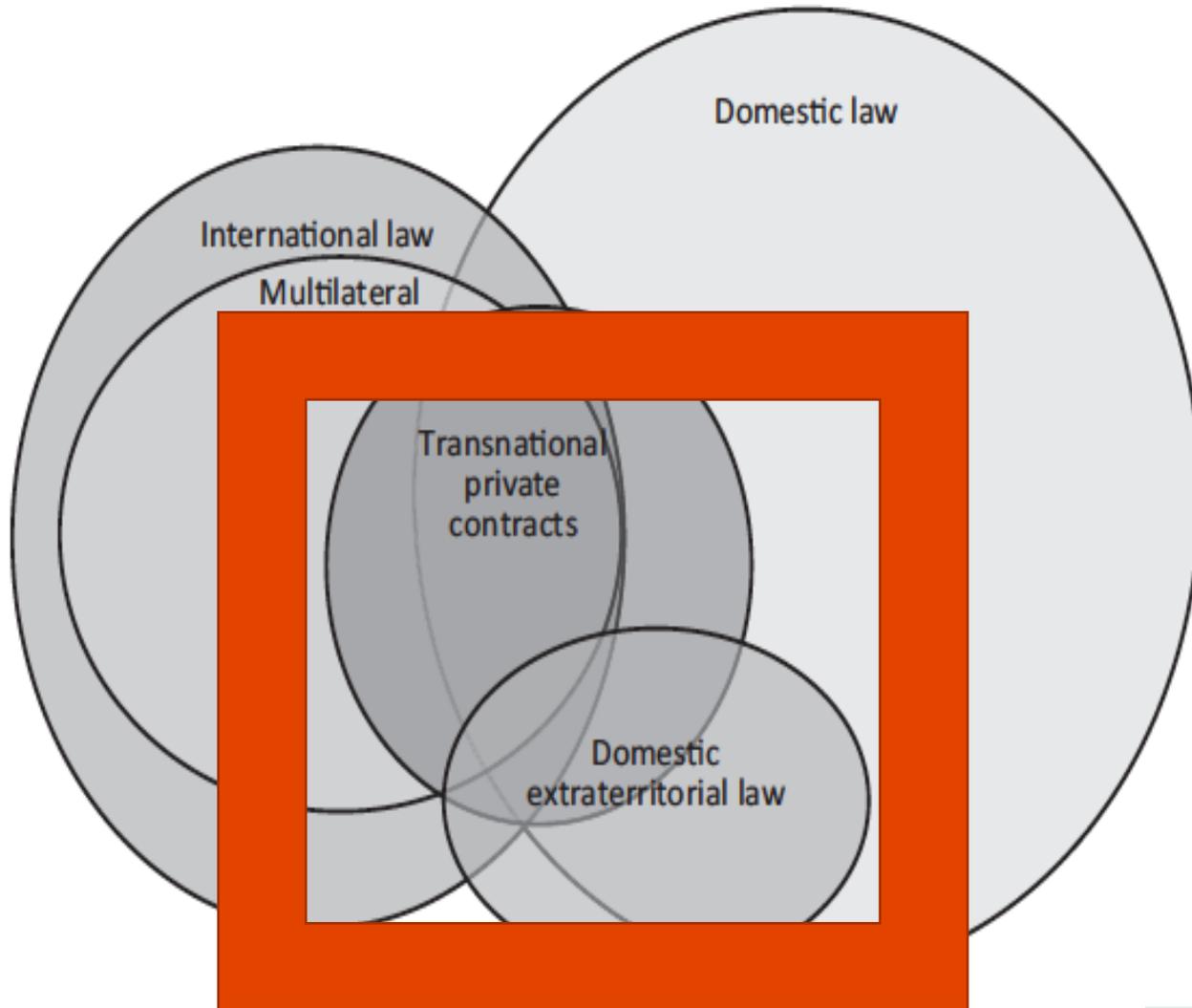
UN Security Council can generate binding laws

The World According to Business



Global Economic Law: A primer

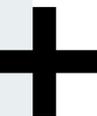
Multilateral era



The World According to Business

Mostly domestic law & contracts

But also—
OECD Bribery convention
Bilateral tax treaties



(Hard) Global Economic Law Today

See handout for more details

Categories

- Multilateral agreements (general principled obligations) 
- Bi-lateral & unilateral agreements (specific reciprocity) 
- Contracts (firm/firm, state/firm) 

Substantive Law

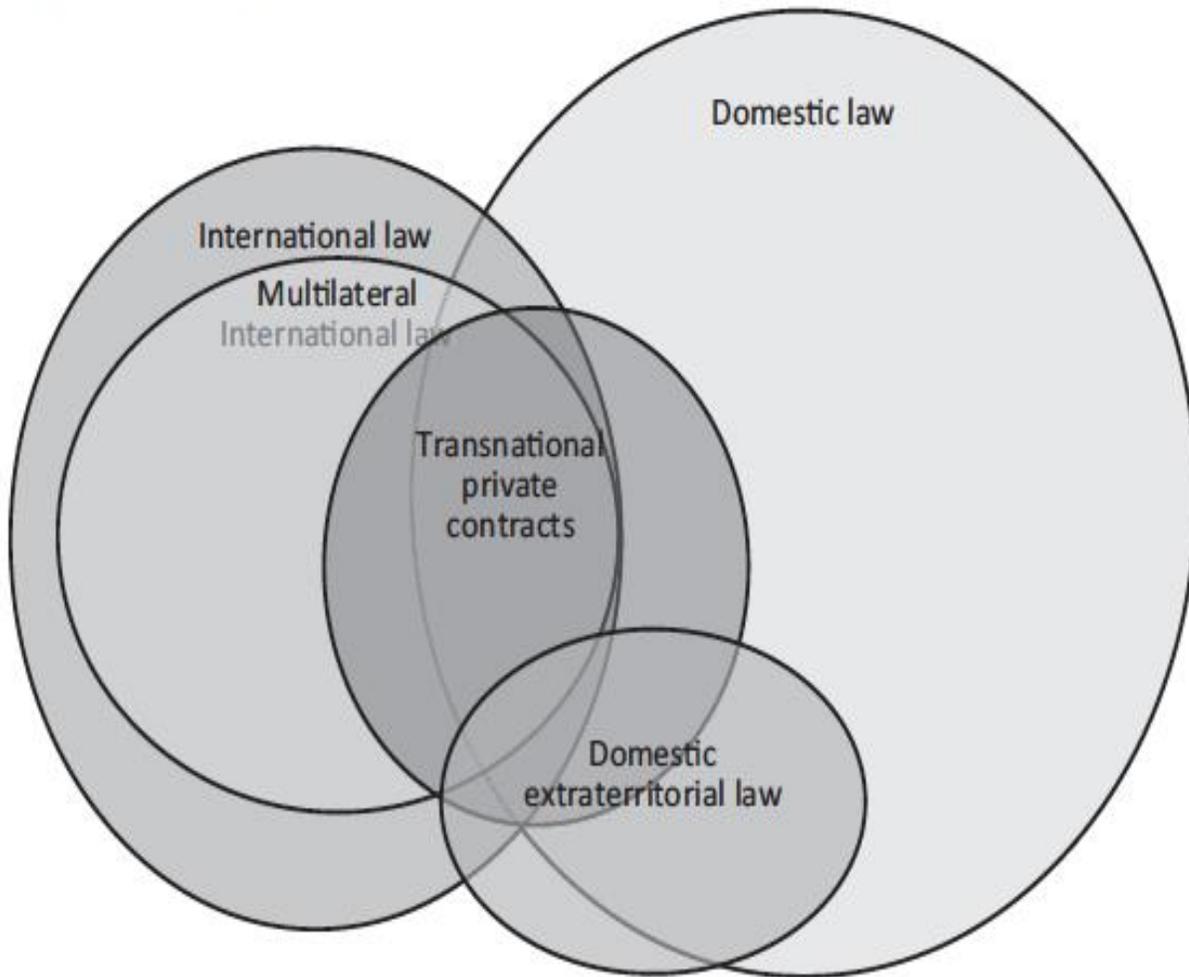
- WTO (trade), ICSID (investment), New York Convention (arbitration)
- BITs (investment), BRI (investment), PTA (trade + sometimes investment & IP)
- Commercial arbitration world

Foreign investment = contracts + BITS + ICSID



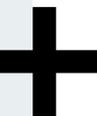
The Legal Operating System of Global Capitalism

Multilateral era



A global economic regime complex:

- More than standard IL category
- Different actors create the rules in each circle
- States choose how to bind themselves and their nationals
- Rules are layered, variegated, patchwork & full of lacunae
- Firms prefer binding & enforceable contracts
- Multiple types of lawmaking= states/firms have options. Choice advantages the powerful.



Simple Take Away

1. There are a number of different ways to generate binding & enforceable global economic law
2. The world of IL presents different faces
 - China's IL world is authoritarian & circumscribed
 - Business' IL is self-interested & partial
3. Choice empowers
 - *Firm level*: Race to top (sovereign debt) & race to bottom (flags of convenience)
 - *State level*: bilateralism & BRI as neo-imperialism
4. Governing via a “regime complex” generates substantive & accountability lacunae



1

Categories of International Law: A Primer

Globalization problems are generated by the variegated legal operating system of global capitalism. States have choices, but so do other actors.

2

Alter/Meyer
Argument about
how legal form
matters

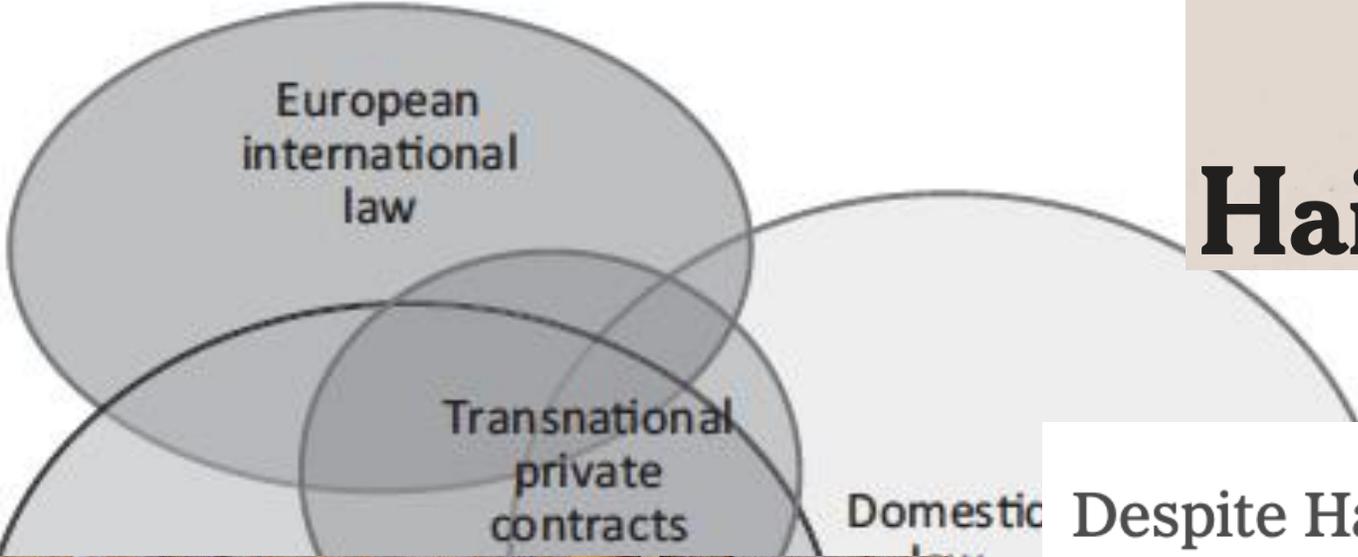
Contracting v. multilateralism

The Legalization of Global Economic Governance:
Contracting or Multilateralism?

Karen J. Alter
Northwestern University

Timothy Meyer
Vanderbilt Law School

Colonial era



The New York Times

THE RANSOM

Haiti's Lost Billions

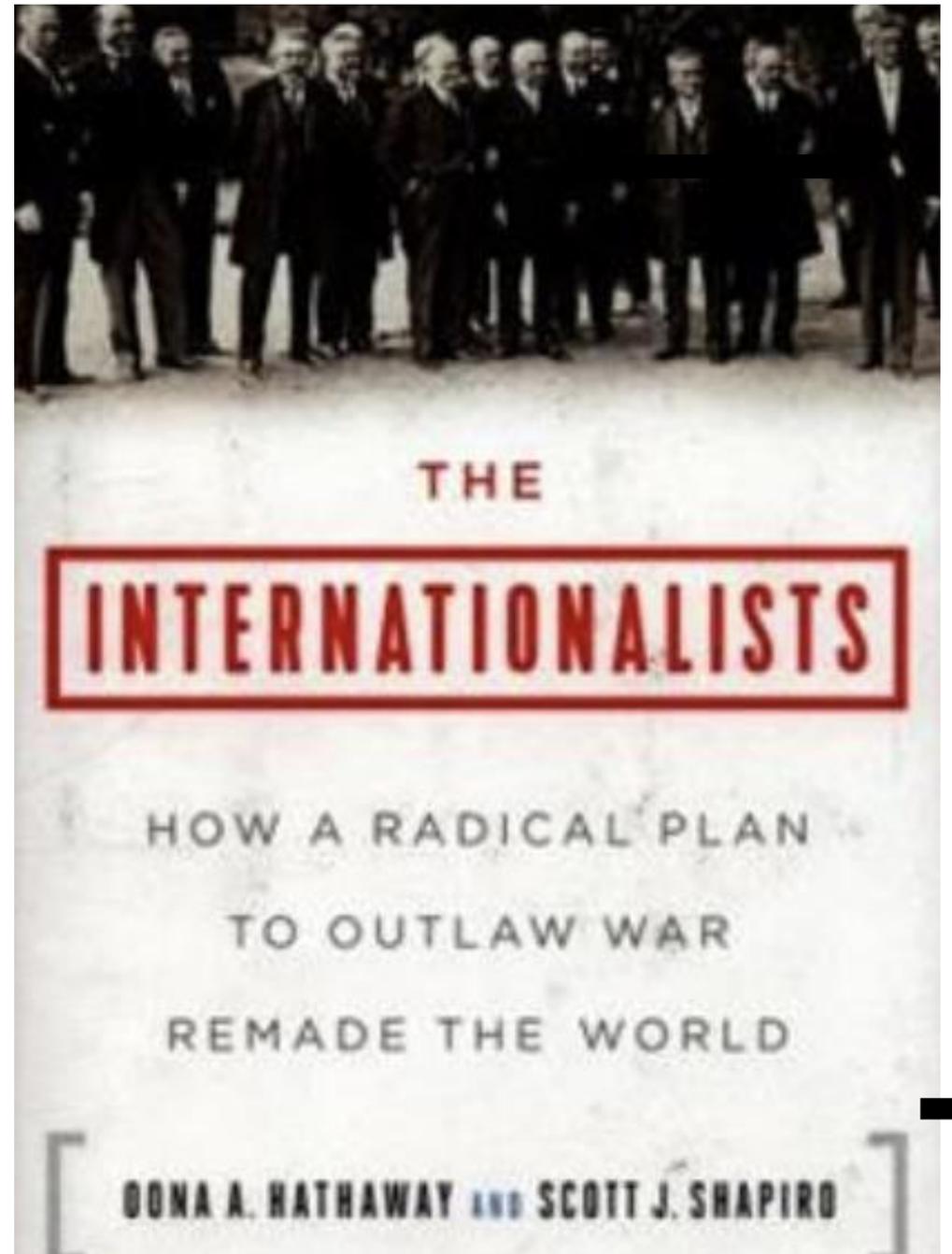
May 20, 2022

Despite Haiti's troubles, France made sure its former colony kept paying. It sent warships again, threatening to bomb the country's ports.



Multilateral era substitutes law for force

- From a much abused system of private contracting & colonial rule
- To:
 - ➔ Law-based contract enforcement
 - ➔ Interstate contracting (aka bilateralism) to address issues that used to be solved by gunboat diplomacy
 - ➔ Principled multilateralism (perhaps) changes nature of global economic governance



The Three Ideal Types

Of global economic law

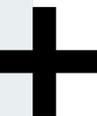
Transnational private
contracting (firm/state)

Interstate contracting
(bi-lateral &
minilateralism)

Principled
Multilateralism (Sub-
category of IL)

Contracting: A perform or pay logic

- 1. Contracts are legal promises.**
Choose law. Choose adjudicatory forum. Either perform or pay.
- 2. State power always stands behind a contract**
 - States set the bounds of legal contracting (e.g. no slave labor, no selling babies)
 - Private contracting = States defer to private actors to define rules of exchange & dispute settlement
 - States lend coercive power to contract enforcement



Private & inter-state contracting

Transnational private contracting

Choice of law and choice of forum

- Contract writers set terms, select judges, and rely on decentralized enforcement
- Model extended to firm-states contracts

Problem cases: Sovereign debt contracts, vulture funds, concession agreements

Both follow perform or pay logic

Inter-state contracting (aka bilateralsms)

Limits choice of law; may limit choice of forum

- *Can* address problematic outcomes of private contracting system
- *Can* require a multilateral dispute adjudication with greater oversight

Yet

- states can also let private contracting operate
- Inter-state contract can be Mercantilist/Power-based or enforced by direct reciprocity



Principled Multilateralism

(alla John Ruggie)

- An institutional form for making global agreements that differs from bi-literalism & imperialism
- Principled multilateralism comes with corollaries:
 - **Equality**– Same system of rules for weak and strong
 - **Diffuse reciprocity**: rule of law logic (erga omnes obligations of law)

Features associated with multilateralism

Multilateralism traffics in the currency of legality

legal behavior = respect for multilateral principles

Compared to contracting, multilateralism is more public

Agreements more accessible

Individuals and groups can be non-party stakeholders with participation & legal rights

Individual treaties become part of a system of international law

Ruggie, J. (1993). *Multilateralism: The Anatomy of an Institution*. In J. Ruggie (Ed.), *Multilateralism Matters* (pp. 3-47). Columbia University Press. Also in *International Organization*



All 3 forms can, will
and should co-exist,
so what is the real
question?

+

What is at stake
here? Why does
the legal form
matter?

Alter/Meyer concern: Is the public interest sufficiently protected?

Negotiation stage

- 1. To whom are duties owed?** *This is a formal legal question*
 - The assumption is that states are protecting public interests, but is this a realistic assumption?
- 2. Who can be legally excluded from consideration ?**
 - Who gets to make the agreement?
 - Who can be excluded from negotiation & implementation discussions?

Consequences of breach (aka enforcement)

Inclusion: for contracts, only parties to the agreements have duties and rights under the agreement

Exclusion: Whose interests are excluded from consideration when the agreement is litigated so as to be enforced?



Table 1: A preview of the three ideal types

	<i>Private contracting</i>	<i>Inter-state Contracting</i>	<i>Multilateralism</i>
<i>To whom are duties owed?</i>	Contracting parties: commercial entities and state counterparts. Public concerns are mostly excluded.	Two or a few additional states; sometimes rights extend to the countrymen of contracting states.	Narrow or public facing duties that extend to all state parties; participation, observation and enforcement rights may extend to stakeholders and effected private and group entities
<i>Consequences of breach</i>	Pecuniary compensation for harms → <u>pay</u> or perform calculation	Abrogation of contractual benefits; sometimes pecuniary compensation for harm → perform, <u>break</u> or pay calculation	Public findings of noncompliance that can generate sanctions and legal liabilities; damage to diffuse reciprocity expectations → reputational, <u>outcasting</u> and material repercussions
<i>Exclusion</i>	All non-parties are excluded	All non-parties are excluded	Maybe a select exclusion where both desirable and practicable



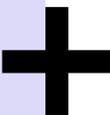
Legal form simple take away

1. As voluntary commitments, a rule is a rule. Law is different. Law is binding & enforceable (in theory).
2. The realistic possibility of enforcement judicializes the negotiation context
 - Legal forms are not functional substitutes
3. The type of legal agreement defines to whom duties are owed
4. Contracting by design excludes actors & interests
5. Multilateralism is:
 - More likely to be inclusive of weak powers & interests
 - More likely to generate diffuse reciprocity
 - Is a legal form that can generate a rule of law logic
 - Is the best chance of avoiding neo-imperialism.



2

**Alter/Meyer
Argument about
how legal form
matters**



3

The Politics of International Regime Complexity

Karen J. Alter and Sophie Meunier

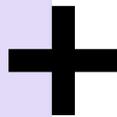
Perspective on Politics, 2009

What it means
that a “regime
complex”
regulates the
global economy

Annual Review of Law and Social Science

The Rise of International Regime Complexity

Karen J. Alter^{1,2} and Kal Raustiala³ 2018



What is an international regime complex?

Regime complexes may or may not be legalized

Regime Complex: An array of elemental institutions with an authority claim for a particular issue area or territory.

- Elemental institutions may be multilateral, mini-lateral, bilateral, public and private (e.g. foundations)

International regime complexity refers to international political systems of global governance that emerge because of the coexistence of rule density and regime complexes

- Institutions can self-organize to create order, but layering, regime shifting, forum shopping and contested multilateralism is also possible

Alter, Karen J., and Kal Raustiala. 2018. The Rise of International Regime Complexity. *The Annual Review of Law and Social Science* 14: 329-49.





Legal ideal- an ordered system

Ex. Law of Seas

multilateral

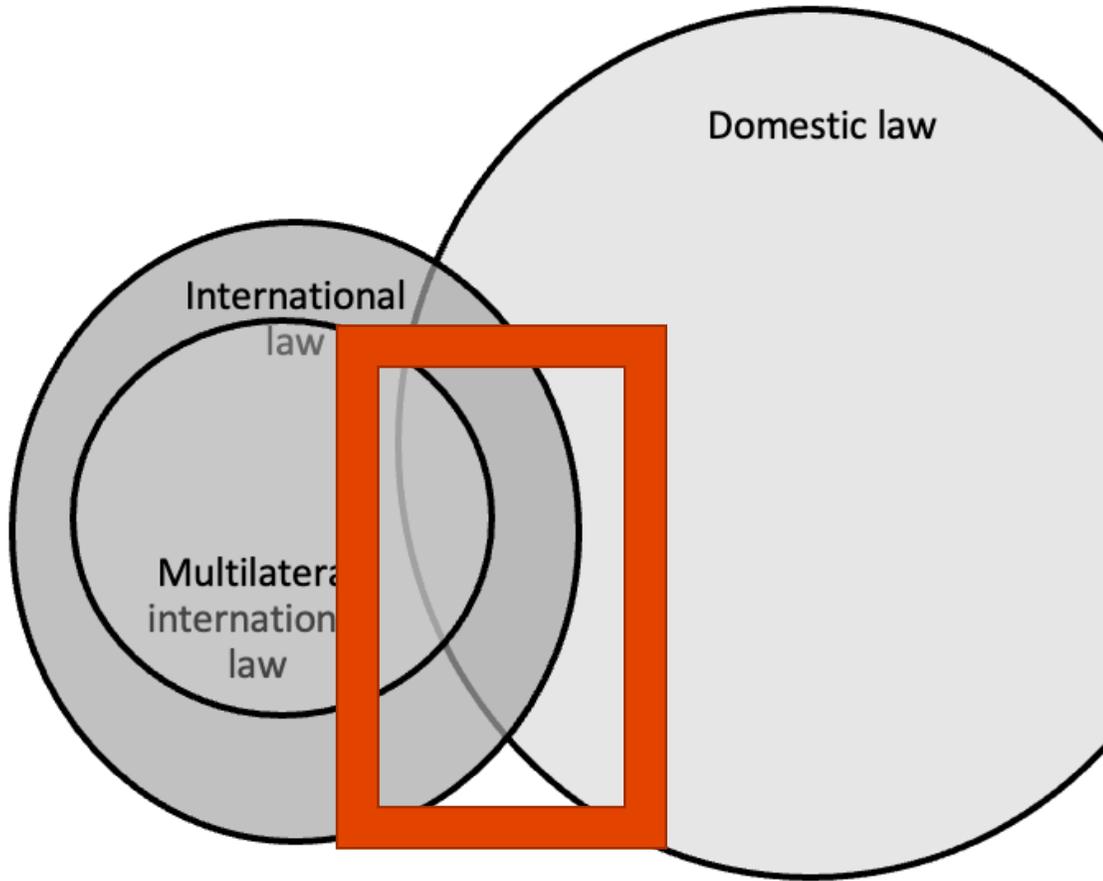
- Focal law is defined internationally

Bilateral/minilateral

- Plus agreements- add but do not contradict multilateral

Domestic

- Implementing legislation of IL



multilateral

- Focal law is defined internationally

Bilateral

- Plus agreements- add but do not contradict multilateral

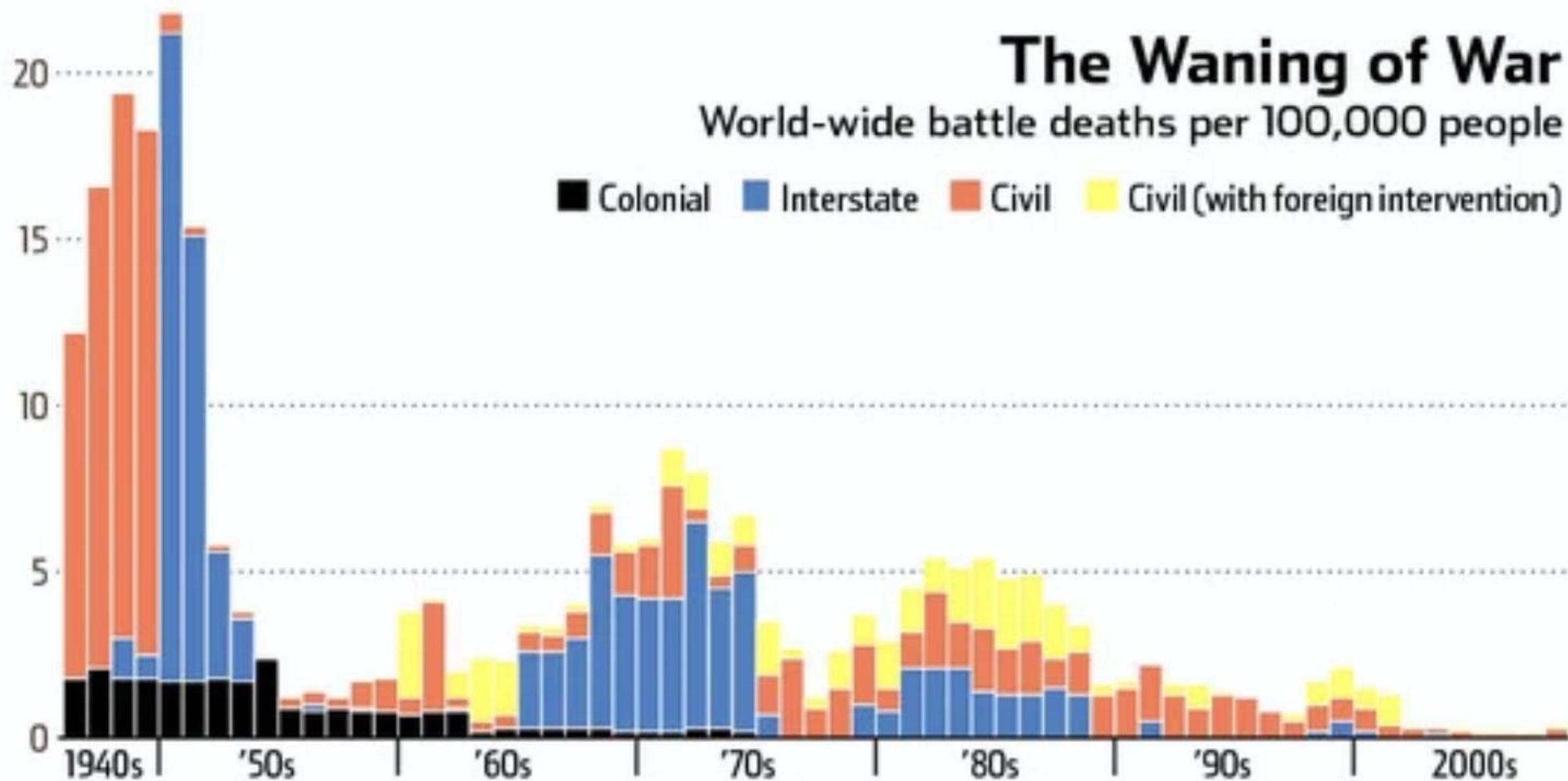
Domestic

- Implementing legislation of IL

The Waning of War

World-wide battle deaths per 100,000 people

■ Colonial ■ Interstate ■ Civil ■ Civil (with foreign intervention)

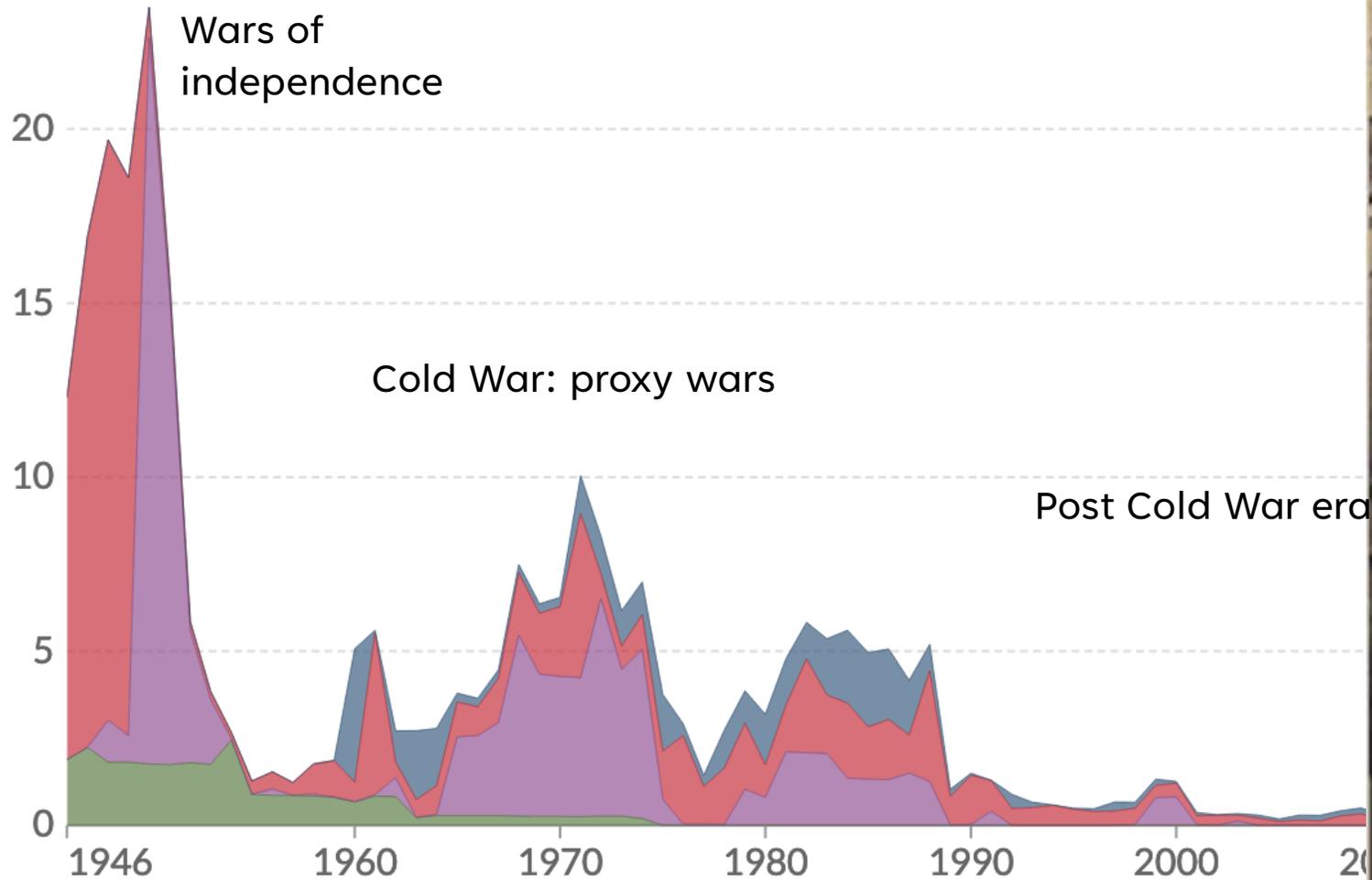


Source: Human Security Report Project, the Uppsala Conflict Data Project, and the Peace Research Institute of Oslo

A chart showing war on the decline

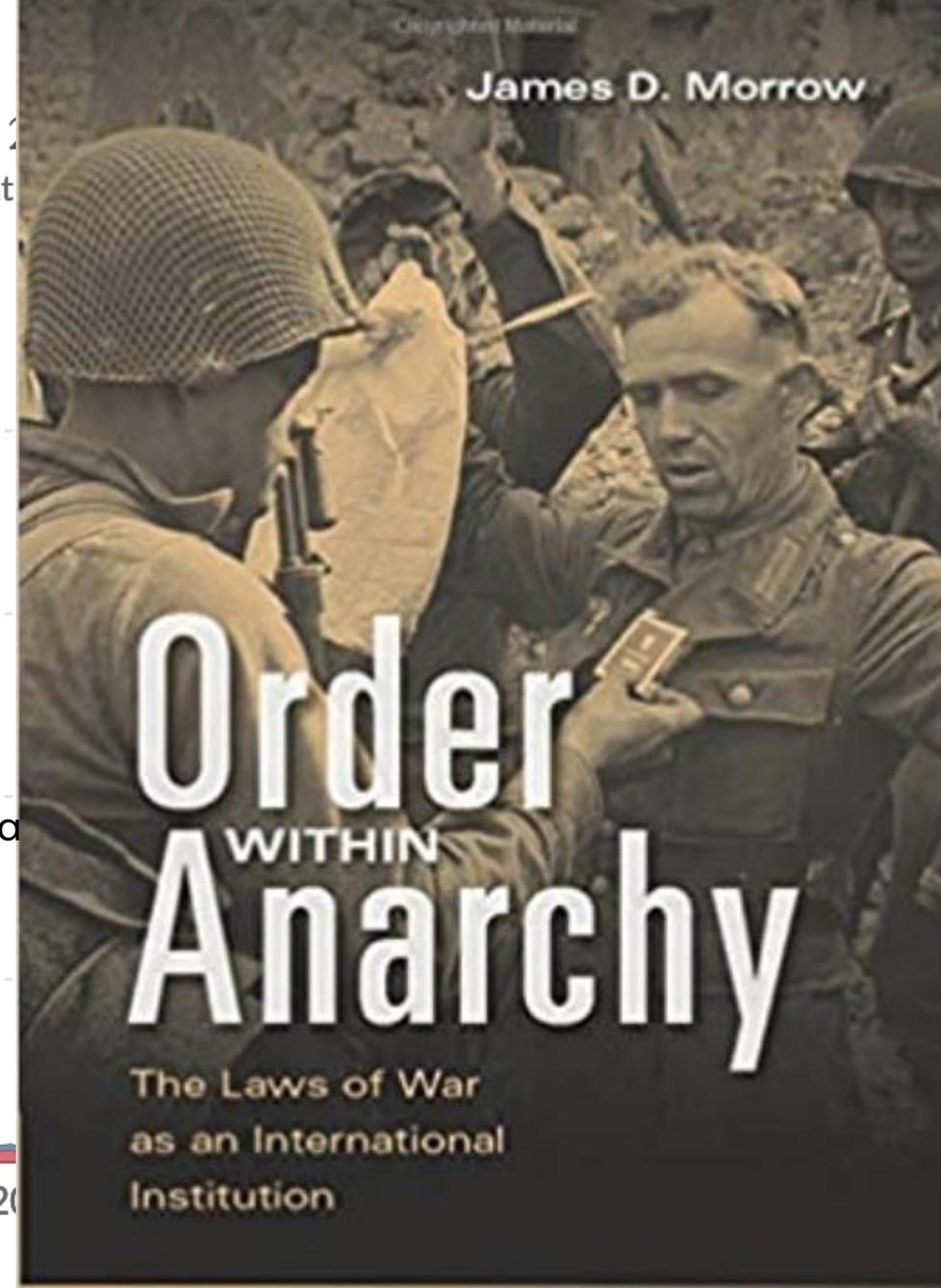
Deaths in state-based conflicts per 100,000, 1946 to 2019

Civilian and military deaths in conflicts where the government of a state was a participant on at least one side. The data counts only direct violent deaths (i.e. excluding deaths from disease or famine).



Source: OWID based on PRIO and UCDP

Note: The figures shown aggregate the sources' 'best' estimates for deaths in individual conflicts, or the mid-range where no best estimate is provided.

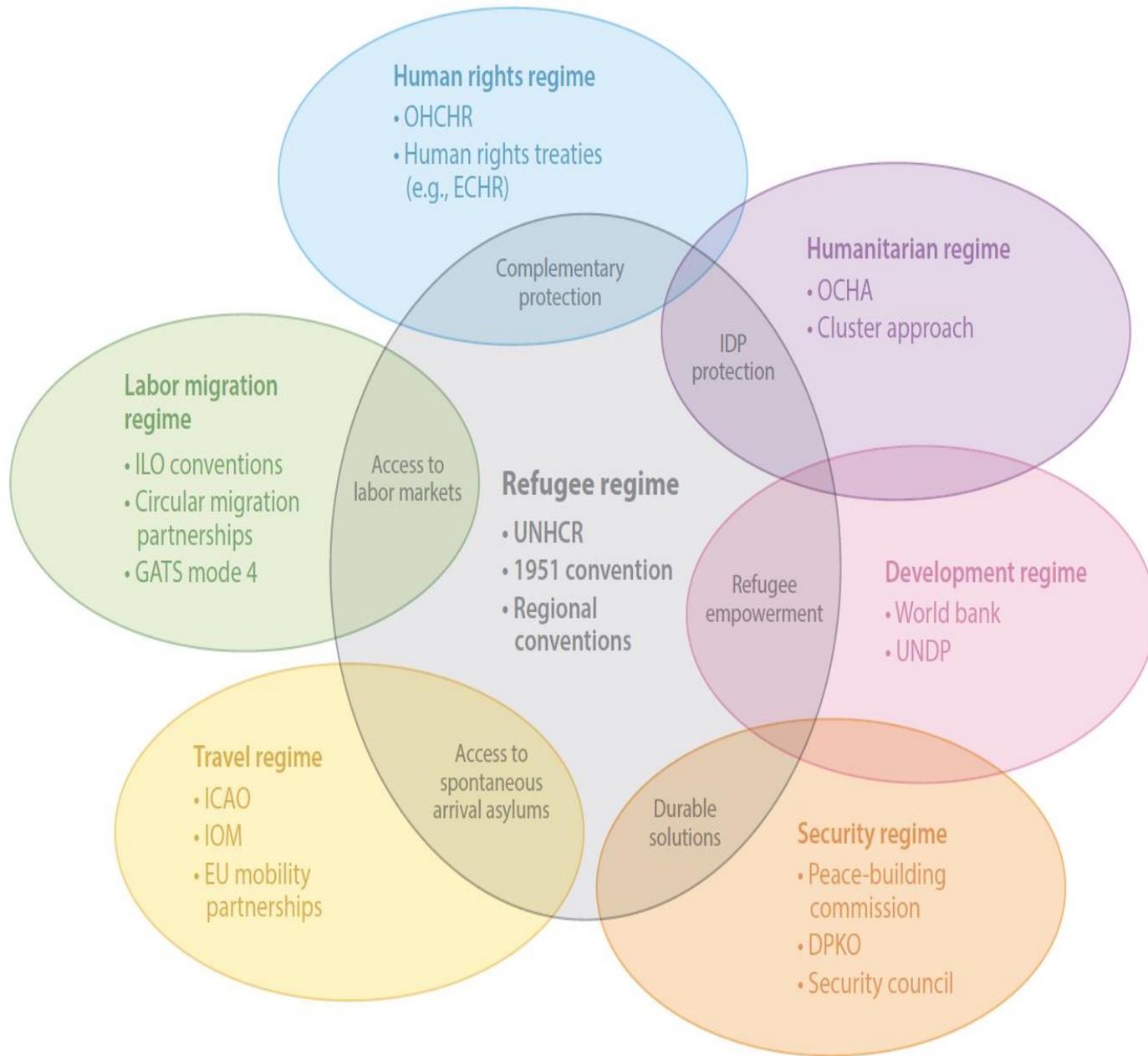


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Int'l Regime Complex

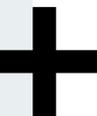
- Multiple multilateral institutions, probably with rules & jurisdiction that covers only part of an issue
- Also have bi-lateral and mini-lateral agreements that may overlap.
- Also have domestic law that may implement or ignore IL.
- Also have global actors that are not legally obligated to follow IL





Alexander Betts refugee regime complex

An international institutional
set of actors & policies



The regime complex for managing climate change.



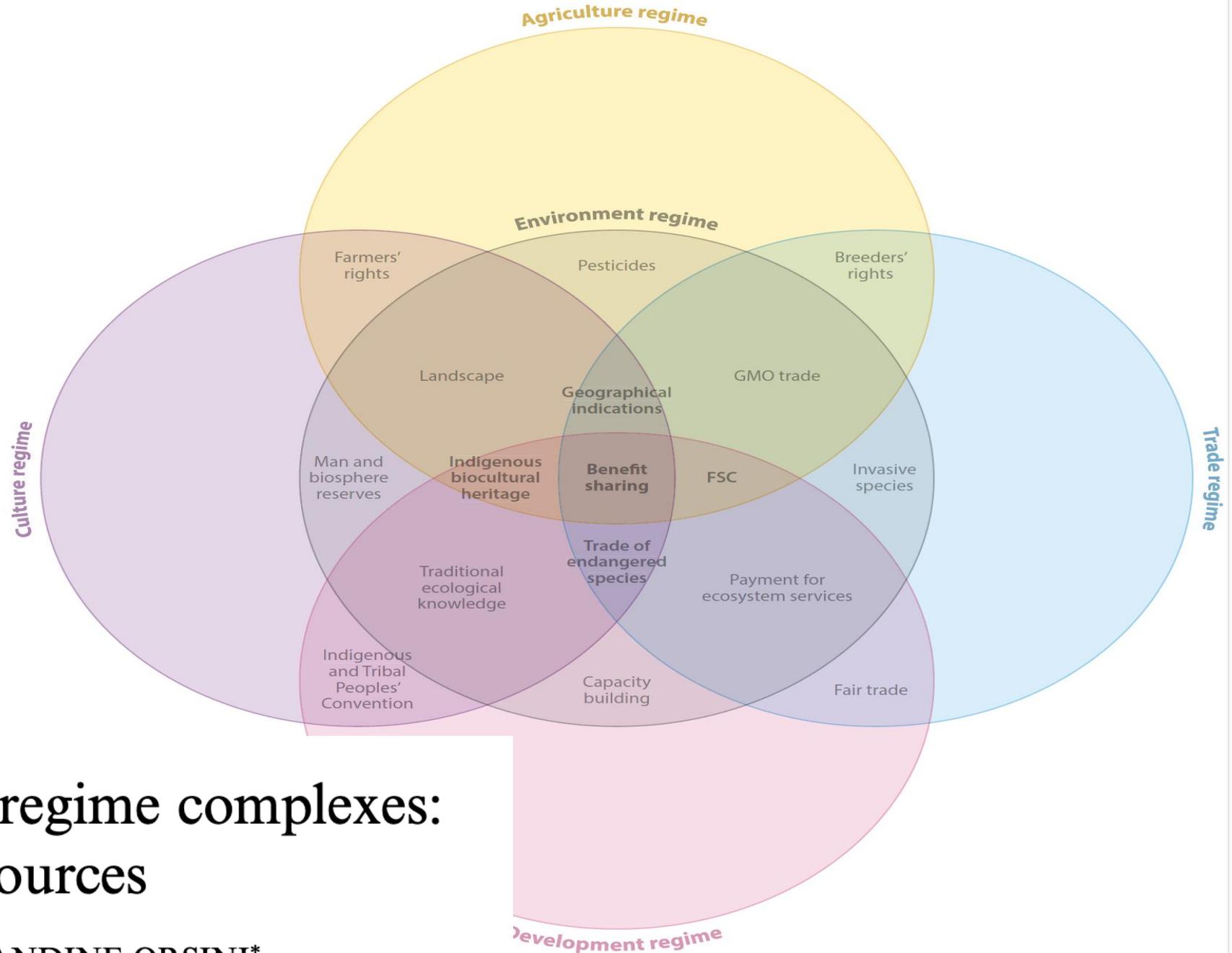
Oval = serious rule-making efforts

David Victor & Robert Keohane

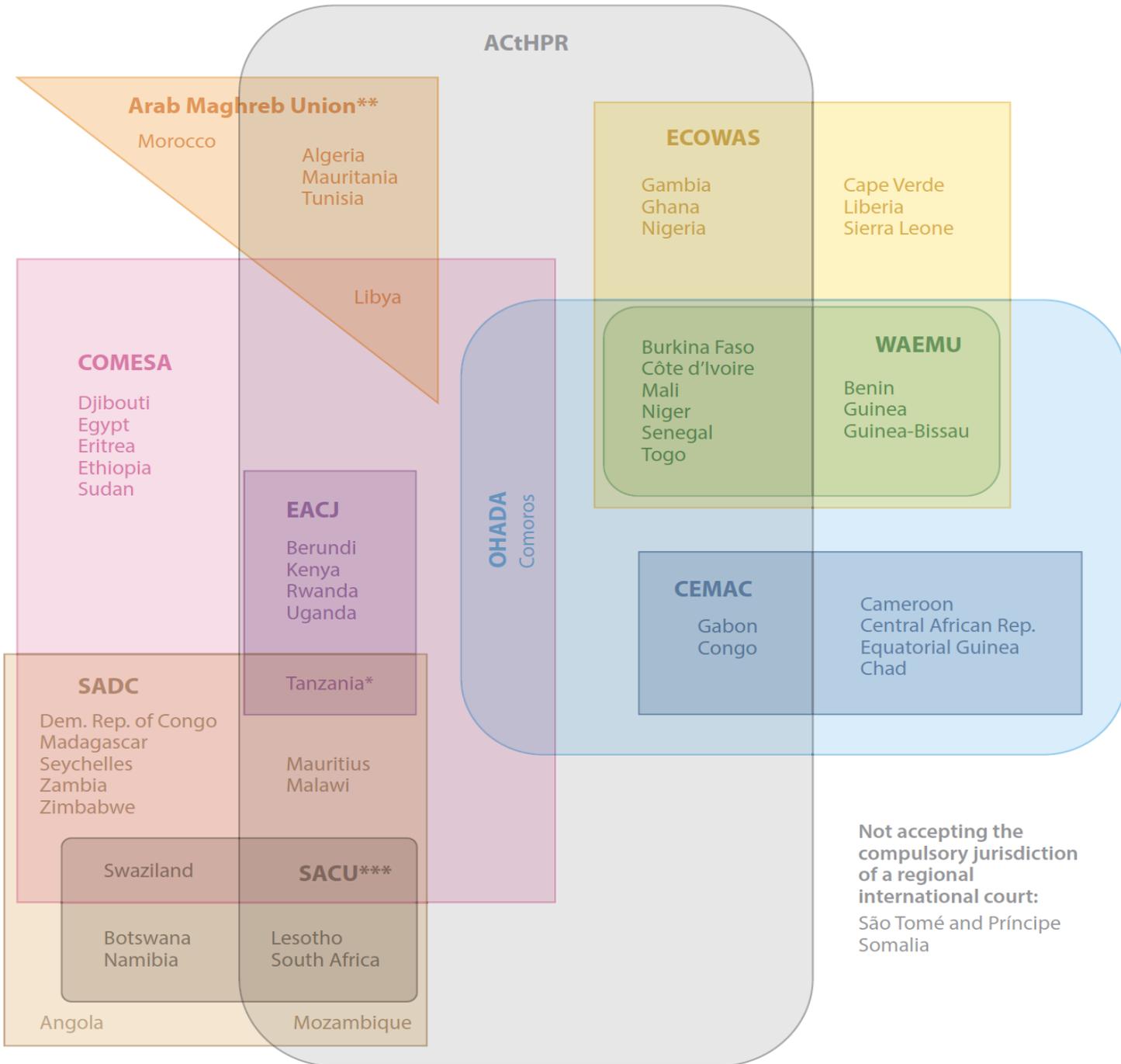
Domestic/Int'l; Formal/Informal; Direct/Indirect; hard/soft



Jean-Federic
Moran's
biodiversity
regime
complex
Regime complex as
an issue/interest
space



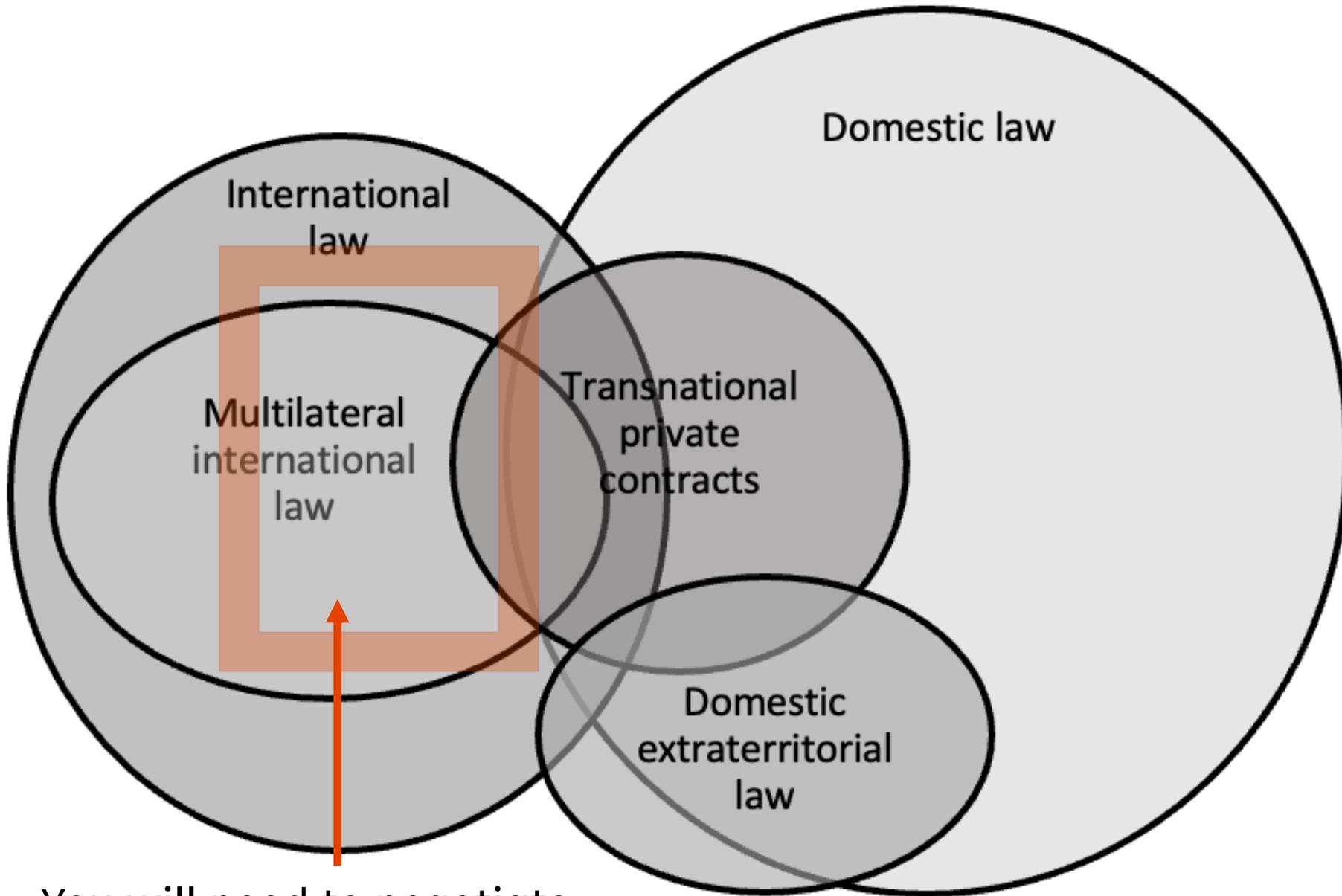
Policy coherency and regime complexes:
the case of genetic resources



Not accepting the compulsory jurisdiction of a regional international court:
São Tomé and Príncipe
Somalia

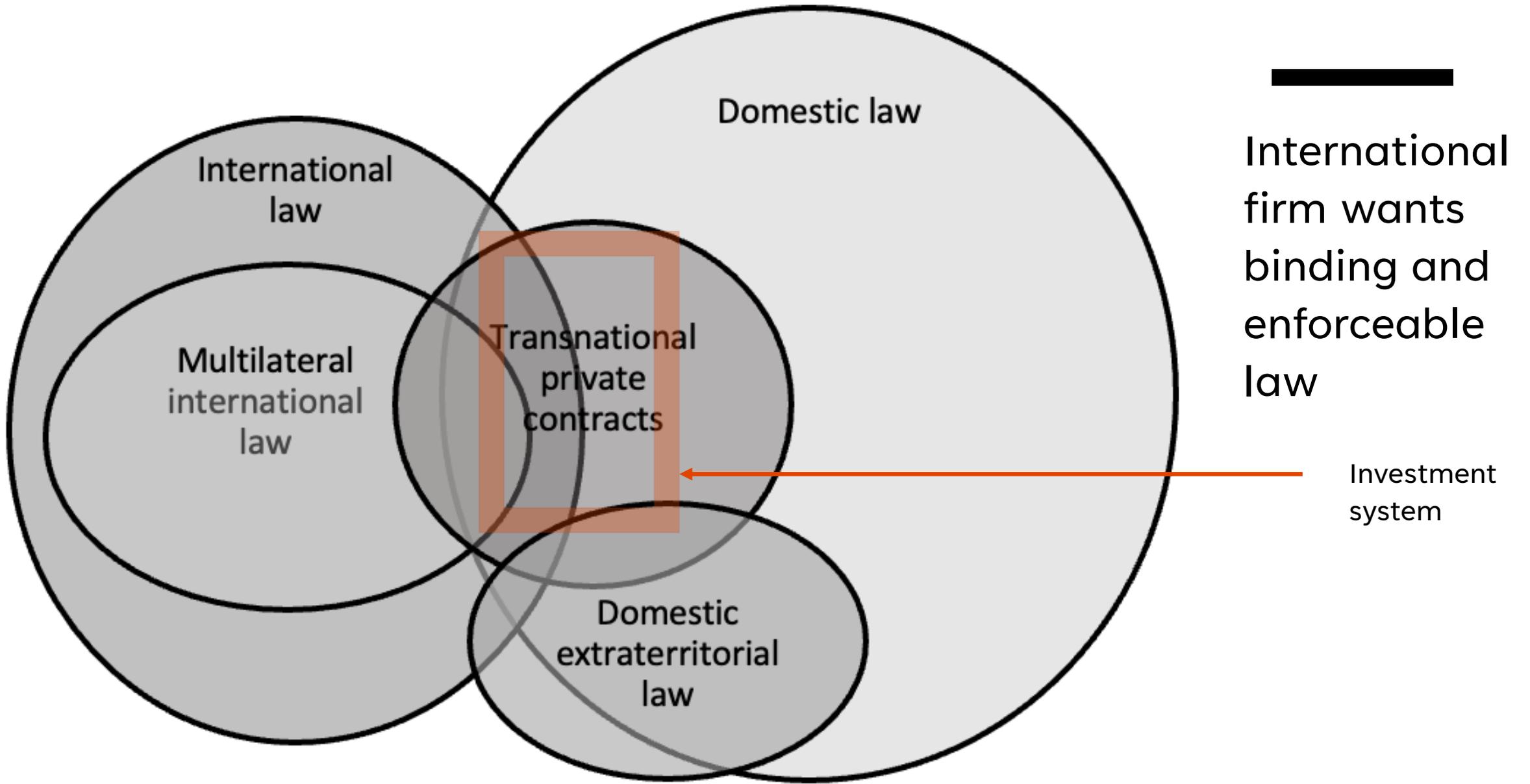
Alter's territorial and institutional regime complex

Regime complex as a policy-space



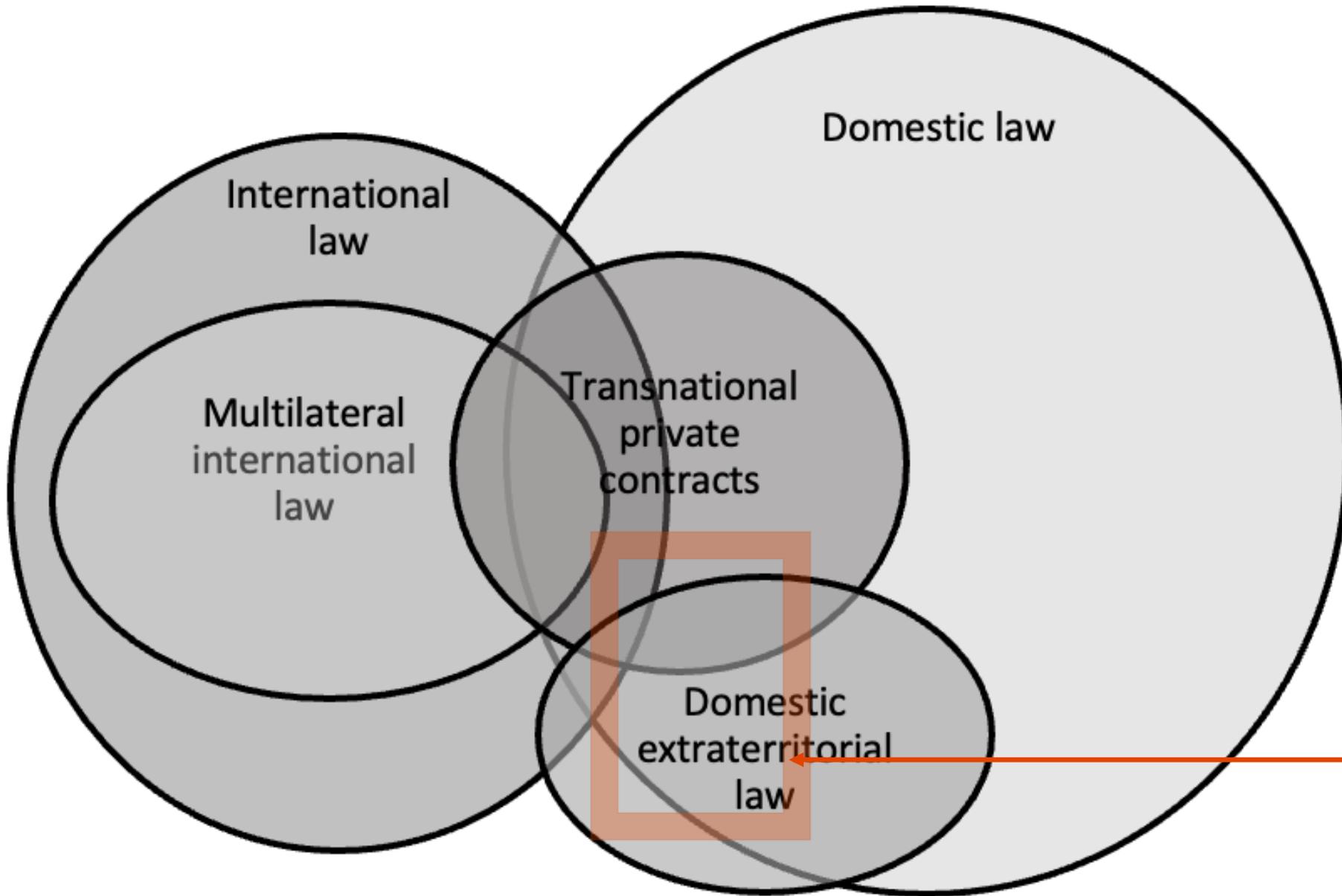
International firm wants binding and enforceable law

You will need to negotiate with developing countries.



International firm wants binding and enforceable law

Investment system

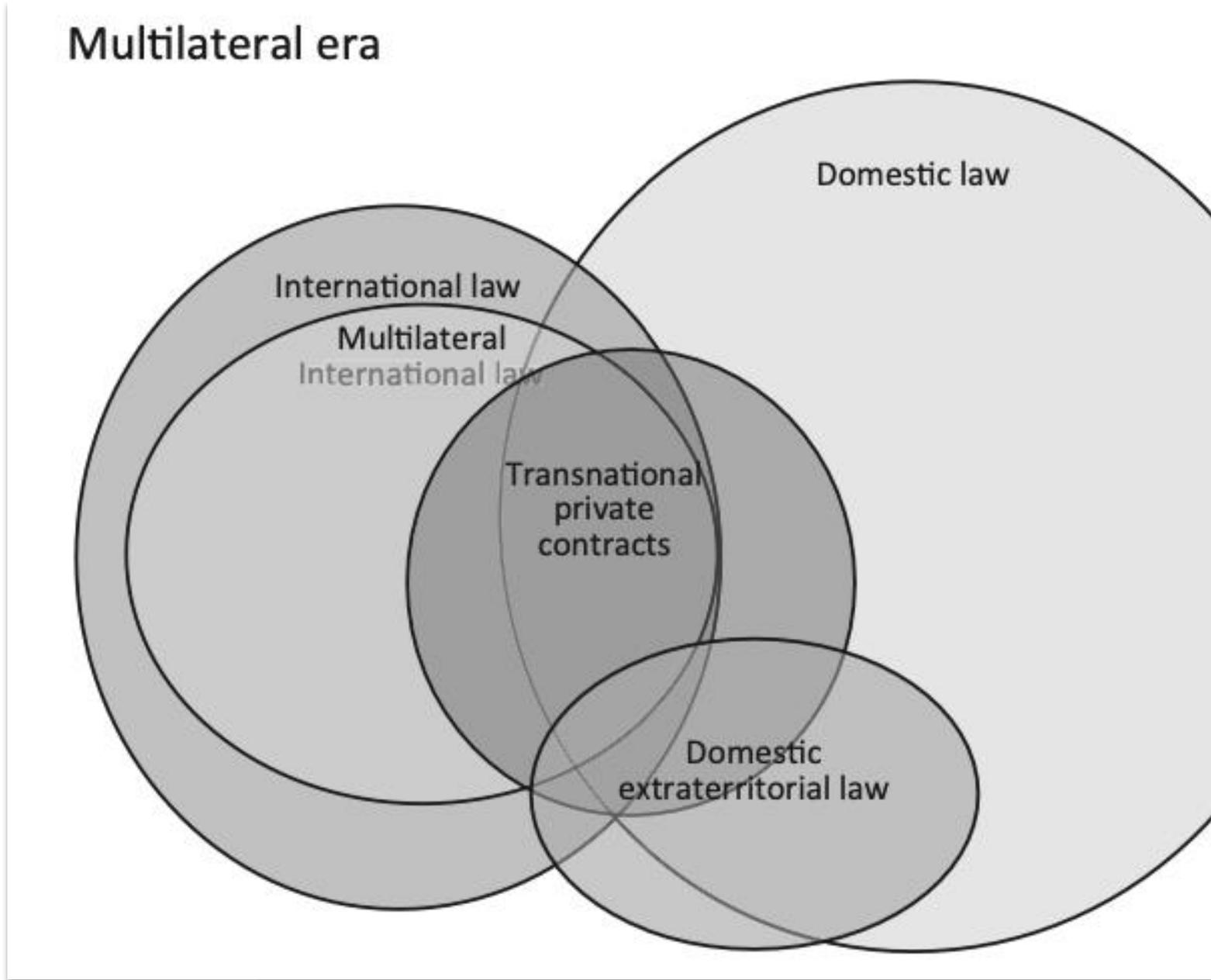


International firm wants binding and enforceable law

Belt Road system

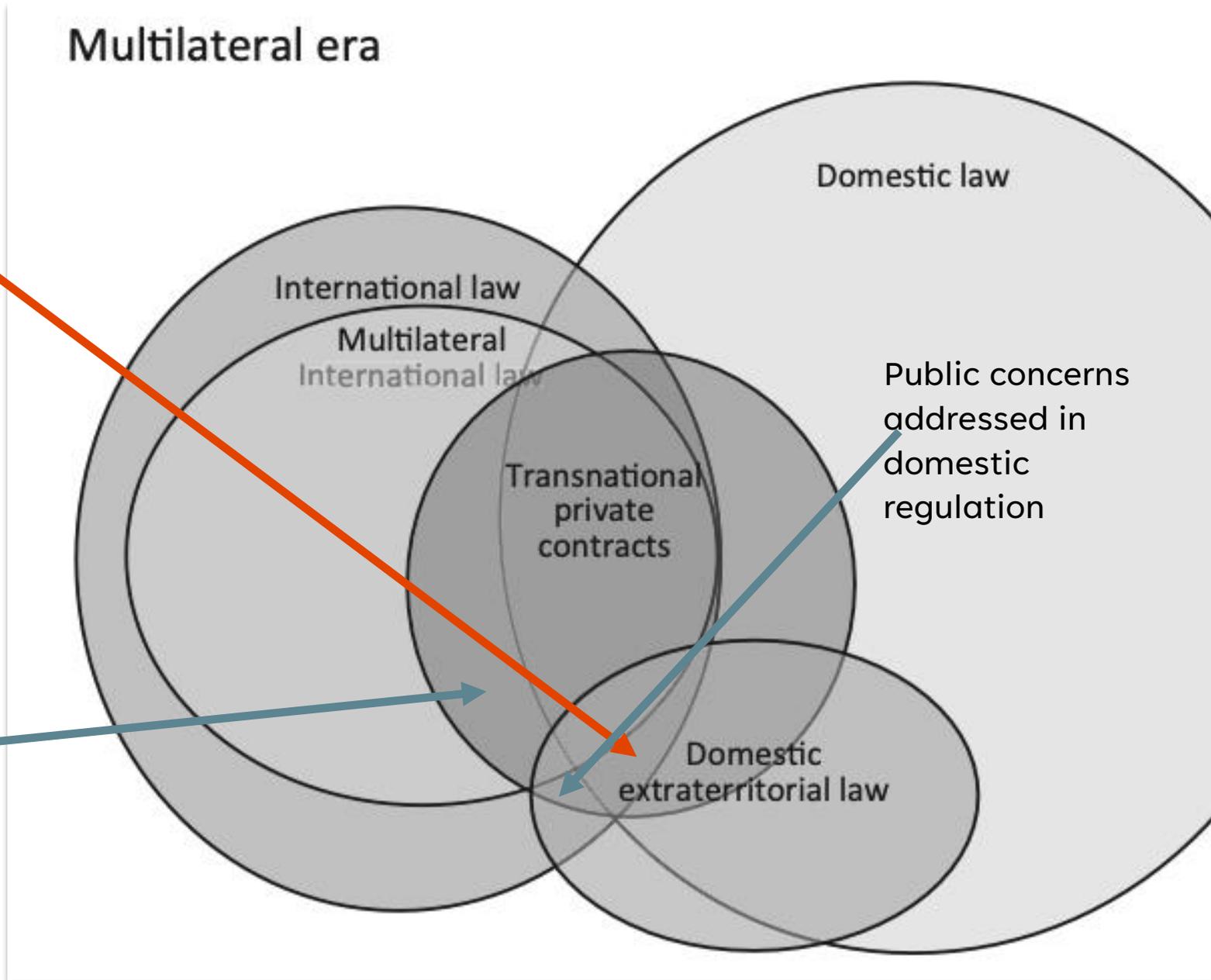
Regime complex Dynamism

- Why is there no international investment code?
- Why is there a system of BITS, that is mostly a post 1990s phenomenon?
- How did the regulation of commodity agreements fall out of the international law agenda?



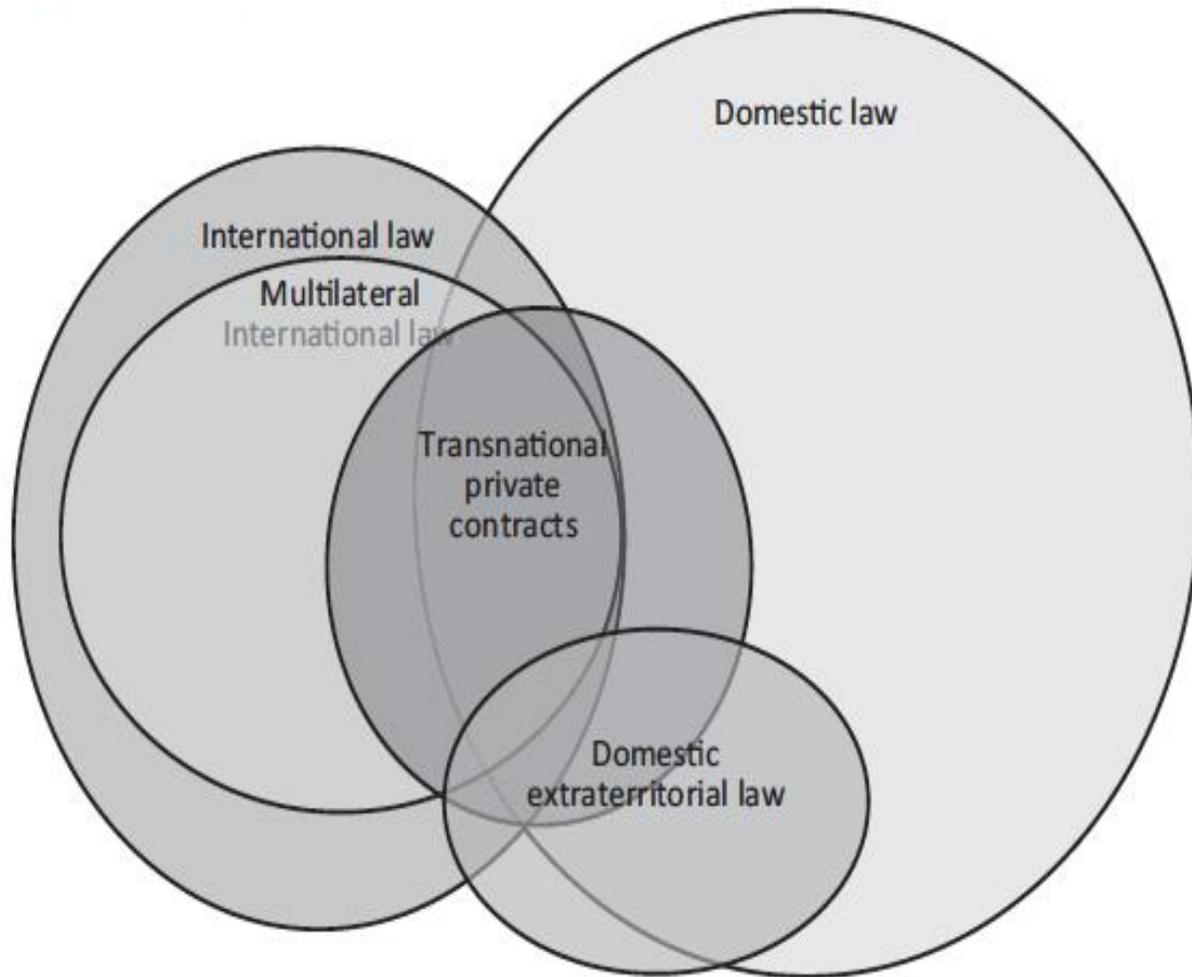
Regime complex Dynamism

- Contracting can satisfy business demands. In satisfying the itch, the demand for a global uniform solution is undermined.
- Contracting → Public concerns can be crowded out/ignored
- When & how do vested transnational private rights get redefined to protect other valued goals (e.g. environment, food supply)?



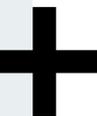
The Legal Operating System of Global Capitalism

Multilateral era



Some observations on the system:

- Powerful actors (states & MNCs) are advantaged by choice
- Certain issues are left unaddressed or addressed only by soft law (e.g. environment, sustainability, labor rights)
- Multilateral agreements are:
 - More transparent
 - Include weaker powers
 - Private actors might also have a seat at the table.






3

What it means
that a “regime
complex”
regulates the
global economy



Simple take away (the negative side of the coin)

1. The global economic regime complex is more than a single institution (e.g. WTO), and more than the sum of international treaties
2. Non-decisions matter as much as decisions:
Space that is not occupied multilaterally gets filled by bi-lateral & private contracting
 - ➔ private overtakes public
 - ➔ multilateralism gets stymied
3. Global markets are not-encased, and individual states are unable to address the negative impact of globalization

Positive flip side: One should create political strategies that include a range of legal forms & strategies

Paris Climate Agreement Complex

- Interstate, Federal States, Cities, Firms make pledges
- Can bring it into the trade regime
- Investor protection system can help or hinder

World Health Organization Pandemic response

- Multilateral standard setting
- Multilateral medication delivery mechanism
- TRIPs- IP protections & exceptions
- Firms- contracts

How to encase global markets?

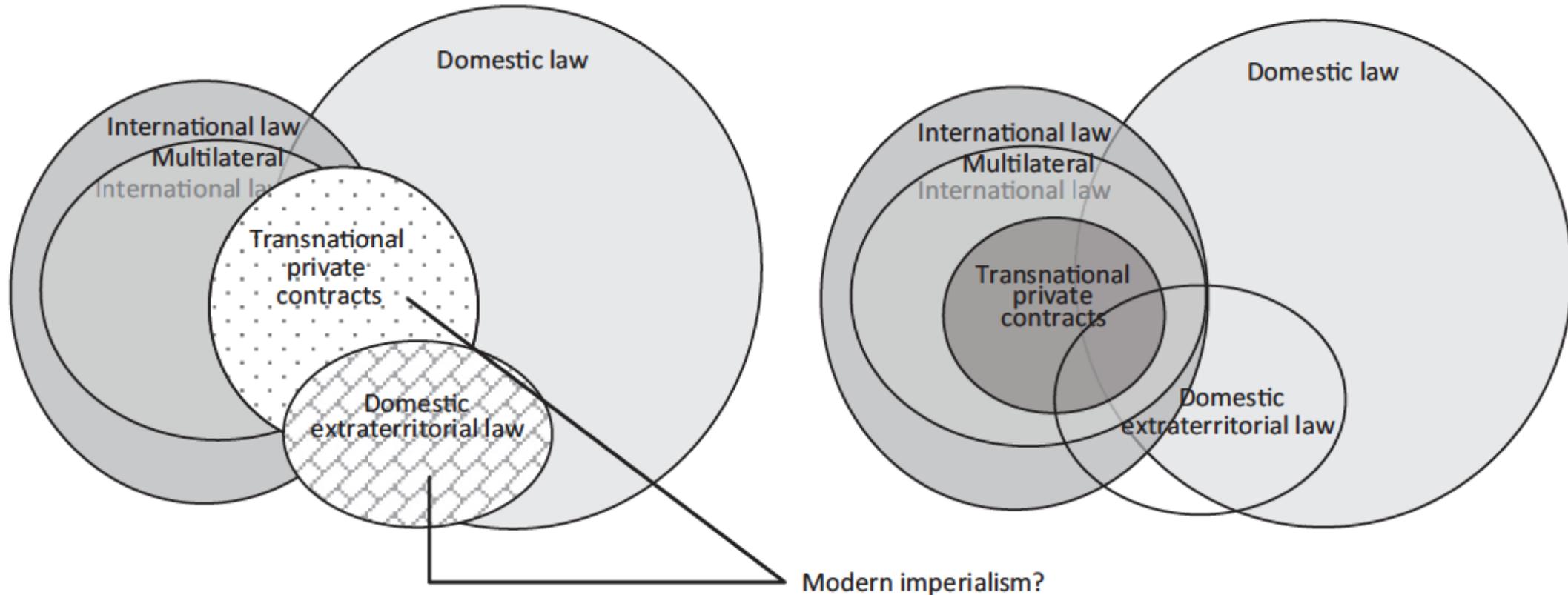


Figure 2. Global law complex in the multilateral globalization and post-globalization eras.

Note: What matters for this figure is the positioning. The relative size is notional; some categories are drawn larger, because modern capitalism is more complex and law-based, so I imagine that laws are more numerous and prevalent.

