Informal International Public Policy Making (IIPPM):
Mapping the Action and Testing Concepts of Accountability and Effectiveness

PROJECT FRAMING PAPER

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> *Today, we need to be clear-eyed about the strengths and shortcomings of international institutions that were developed to deal with the challenges of an earlier time.*
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> *... strengthening bilateral and multilateral cooperation cannot be accomplished simply by working inside formal institutions and frameworks.*
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> *… We need to spur and harness a new diversity of instruments, alliances, and institutions in which a division of labor emerges on the basis of effectiveness, competency, and long-term reliability.*[1]

I. Project Objectives

This project strives to be empirical and solutions-oriented. We want to gauge whether there is a problem and, if so, think about how to solve it in a way that can assist policy makers and their stakeholders. We see no independent value in minutely circumscribing our field of study or the concepts involved. Rather, our starting point is a perceived problem, which can be paraphrased as follows:

> *Informal international public policy making (IIPPM) is on the rise. It seems to fall outside the strictures of both domestic law as well as international law. Hence, this activity raises questions of accountability deficit.*[2]

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[1] U.S. National Security Strategy, 27 May 2010, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[2] This paraphrases paras. 29-36 of The Hague Institute for the Internationalisation of Law (HiiL) Call for Research Proposals, HiiL Research Theme on Transnational Constitutionality: Democracy and Accountability in the Context of Informal International Public Policy-Making (September 2008), available at http://www.hiil.org/assets/204/HIIL_n6434_v21_HiiL_Constitutional_Law_Project_-_Tender_Document.pdf (hereafter "the Tender document").

This statement of the problem includes many assumptions. Our goal is, firstly, to double-check these assumptions: Is IIPPM really that novel and on the rise? Does it fall outside domestic law? Does it fall outside international law? Is it problematic in terms of accountability?

Secondly, to the extent the problem is real, how can we increase accountability and do so in a way that does not undermine the effectiveness of IIPPM? How can we improve accountability at the domestic level? How can we set up accountability mechanisms at the international level? What is the role of what has been referred to as "transnational constitutional standards"[3]?

The project proceeds in three stages. First, selected IIPPM activity is mapped based on in-depth case study research, questionnaires and interviews. Second, using our empirical findings and the existing literature as a starting point, we identify and explain incidence and variance in design, operation, domestic implementation and success of IIPPM, especially as they relate to questions of accountability and effectiveness. Third, extrapolating from the case studies examined, we offer suggestions for reform both at the international and the domestic level with the aim to enhance IIPPM accountability and effectiveness.

IIPPM is here to stay and, to the extent the 2010 U.S. National Security Strategy quoted above reflects a trend, may well become the international cooperation of choice. In an era where international cooperation is needed more than ever, but traditional formalities remain, public authorities will unavoidably seek to cut corners. With this reality in mind, this Project does not aim at condemning, let alone halting IIPPM, but rather to give it its rightful place at the intersection of national and

[3] HiiL Revised Concept Paper, Constitutions in the Age of Internationalisation: Towards Transnational Constitutional Standards, May 2008, at p. 4, available at http://www.hiil.org/assets/147/1-6850-Microsoft_Word_-_HIIL_n5567_v4_Revised_Concept_paper_9_May_2008.pdf: "transnational constitutional standards are considered to be neither a matter of purely domestic law, nor an exclusive matter of international treaties, but as standards which transcend both. They are intended to fill the gap where, in the context of internationalisation, domestic law offers insufficient protection and where international law standards cannot fully compensate for the loss. If formulated in a workable manner, transnational constitutional standards could become 'smart' standards which would allow domestic courts and political institutions in several states at once to enforce high levels of protection without resorting to 'nationalist' remedies against international action.

international law, and to improve it along the fine line between effectiveness and accountability.

II. What do we mean with "informal international public policy making"?

1. Informal

IIPPM is "informal" in the sense that it dispenses with certain formalities traditionally linked to international law making. These formalities may have to do with *output, process* or the *actors involved*.[4] It is exactly this "circumvention" of formalities under international and/or domestic procedures that generated the claim that IIPPM is not sufficiently accountable.[5] At the same time, escaping these same formalities is also what is said to make IIPPMs more desirable and effective. Lipson, for example, explains that "informality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels".[6]

a. Output informality

Firstly, in terms of *output*, international cooperation may be informal in the sense that it does not lead to a formal treaty or legally enforceable commitment but rather a guideline, standard, declaration or even more informal policy coordination or exchange. Aust, for example, defines an "informal international instrument" as "an instrument which is not a treaty because the parties to it do not intend it to be legally binding".[7]

At the domestic level, output informality often leads to much weaker forms of domestic oversight, e.g. little or no internal coordination, notice and comment

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[4] See the Tender document, *supra* note 2, at para. 29: "This relative informality concerns the identity of the decision-makers, the character of the decision-making procedure as well as the character of the decisions actually adopted".

[5] See, for example, Eyal Benvenisti, "Coalitions of the Willing" and the Evolution of Informal International Law in "Coalitions of the Willing" - Avantgarde or Threat? 1 (C. Calliess, C. Nolte, G. Stoll, eds., 2008).

[6] Charles Lipson, Why Are Some International Agreements Informal?, 45 International Organization 1991, 495-538 at 500.

[7] Anthony Aust, The Theory and Practice of Informal International Instruments, 35 ICLQ 1986, 787-812 at 787.

procedures, parliamentary approval or obligation of publication. In the United States, for example, Circular 175 and its coordinating role for the U.S. State Department and obligation of publication and transmittal to Congress, "does not apply to documents that are not binding under international law".[8] Similarly, in the U.K, the formalities which surround treaty-making do not apply to so-called Memoranda of Understanding (MOUs) -- which the U.K. defines as "international commitments" that are "not legally binding" -- and are, moreover, not usually published.[9] In Germany, an internal order directed at all federal ministries stipulates that ministries must always inquire whether an international agreement is really needed or whether "the same goal may also be attained through other means, especially through understandings which are below the threshold of an international agreement".[10]

At the international level, output informality raises the fundamental question of whether IIPPM is even part of international law and the normative strictures that come with it. Unlike the Tender document -- which presumes that IIPPM is *not* "regulated by either national or international (public) law" -- we do not want to prejudge this question. We leave the matter of whether IIPPM and/or its output is regulated under, part of, or even (partly) binding under, international law open for further scrutiny. Indeed, if anything, we are inclined to house (at least some) IIPPM within the field of international law albeit broadly defined or "New International Law" (the Project's original title). We feel confident to start from the presumption that international cooperation, albeit less formal, falls within the remit of international law (a question that may be distinguished from whether IIPPM output is "legally binding" under international law), on the ground that international law has, even

[8] See U.S. State Department website, Circular 175 Procedure, at http://www.state.gov/s/l/treaty/c175/. Similarly, the U.S. constitutional rule that "treaties" must be adopted in the Senate by 2/3 majority does not apply to what in U.S. law are known as "international agreements" (distinguished from "treaties"). This explains why today the large majority of U.S. international cooperation takes the form of "executive agreements" rather than "treaties" (to avoid the hurdle of 2/3 majority in the Senate). Such "international agreements" are, however, subject to Circular 175. That said, if a document is not legally binding (i.e., not an "international agreement" under the specific criteria of Circular 175), even the limited obligations in Circular 175 do not apply.

[9] Treaties and MOUs, Guidance on Practice and Procedures, 2004, Treaty Section, Foreign & Commonwealth Office, p. 1.

[10] Gemeinsame Geschäftsordnung der Bundesministerien, para. 72, available at http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_21072009_O113120018.htm.

traditionally, been defined with reference to its *subjects* (e.g. inter-state relations) rather than its *object* (be it subject matter or the particular form or type of output).[11][12]

b. Process informality

Secondly, in terms of *process*, international cooperation may be informal in the sense that it occurs in a loosely organized network or forum rather than a traditional international organization (IO) (think of the Basel Committee on Banking Supervision or the Financial Action Task Force, versus the UN or the WTO). Such process or forum informality does, however, not prevent the existence of detailed procedural rules (as exist, for example, in the Internet Engineering Task Force), permanent staff or a physical headquarter. Nor does process informality exclude IIPPM in the context or under the broader auspices of a more formal organization (a lot of IIPPM occurs, for example, under the auspices of the OECD).

What we do *not* include under IIPPM, however, is what some could consider as the "informal" negotiation or conclusion of treaties, such as oral agreements or negotiations conducted, or consent expressed, by means of modern technology (internet, fax etc.). Similarly, we do *not* want to include under the notion of IIPPM all international negotiations or contacts that happen behind closed doors such as "informal" or "green room" meetings in preparation of formal agreements (even if quite a bit of IIPPM also happens behind closed doors).

Process informality, on top of output informality, may further limit normative strictures or control under both domestic and international law. For example, regulators may face less domestic constraints when operating in a loose network as compared to formal delegates to an IO. Moreover, meetings and decisions in a

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[11] See, for example, Robert Kolb, *Le domaine materiel du droit international – Esquisses sur les matières régies par le droit international public à travers l'histoire*, draft on file with author, W. G. Grewe, *The Epochs of International Law* (translated from German by M. Byers), Berlin / New York, 2000, p. 7, A. Truyol y Serra, *Histoire du droit international public*, Paris, 1995, p. 2 (« [U]n droit international émerge dès que s'établissent des rapports minimement suivis entre groupes humains organisés, différenciés et indépendants ») and W. Preiser, *Frühe völkerrechtliche Ordnungen der aussereuropäischen Welt*, Wiesbaden, 1976, p. 96-97 (8-9).

[12] Moreover, but this is more a question of semantics, if IIPPM were defined as *necessarily* falling outside of international law, it is hard to see how international law – the central focus of this Project -- could offer a solution since, purely based on definition, any international law solution would then, by definition, transform IIPPM into something that is no longer IIPPM.

traditional IO are normally more tightly regulated and structured than informal gatherings. As a result, process informality raises similar questions and trade-offs between effectiveness and accountability.

As we did above in respect of IIPPM output and the question of whether such output is part of international law, we do not want to prejudge the matter of whether an IIPPM grouping or network can be a subject of international law or have legal personality of its own. We leave this question open for further scrutiny. A possible advantage of thus being a subject or having legal personality may be that some IIPPM groupings or networks can be held accountable as separate entities and may fall under the control (albeit partly) of international law. A possible drawback of such independent status may, however, be that it enhances the power of the grouping or network and may, in turn, make it more difficult rather than easier to hold the IIPPM accountable (participating national actors may, for example, hide behind the IIPPM when it comes to responsibility; independent international status may reduce the need for domestic implementation and the domestic control that comes with it). Indeed, as much as process or forum informality may enhance fears of lack of accountability, as Anne-Marie Slaughter has argued, IIPPM (or, in her words, "transgovernmental networks") may also be *more* accountable to domestic constituencies than traditional IOs. Slaughter's argument is that in transgovernmental networks input and output is channeled directly through domestic actors with a shorter accountability chain back to the people, and no independent international body exists to which authority has been delegated or which could impose its will on participants.[13]

c. Actor informality

Thirdly, in terms of *actors involved* international cooperation may be informal in the sense that it does not engage traditional diplomatic actors (such as heads of state, foreign ministers or embassies) but rather other ministries, domestic regulators, independent or semi-independent agencies (such as food safety authorities or central banks), sub-federal entities (such as provinces or municipalities) or the legislative or

[13] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press, 2004), Chapter 6.

judicial branch.[14] Under Article 7 of the Vienna Convention on the Law of Treaties, for example, only heads of state, heads of government, foreign ministers, heads of diplomatic missions or specifically accredited representatives are presumed to have so-called full powers to represent and bind a state.

The non-traditional nature of the actors involved in IIPPM may be further accentuated with the participation of private actors (besides public actors) and/or international organizations. In some cases, IIPPM may even consist exclusively of a network of IOs (think of the UN System Chief Executive Board of Coordination). Purely private cooperation (that is, with no public authority involvement), on the other hand, is not covered under IIPPM (see below) and is the subject of another HiiL Project.[15]

The fact that regulators or agencies – rather than diplomats – are involved further complicates the question of whether IIPPM is part of international law (e.g., can such regulators or agencies bind their state; are they "subjects" of international law?). Under U.S. law, for example, "agency agreements" *do* constitute international agreements.[16] For France, in contrast, "arrangements administratifs" are *not* recognized under international law, are not even registered by the French Ministry of Foreign Affairs and should, according to a 1997 Circular of the Prime Minister, only be resorted to in exceptional circumstances given, *inter alia*, their uncertain effects.[17]

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[14] That the actors involved may make international law making (including its domestic angle) more or less formal is confirmed in the distinction made under French practice which distinguishes between "accords en forme solennelle" (Article 52 of the Constitution), concluded by the French President and subject to "ratification", and "accords en forme simplifié", concluded at the level of the government by the Minister of Foreign Affairs and subject to "approbation" (*Circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux)*.

[15] See http://www.hiil.org//research/main-themes/private-actors/background-and-overview/.

[16] Circular 175, 1 U.S.C. 112a, 112b, para. 181.2, 5(b): "*Agency-level agreements.* Agency-level agreements are international agreements within the meaning of the Act and of 1 U.S.C. 112a if they satisfy the criteria discussed in paragraph (a) of this section. The fact that an agreement is concluded by and on behalf of a particular agency of the United States Government, rather than the United States Government, does not mean that the agreement is not an international agreement. Determinations are made on the basis of the substance of the agency-level agreement in question".

[17] Website of the French Ministry of Foreign Affairs, http://www.doc.diplomatie.gouv.fr/pacte/index.html: « Les arrangements administratifs conclus par un ministre français avec son homologue étranger ne sont pas répertoriés dans la base de données documentaire. En effet, il ne s'agit pas de traités ou d'accords internationaux … Cette catégorie n'est pas reconnue par le droit international. La circulaire du 30 mai 1997 relative à l'élaboration et à la conclusion des accords internationaux recommande aux négociateurs français de ne recourir à ce type d'arrangements qu'exceptionnellement et souligne que les effets qu'ils produisent sont incertains »

Besides creating uncertainty under international law, actor informality may also reduce domestic oversight and coordination (e.g. through the ministry of foreign affairs). At the same time, non-traditional actors (such as regulators and agencies) do remain subject to internal bureaucratic controls, ministerial responsibility and any parliamentary-oversight or limited mandate that may be in place under domestic law. In this respect, the question arises whether an ambassador or diplomat (traditionally engaged in international cooperation) is more accountable, more legitimately exercising authority or subject to a shorter delegation chain than a regulator or agency, or *vice versa*.

2. International

IIPPM is "international", as opposed to domestic, in the sense that the cooperation must include two or more actors in different countries. It also includes cooperation between international organizations. Given that the IIPPM we will focus on in particular is between regulators or agencies in different countries (rather than the traditional diplomatic actors which usually conclude formal treaties, see "actor formality" discussed above), reference could have been made also to "transnational" or "transgovernmental" public policy making. Suffice it to say that, as with the notion of "informal", we take a flexible approach and include as "international" all cross-border cooperation, be it inter-national or trans-national, and with or without the participation of private actors or international organizations.

The fact that IIPPM occurs cross-border, between two or more countries, has raised the fear that, unlike purely domestic public policy, IIPPM falls outside or escapes domestic law and the strictures that come with. Unlike the Tender document -- which presumes that IIPPM is *not* "regulated by either national or international (public) law" -- we do not want to prejudge this question. Indeed, to the extent domestic law imposes limits on, and controls the activity of, regulators and agencies, such limits and controls can be presumed to affect also their international activity. In addition, to the extent IIPPM is having an effect or is being implemented into domestic law, law making procedures and constraints under domestic law would also seem to apply. As a result, domestic law may be the prime source of IIPPM accountability, a question we will further examine in this Project.

3. Public policy making

IIPPM covers only "public" policy making in the sense that public authorities must be involved. IIPPM can include private actor participation, but excludes cooperation that only involves private actors. A separate HiiL project examines private regulation.[18] One *caveat* to make is that we cannot exclude that public authorities delegate public policy making to private entities, and in that sense what these private entities are doing could still be called "public policy making". Moreover, it may also be that private regulation is, in effect, setting public policy, that is, imposing regulations or behavior on the public at large rather than engage in pure self-regulation of an industry or sector. The controversial example of ICANN (Internet Cooperation for Assigned Names and Numbers), which we will more closely examine, springs to mind. When it comes to defining "public policy" beyond referring to *who* is acting (public authorities) we are guided by the definition of "exercise of international public authority" offered by von Bogdandy, Dann and Goldman: "any kind of governance activity by international institutions [for our purposes, including informal networks or fora] … [which] *determines* individuals, private associations, enterprises, states, or other public institutions".[19]

4. Our summary definition of IIPPM

Given our flexible, problem-oriented approach, we are open to count as IIPPM any activity which is informal in any of the above three ways (output, process or actors involved). This means that IIPPM can be informal in different ways and to different degrees. That said, our focus is mainly, if not exclusively, on IIPPM which is informal in *all three ways*: output, process (or forum) and actors involved. We will, more particularly, focus on regulatory or agency networks which do not issue legally binding documents.

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[18] See http://www.hiil.org//research/main-themes/private-actors/background-and-overview/.

[19] von Bogdandy, Dann and Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 German Law Journal 1375, at 1376, italics added. "Determines" is further clarified as "reduce their freedom" or "unilaterally shape their legal or factual situation", adding that "determination may or may not be legally binding" (at p. 1381-2).

In summary, our working definition of IIPPM is

*Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (*process informality*), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (*actor informality*),and/or which does not result in a formal treaty or legally enforceable commitment (*output informality*).*

III. What do we mean with "accountability" and "effectiveness"?

1. Accountability

Besides mapping the creation and operation of IIPPM, this Project's main task is to assess whether IIPPM suffers from an accountability deficit. As with the notion of IIPPM itself, we want to take a broad and flexible approach to the notion of accountability. We realize that no one definition of accountability exists and that its broad and flexible meaning (in some languages, such as French, there is not even a precise word for it) may well explain its popularity when it comes to thinking about controlling, enhancing trust in or improving the quality of international cooperation or, in the (more limited) words of Grant and Keohane, preventing "abuses of power in world politics".[20] Since it is now commonly accepted that traditional checks and balances and democratic mechanisms under domestic law cannot simply be replicated at the international level, the broad and multi-faceted notion of accountability offers a welcome canvass to think "outside the box". That said, we do need to specify the notion if only to delimit our work.

We are happy, like many before us, to start from Boven's definition of accountability as

[20] Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 American Political Science Review (2005) 1-15.

A relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pose judgement, and the actor may face consequences.[21]

To further refine the concept and how we may apply it to IIPPM, we find it useful to introduce the following four lenses through which accountability could be assessed: (1) accountability *to whom*; (2) functions of accountability (*why*); (3) accountability mechanisms (*how*); and (4) timeline of accountability (*when*).

At the outset, one crucial clarification must be made: this Project examines accountability both at the international level (e.g. transparency, participatory decision-making or the existence of a complaints mechanism at the level of the Basel Committee) and at the domestic level (domestic administrative or political control over finance ministers or central bankers active at the Basel Committee, domestic implementation of relevant standards, domestic judicial processes, etc.).

Moreover, our starting point is that the question of accountability for our purposes only arises to the extent authority or power is being wielded under IIPPM. This goes back to our definition of public policy as action which unilaterally "determines" or "reduces the freedom of" others.[22] As the ILA report on accountability of IOs points out, "as a matter of principle, accountability is linked to the authority and power of an IO. Power entails accountability, that is the duty to account for its exercise".[23]

a. Accountability to whom? (delegation/internal v. participation/external)

The accountability of IIPPM could be invoked by two sets of actors. First, accountability could be owed to actors who entrusted the makers of IIPPM with the power to do so (think of participating countries, the responsible ministers in those countries or the people/parliament who elected those ministers). Grant and Keohane refer in this respect to a *delegation* model of accountability to which they apply theories of principal-agent or trustee. One could also think of *internal* accountability,

[21] M. Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, 13 European Law Review, 447 at 450.
[22] See *supra* note 19.
[23] ILA report, p. 225.

that is, accountability to those (principals) who set up and directly control the IIPPM. Given the informal nature of IIPPM, especially at the international level (there is no traditional IO in place), little authority (if any) is formally delegated by national participants (principles) to an international body (agent or trustee). Therefore, internal or delegation accountability is most likely to play out domestically (e.g., domestic regulators participating in IIPPM being held accountable by their supervising domestic ministries).

Second, accountability could be owed to actors who are affected by IIPPM. Grant and Keohane refer to a *participation* model of accountability. One could also think of *external* accountability in the sense that those who are holding IIPPM accountable are not within the system of IIPPM but rather stakeholders affected by it, be it beneficiaries, victims, observers, third states who do not participate in the IIPPM, etc.

b. Functions of accountability (democratic, constitutional, learning)

Bovens distinguishes between a democratic dimension of accountability, a constitutional dimension and a learning dimension.[24] The democratic dimension follows the delegation model of accountability explained above. The idea is that IIPPM should ultimately be accountable to the people who originally conferred decision-making powers to their elected officials who, in turn, set up IIPPM. The Tender document that originally defined our Project clearly stresses the democratic function of accountability as our focal point. This is important since there may be accountability without any democratic element (e.g. a regulatory agency may be under an obligation to disclose its internal finances to an audit office, neither of which may be democratically elected or controlled).[25] In our assessment of accountability of IIPPM we will, therefore, pay special attention to their democratic accountability, that is, their representativeness or responsiveness towards elected officials and the people.

That said, accountability also has a constitutional function (which partly overlaps with the democratic dimension) in the sense of preventing the abuse of power and

[24] See Bovens (2007) and also Aucoin and Heintzman, The Dialectics of Accountability for Performance in Public Management Reform, 66 International Review of Administrative Sciences 45.
[25] See HiiL Inventory Report, p. 8.

imposing checks and balances on power wielders. The learning function of accountability, finally, is where the notions of accountability and effectiveness of IIPPM may meet: accountability, in this sense, offers an opportunity for learning through improvement upon earlier mistakes or public exposure of failure. Making an organization more accountable in this sense makes it also more effective.

c. Mechanisms of accountability (international v. domestic; legal v. other)

Accountability can occur or be exercised in different ways. As noted earlier, we want to address the accountability of IIPPM both at the international level (e.g. where regulators from different countries meet and coordinate policy) and at the domestic level (e.g. where regulators may be controlled, and agreed upon policy may be implemented or subject to judicial review). Moreover, since this is a law-focused research project, we will focus on accountability mechanisms provided for (or that could be provided for) under legal rules or procedures. From our perspective, these are not limited to accountability through a complaints or court procedure (unlike what Grant and Keohane's classification may imply), but also include rules or procedures related to decision-making, peer-review, bureaucratic control, budgetary oversight etc.

Grant and Keohane offer seven mechanisms of accountability: hierarchical (exercised by leaders of an organization), supervisory (exercised by states), fiscal (exercised by funding agencies), legal (exercised by courts), market (exercised by equity and bond-holders and consumers), peer (exercised by peer organizations) and public reputational (exercised by peers and diffuse public).

*d. Timeline of accountability (*ex ante *v.* ex post *accountability*)

Accountability may be pursued at the international level where the IIPPM actually takes place, but also at the domestic level where participants and domestic implementation may face constraints or control. Time-wise, it may be useful also to distinguish between accountability of the decision-making process leading up to IIPPM (*ex ante* accountability), and accountability where judgments are made on activity already taken or questions of implementation or compliance are addressed (*ex post* accountability).

e. Summary definition and challenge

Taking on board the above elaborations, we can now define our working definition of accountability (with our additions to Bovens' definition in brackets) as:

> A relationship *(at the domestic or international level)* between an actor *(exercising public authority in the context of IIPPM)* and a forum *(internal to the IIPPM process or an external stakeholder)*, in which the actor has an obligation *(in particular, but not exclusively, expressed in legal rules or procedures)* to explain and to justify his or her conduct *(ex ante leading up to a decision or ex post in the implementation of a decision)*, the forum can pose questions and pose judgment, and the actor may face consequences *(in particular, but not exclusively, so as to enhance the democratic nature of the IIPPM)*.

The challenge of keeping IIPPM accountable has been summarized and explained by one author as follows:

> *[Multilevel governance (MLG) networks] generate novel forms of accountability, but undermine its democratic dimension mainly for the following reasons: the week visibility of MLG networks, their selective composition and the prevalence of peer over public forms of accountability*.[26]

It is statements like these that this Project aims to examine, based on empirical evidence, and to the extent they are justified, which this Project hopes to offer remedies for.

2. Effectiveness

As pointed out earlier, one of the main attractions of IIPPM as opposed to traditional, formal international law making is that it offers "a device for minimizing

[26] Yannis Papadopoulos, Problems of Democratic Accountability in Network and Multilevel Governance, 13 European Law Journal 2007, 469.

the impediments to cooperation, at both the domestic and international levels".[27] Enhancing the chances for international cooperation to occur is one crucial element of what we understand with effectiveness. The other element of effectiveness we plan to examine relates to how this cooperation – once it has been established – is actually implemented or complied with. A final element of effectiveness we want to assess is the extent to which IIPPM actually, and in a cost-effective way, addresses the original problem. These four dimensions of effectiveness could be summarized as follows: (1) does cooperation materialize; (2) does it stick; (3) does it solve the problem; (4) does it solve the problem in a cost-effective way.

It is often presumed that, by definition, increased effectiveness requires a reduction in accountability or that more accountability will necessarily hamper effectiveness. We plan to further examine the relationship between effectiveness and accountability. Yet, as pointed out earlier, there are certainly times where accountability and effectiveness go hand in hand. One such example is under the learning dimension of accountability whereby *ex post* accountability mechanisms that expose failures or mistakes can lead to improvement and more (rather than less) effectiveness of action.

IV. This Project as compared to other, related projects

This Project is different from the Global Administrative Law (GAL) project originating in NYU Law School.[28] In terms of scope, GAL covers activities that are much broader than informal international public policy making and includes, for example, formal and legally binding output by traditional IOs. Activity does not have to be "informal" to be subject to a GAL analysis. Indeed, even if we might detect and/or propose GAL type solutions to keep IIPPM accountable (such as transparency or due process), our focus on "informal" international cooperation clearly distances itself from GAL: whereas the very idea of GAL is to describe and/or impose formal, legal strictures analogous to those found in domestic administrative law, the *raison d'être* and perceived problem of IIPPM is exactly the avoidance of formal, legal

[27] Charles Lipson, Why Are Some International Agreements Informal?, 45 International Organization 1991, 495-538 at 500.
[28] See http://www.iilj.org/GAL/.

strictures under domestic and/or international law. In this sense, GAL is a particular, law-based *solution*; IIPPM, a perceived *problem* where actors move away from law.

Our Project is different also from the work of the International Law Association (ILA) Committee on *Accountability of International Organizations*[29], the Netherlands Yearbook of International Law special issue on *Accountability in the International Legal Order*[30] or the Max Planck Institute's research project on *The Exercise of Public Authority by International Organizations*.[31] Even if each of these projects focus on accountability (or control over public authority) and can contribute a great deal to our analysis, none have addressed the special problem of "informal" international law or cooperation. Indeed, their focus is on formal international organizations and output or activity that is (most of the time) legally binding.

Finally, our Project follows in the footsteps of the burgeoning international relations (IR) scholarship on "transgovernmental networks", initiated by Keohane and Nye in 1971[32] and expanded by Slaughter in the late 1990s[33] and beyond.[34] Where we hope to add to this literature is in terms of (i) more detailed empirical analysis of a wide range of IIPPM[35], (ii) legal (as opposed to IR) analysis, and (iii) normative

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[29] See, in particular, Final Report of the International Committee on the Accountability of International Organizations, adopted by the ILA in 2004 (ILA, *Report of the Seventy-first Conference, Berlin 2004* (London, ILA 2004), p. 164-234.

[30] 36 Netherlands Yearbook of International Law, December 2005.

[31] Von Bogdandy, Wolfrum, von Bernstorff and Dann, *The Exercise of Public Authority by International Organizations; Advancing International Institutional Law*,

[32] JOSEPH S. NYE & ROBERT O. KEOHANE, *Transnational Relations and World Politics: An Introduction*, 25 International Organization 329 (1971).

[33] See, in particular, ANNE-MARIE SLAUGHTER, *The Real New World Order* 76 Foreign Affairs 183 (1997), ANNE-MARIE SLAUGHTER, Agencies on the Loose? Holding Government Networks Accountable (1999), ANNE-MARIE SLAUGHTER, A New World Order (Princeton University Press. 2004) and ANNE-MARIE SLAUGHTER, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 Government and Opposition (2004).

[34] See, in particular, Kal Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 43 *Virginia Journal of International Law* (2002-2003); DAVID ZARING, *Informal Procedure, Hard and Soft, in International Adminsitration*, 5 Chicago Journal of International Law 547 (2004-2005); PIERRE-HUGUES VERDIER, *Transnational Regulatory Networks and Their Limits* 34 Yale Journal of International Law 113 (2009) and Kenneth Abbott & Duncan Snidal, Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit, 42 *Vanderbilt Journal of Transnational Law* (2009), 501-578.

[35] Lack of empirical analysis has been one of the critiques voiced against Slaughter's work. See, for example, Anderson, K. "Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks (Review of Anne-Marie Slaughter, a New World Order), January 2005, *Harvard Law Review* 118.

prescriptions for reform and possible solutions to enhance accountability rather than description of the phenomenon, its causes and typology.