



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

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in cooperation with the

**Hertie School
of Governance**



**GLOBAL GOVERNANCE AS PUBLIC AUTHORITY:
STRUCTURES, CONTESTATION, AND NORMATIVE CHANGE**

Jean Monnet Working Paper 06/11

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**The Exercise of Public Authority through
Informal International Lawmaking: An Accountability Issue?**

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ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Joost Pauwelyn, Ramses A. Wessel, Jan Wouters 2011
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New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

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This Working Paper is the fruit of a collaboration between The Jean Monnet Center at NYU School of Law and the Global Governance Research Cluster at the Hertie School of Governance in Berlin. The Research Cluster seeks to stimulate innovative work on global governance from different disciplinary perspectives, from law, political science, public administration, political theory, economics etc.

The present Working Paper is part of a set of papers presented at (and revised after) a workshop on 'Global Governance as Public Authority' that took place in April 2011 at the Hertie School. Contributions were based on a call for papers and were a reflection of the intended interdisciplinary nature of the enterprise - while anchored in particular disciplines, they were meant to be able to speak to the other disciplines as well. The discussions at the workshop then helped to critically reflect on the often diverging assumptions about governance, authority and public power held in the many discourses on global governance at present.

The Jean Monnet Center at NYU is hoping to co-sponsor similar symposia and would welcome suggestions from institutions or centers in other member states.

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Prologue:

Global governance is no longer a new phenomenon – after all, the notion became prominent two decades ago – but it still retains an aura of 'mystery'. We know much about many of its instantiations – institutions, actors, norms, beliefs – yet we sense that seeing the trees does not necessarily enable us to see the forest. We would need grander narratives for this purpose, and somehow in the muddle of thousands of different sites and players, broader maps remain elusive.

One anchor that has oriented much work on global governance in the past has been the assumption that we are faced with a structure 'without government'. However laudable the results of this move away from the domestic frame, with its well-known institutions that do not find much correspondence in the global sphere, it has also obscured many similarities, and it has clouded classical questions about power and justification in a cloak of technocratic problem-solving. In response, governmental analogies are on the rise again, especially among political theorists and lawyers who try to come to terms with the increasingly intrusive character of much global policy-making. 'Constitutionalism' and 'constitutionalization' have become standard frames, both for normative guidance and for understanding the trajectories by which global institutions and norms are hedged in. 'Administration', another frame, also serves to highlight proximity with domestic analogues for the purpose of analysing and developing accountability in global governance.

In the project of which this symposium is a part, we have recourse to a third frame borrowed from domestic contexts – that of 'public authority'. It seeks to reflect the fact that much of the growing contestation over global issues among governments, NGOs, and other domestic and trans-national institutions draws its force from conceptual analogies with 'traditional rule'. Such contestation often assumes that institutions of global governance exercise public authority in a similar way as domestic government and reclaims central norms of the domestic political tradition, such as democracy and the rule of law, in the global context. The 'public authority' frame captures this kind of discourse but avoids the strong normative implications of constitutionalist approaches, or the close proximity to particular forms of institutional organization characteristic of 'administrative' frames. In the project, it is used as a heuristic device, rather than a normative or analytical fix point: it is a lens through which we aim to shed light on processes of change in global governance. The papers in the present symposium respond to a set of broad questions about these processes: what is the content of new normative claims? which continuities and discontinuities with domestic traditions characterise global governance? how responsive are domestic structures to global governance? How is global governance anchored in societies? and which challenges arise from the autonomy demands of national (and sometimes other) communities?

The papers gathered here speak to these questions from different disciplinary perspectives – they come from backgrounds in political science, international relations, political theory, European law and international law. But they speak across disciplinary divides and provide nice evidence for how much can be gained from such engagement. They help us better understand the political forces behind claims for change in global governance; the extent of change in both political discourse and law; the lenses through which we make sense of global governance; and the normative and institutional

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responses to competing claims. Overall, they provide a subtle picture of the pressure global governance is under, both in practice and in theory, to change its ways. They provide attempts to reformulate concepts from the domestic context, such as subsidiarity, for the global realm. But they also provide caution us against jumping to conclusions about the extent of change so far. After all, much discourse about global governance – and many of its problems – continue in intergovernmental frames. Global governance may face a transition, but where its destination lies is still unclear. 'Public authority' is an analytical and normative frame that helps to formulate and tackle many current challenges, though certainly not all. Many questions and challenges remain, but we hope that this symposium takes us a step closer to answering them.

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THE EXERCISE OF PUBLIC AUTHORITY THROUGH INFORMAL INTERNATIONAL LAWMAKING: AN ACCOUNTABILITY ISSUE?

By Joost Pauwelyn, Ramses A. Wessel, Jan Wouters *

Abstract

An increasing number of fora and networks have been recognised to play a role in international or transnational normative processes. While lawmaking by formal, intergovernmental international organizations received abundant attention over the past years, we know less about a phenomenon that this paper refers to as ‘informal international lawmaking’ (IN-LAW). Lawyers struggle with the new and extensive normative output in global governance. We nevertheless use the term ‘law’ to connote the exercise of public authority, as opposed to what is often referred to more broadly as ‘regulation’ (covering both public and private regulation). IN-LAW, as we define it, can include private actor participation, but excludes cooperation that only involves private actors. The present paper thus purports to introduce the concept of ‘informal international lawmaking’ and it will present some findings based on case studies in the IN-LAW project related to the reasons for actors to opt for informal lawmaking. We also analyse whether – and to what extent – IN-LAW bodies are subject to some form of accountability and, if so, in what form and at what level. Finally, we will look at some consequences of informal international lawmaking, in particular in relation to the changing role of law in global governance.

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1. Introduction

It has become a truism that “law-making is no longer the exclusive preserve of states”.¹ First of all we have grown accustomed to the idea that decisions of international organizations can be considered a source of international law.² Secondly, an increasing number of other fora and networks have been recognised to play a role in international or transnational normative processes. As José Alvarez noted, more and more technocratic international bodies “appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms for making customary law or engaging in treaty-making; [t]hey also often engage in law-making by subterfuge.”³

Indeed, students of international relations and public administration pointed to the fact that the absence of a world government did not stand in the way of an “emerging reality of global governance.”⁴ Recently, Koppell sketched – both empirically and conceptually – the “organization of global rulemaking”. Even in the absence of a centralized global state, the population of Global Governance Organizations (GGOs) is not a completely atomized collection of entities. “They interact, formally and informally on a regular basis. In recent years, their programs are more tied together, creating linkages that begin to weave a web of transnational rules and regulations.”⁵

While lawmaking by formal, intergovernmental international organizations received abundant attention over the past years,⁶ we know less about a phenomenon that we would coin ‘informal international lawmaking’ (IN-LAW). This concept is the subject of an international research project and some first results serve as a basis for our analysis.⁷

¹ ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* (Oxford University Press, 2007). See for a non-legal approach: M.J. WARNING, *TRANSNATIONAL PUBLIC GOVERNANCE: NETWORKS, LAW AND LEGITIMACY* (Palgrave Macmillan, 2009).

² See also Ige F. Dekker & Ramses A. Wessel, *Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions*, in *GOVERNANCE AND INTERNATIONAL LEGAL THEORY* 215-236 (I.F. Dekker & W.G. Werner eds., 2004).

³ JOSE ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 217 (Oxford University Press, 2005).

⁴ JONATHAN G.S. KOPPELL, *WORLD RULE. ACCOUNTABILITY, LEGITIMACY, AND THE DESIGN OF GLOBAL GOVERNANCE* (The University of Chicago Press, 2010), Chapter 1.

⁵ *Ibid.*

⁶ A prime example being ALVAREZ, *supra* note 4.

⁷ See www.informallaw.org.

Whereas it may have been relatively easy for students of political science or public administration to accept a shift from *government* to *governance*, lawyers struggle with the new and extensive normative output in global governance. Indeed, “we continue to pour an increasingly rich normative output into old bottles labelled ‘treaty’, ‘custom’, or (much more rarely) ‘general principles’”.⁸ At the same time it is increasingly recognised that we may not be able to capture all new developments by holding on to our traditional notions. One solution is to simply disregard all normative output that cannot be traced back to any of the traditional sources of international law. This approach, however, runs the risk of placing international legal analysis (even more) outside the ‘real world’.⁹ After all, in many cases the non-traditional normative processes *de facto* have similar effects as traditional legal rules. In addition, given the absence of formal criteria for an agreement to constitute a treaty or legally binding commitment, some IN-LAW may even fit within existing sources of international law or can at least be part of the process of law creation (including custom and treaty interpretation). This forms a reason to refer to ‘lawmaking’ in the sense of norm-setting or public policy making by public authorities. We use the term ‘law’ to connote the exercise of public authority, as opposed to what is often referred to more broadly as ‘regulation’ (covering both public and private regulation). IN-LAW, as we define it, can include private actor participation, but excludes cooperation that only involves private actors (see *infra*, 2).

Following the notion that ‘governance’ is about creating (public) order,¹⁰ the ‘public authority’ avenue may indeed lead us in the right direction. The notion was recently studied in the framework of a Max Planck project on the ‘Exercise of International Public Authority’.¹¹ Large parts of international cooperation (including

⁸ ALVAREZ, *supra* note 4.

⁹ The scope of this contribution does not allow us to refer to the large debate on the question how to differentiate ‘law’ from ‘non-law’. See for a recent contribution to the IN-LAW project: Dick W.P. Ruiter & Ramses A. Wessel, *The Legal Nature of Informal International Law: A Legal Theoretical Exercise*, in *INFORMAL INTERNATIONAL LAWMAKING* (J. Pauwelyn, R.A. Wessel & J. Wouters eds., 2012 (forthcoming)).

¹⁰ For example: Guy Peters, *Introducing the topic*, in *GOVERNANCE IN A CHANGING ENVIRONMENT* (B.G. Peters & D.J. Savoie eds., 1995).

¹¹ See ARMIN VON BOGDANDY, RÜDIGER WOLFRUM, JOCHEN VON BERNSTORFF, PHILIPP DANN, MATTHIAS GOLDMANN eds., *THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Springer, 2010). See in the same volume also also Matthias Goldmann, *Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority* 661-711; and Armin von Bogdandy, Philipp Dann and Matthias Goldmann,

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some of the forms mentioned above) could be considered as merely affecting the private legal relationships between actors. In particular when non-governmental actors are involved, we would argue that the ‘public’ dimension is essential whenever we wish to see international norm-setting as ‘lawmaking’. Von Bogdandy, Dann and Goldmann define the ‘exercise of international public authority’ in the following terms: “any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international public authority *if* it determines individuals, private associations, enterprises, states, or other public institutions”.¹² ‘Authority’ is defined as “the legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation”. Also important is the fact that the determination may or may be not legally obligating: “It is binding if an act *modifies the legal situation* of a different legal subject without its consent. A modification takes place if a subsequent action which contravenes that act is illegal.”¹³ The authors believe that this concept enables the identification of all those governance phenomena which public lawyers should study. At the same time, the blurring of formal and informal law once public authority is exercised triggers questions related to the accountability of IN-LAW mechanisms.

The present contribution thus purports to introduce the concept of ‘informal international lawmaking’. Section 2 will first of all define the notion. Section 3 will present some findings based on case studies in the IN-LAW project related to the reasons to opt for informal lawmaking. A fourth Section will analyse whether – and to what extent – such IN-LAW bodies are subject to some form of accountability and, if so, in what form and at what level. Section 5, finally, will be used to look at some consequences of informal international lawmaking. Obviously, many questions remain unanswered and new questions will emerge. This paper should therefore be seen as a first step in introducing a new research agenda addressing the changing role of law in global governance.

Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities 3-32.

¹² *Ibid.* at 5.

¹³ *Ibid.*, at 11-12.

2. Defining Informal International Lawmaking¹⁴

We use the term ‘informal’ international lawmaking in contrast and opposition to ‘traditional’ international lawmaking. IN-LAW is ‘informal’ in the sense that it dispenses with certain formalities traditionally linked to international law. These formalities may have to do with *output*, *process* or the *actors involved*. It is exactly this ‘circumvention’ of formalities under international and/or domestic procedures that generated the claim that IN-LAW is not sufficiently accountable.¹⁵ At the same time, escaping these same formalities is also what is said to make IN-LAW 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”.¹⁶

2.1 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 any other traditional source of international law¹⁷, but rather to a guideline, standard, declaration or even more informal policy coordination or exchange. Aust 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’.¹⁸ Our definition, however, does not necessarily equate output informality with not being legally binding. We focus on lack of certain formalities; not lack of legal bindingness per se. While being aware of the extensive debates on ‘soft law’, we

¹⁴ See, more extensively, Joost Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, in *Informal International Lawmaking* (PAUWELYN, WESSEL & WOUTERS, *supra* note 9)

¹⁵ See, for example, Eyal Benvenisti, *Coalitions of the Willing’ and the Evolution of Informal International Law in COALITIONS OF THE WILLING - AVANTGARDE OR THREAT?* (C. Calliess, C. Nolte & G. Stoll eds., 2007); Benedict Kingsbury & Richard Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, in *INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN A CHANGING WORLD* 5 (Spyridon Flogaitis ed., 2008) framed this critique as follows: “Even in the case of treaty-based international organizations, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies – including networks of domestic officials and private and hybrid bodies – operate wholly outside the traditional international law conception and are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree”.

¹⁶ Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *INTERNATIONAL ORGANIZATION* 495, 500 (1991).

¹⁷ That is, sources of international law as described in Article 38 of the Statute of the International Court of Justice (conventions, custom, general principles of law).

¹⁸ Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 *ICLQ* 787, 787 (1986).

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purposively do not use the term here, to allow for a more comprehensive analysis of IN-LAW, in which not only the output, but also the actors and the process are different from formal lawmaking.¹⁹

At the *domestic* level, output informality may, at least in some situations, lead to weaker forms of domestic oversight, e.g. little or no internal coordination, notice and comment 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”.²⁰ 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.²¹ In Germany, an internal instruction 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”.²²

At the *international* level, output informality raises the fundamental question of whether IN-LAW is even part of what we call ‘international law’ (be it traditionally defined or under some modern, evolutionary definition) and whether IN-LAW is, as a result, subject to the normative strictures and consequences that normally come hand in hand with being part of international law. Such strictures and consequences include the

¹⁹ See, however, another contribution to the project, where IN-LAW is placed within the broader debates: Joost Pauwelyn, *Is It International Law or Not and Does it Even Matter?*, in PAUWELYN, WESSEL & WOUTERS, *supra* note 9.

²⁰ See U.S. State Department website, Circular 175 Procedure, at 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.

²¹ Treaties and MOUs, Guidance on Practice and Procedures, 2004, Treaty Section, Foreign & Commonwealth Office, p. 1. Note, however, that the UN Treaty Handbook (p. 61) does consider MOUs as legally binding: “The term memorandum of understanding (M.O.U.) is often used to denote a less formal international instrument than a typical treaty or international agreement ... The United Nations considers M.O.U.s to be binding and registers them if submitted by a party or if the United Nations is a party”.

²² Gemeinsame Geschäftsordnung der Bundesministerien, § 72, available at www.verwaltungsvorschriften-im-internet.de/bsvwvbund_21072009_O113120018.htm.

basic rule that no state can be bound without its consent, applicability before international courts or tribunals, hierarchy and systemic relation to other rules of international law including basic human rights and *jus cogens*, registration with the UN Secretariat²³ etc. We leave the matter of whether IN-LAW and/or its output is regulated under, part of, or even (partly) binding under, international law open for further scrutiny. The reason to use the term ‘lawmaking’ is exactly meant to find out whether the normative processes under review can somehow lead to ‘law’. At the same time it forces lawyers to reassess the foundations of their discipline in view of emerging forms of global governance.

2.2 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 G-20, 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 IN-LAW in the context or under the broader auspices of a more formal organization (a lot of IN-LAW occurs, for example, under the auspices of the OECD).

What we do *not* include under informal international lawmaking, 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 IN-LAW 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 IN-LAW also happens behind closed doors).

²³ Article 102 of the UN Charter provides: “1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. 2. No party to any such treaty or international agreement, which has not been registered in accordance with the provisions of paragraph 1 of this Article, may invoke that treaty or agreement before any organ of the United Nations”.

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Process informality, on top of output informality, may, in certain situations, further limit normative strictures or control under both domestic and international law. As Slaughter phrased it, “[t]he essence of a network is a *process* rather than an *entity*; thus it cannot be captured or controlled in the ways that typically structure formal legitimacy in a democratic polity”.²⁴ For example, regulators may face less domestic constraints when operating in a loose network abroad with foreign partners as compared to when they act purely domestically or in contrast to formal delegates to an IO. Moreover, meetings and decisions in a traditional IO are normally more tightly regulated and structured than informal gatherings. As a result, process informality raises additional questions and trade-offs between effectiveness and accountability both at the domestic and at the international level.

As we did above in respect of IN-LAW output and the question of whether such output is part of international law, we do not want to prejudge the matter of whether an IN-LAW 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 being a subject or having legal personality may be that some IN-LAW bodies 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 body and may, in turn, make it more difficult rather than easier to hold the IN-LAW body accountable (participating national actors may, for example, hide behind the IN-LAW as a legal person when it comes to responsibility; independent international status may enhance the power of the body and 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, IN-LAW (referring to ‘transgovernmental regulatory networks’ – one particular kind of IN-LAW) 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

²⁴ Anne-Marie Slaughter, *Agencies on the loose? Holding government networks accountable, in* TRANSATLANTIC REGULATORY COOPERATION, LEGAL PROBLEMS AND POLITICAL PROSPECTS 525 (G. Bermann, M. Herdegen & P. Lindseth eds., 2000).

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.²⁵

That said, even where accountable to domestic constituencies and, in this sense, accountable to *internal* stakeholders, the question remains whether IN-LAW bodies are sufficiently accountable to *external* actors including broader societal interests and countries outside the IN-LAW body (say where network output is *de facto* implemented, as is the case of ICH²⁶ guidelines in many non-ICH member countries). As Richard Stewart pointed out, “the problem is often not lack of accountability, but disproportionate accountability to some interests and inadequate responsiveness to others”.²⁷

2.3 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 judicial branch.²⁸ 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.

²⁵ ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* Chapter 6 (Princeton University Press, 2004).

²⁶ ICH stands for “International Conference on Harmonization of Technical Requirement for Registration of Pharmaceuticals for Human Use”.

²⁷ Richard Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance* 27 (Draft paper, January 2008) available at www.iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf, adding: “policies are often strongly influenced by well-organized financial, business, and other economic actors, which operate more effectively and exert greater sway in the informal, opaque, negotiation-driven networks of national-global regulatory decision making than more weakly organized general societal interests”.

²⁸ 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 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*).

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The non-traditional nature of the actors involved in IN-LAW may be further accentuated with the participation of private actors (besides public actors) and/or international organizations. In some cases, IN-LAW 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 IN-LAW.

The fact that regulators or agencies – rather than diplomats – are involved further complicates the question of whether IN-LAW 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.²⁹ 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.³⁰

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 domestic administrative law, 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, for example, a regulator or agency, or *vice versa*.

²⁹ Circular 175, 1 U.S.C. 112a, 112b, § 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”.

³⁰ Website of the French Ministry of Foreign Affairs, 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 »

In summary, our working definition of ‘informal international lawmaking’ 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 traditional source of international law (output informality).

3. Reasons for Informal International Lawmaking

Some of the reasons for IN-LAW are novel or recently on the rise (e.g. multipolarity, the disaggregation of the state or new modes of governance by ‘technical necessity’).³¹ This may explain the growing number of IN-LAW mechanisms especially in the last 10-15 years. Other reasons (such as the burdensome procedures linked to formal lawmaking or the uncertainty inherent in specific fields of cooperation) have been around for much longer.³²

Some of the reasons for IN-LAW are perfectly benign. They portray IN-LAW as a complement or alternative to formal law (e.g. in areas that would otherwise not be occupied by formal law) or even as the first-best option to deal with a cooperation problem, more appropriate or effective, or less costly than formal law. These reasons would not seem to raise concern or call for major reforms or changes. Other reasons for IN-LAW are more worrisome. The goal of ‘circumventing’ formalities, for example, has raised questions of accountability and even legality. Those reasons for IN-LAW could lead to calls for reforming, regulating or limiting IN-LAW activity. On other occasions, in contrast, IN-LAW is resorted to because of arguably outdated features of international law itself: who can make it, how can it be made, changed and implemented, and how does it score on the scales of legitimacy and effectiveness. This

³¹ Matthias Hartwich, *ICANN – Governance by Technical Necessity*, in VON BOGDANDY, WOLFRUM, VON BERNSDORFF, DANN & GOLDMANN, *supra* note 11.

³² See Christian Tietje, *History of Transnational Administrative Networks in TRANSNATIONAL ADMINISTRATIVE RULE-MAKING* (O. Dilling, M. Herberg and G. Winter eds., 2011).

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raises the question of not so much how to reform or adjust IN-LAW but how to reform or adjust traditional international law.³³

There are, in any event, multiple reasons for actors to opt for IN-LAW, some of which may even be in tension or outright contradictory. Some of them are sociological explanations related to the broader environment. Others relate to tactical or normative considerations by the actors involved or outside observers. Below we classify those reasons in two broad categories: First, those that, in one way or another, portray IN-LAW (rightly or wrongly) as a ‘second-best’ option that is likely problematic (not least in terms of accountability) as compared to the perceived ‘superior’ route of formal lawmaking (IN-LAW because formal lawmaking is ‘too burdensome’, ‘un-attainable’ or ‘technically impossible’; IN-LAW to ‘favour the powerful’ or to ‘counter formal law’). We refer to these reasons for IN-LAW as reasons that portray IN-LAW as ‘second-best’ only because those reasons put IN-LAW in a bad light or portray it as the ‘inferior’ mode of governance (e.g. in the sense that if only negotiators would have been able to conclude formal law, that is what they would have done). By doing so, we do not in any way make ourselves a normative judgment as to whether IN-LAW is, in the circumstances, first or second-best. Those pejoratively tainted reasons for IN-LAW are what we would call the more conventional explanations for the rise of IN-LAW.

Second, we detect less conventional or less noticed reasons for ‘informal’ lawmaking which set up or perceive IN-LAW (rightly or wrongly) not as a second-best, fall-back choice but as a ‘first-best’ option which may be, rather than problematic, the progressive way forward. This second set of reasons put IN-LAW in a positive light and raise questions about, or cast a pejorative shadow on, not so much IN-LAW itself but on formal lawmaking practices (IN-LAW as ‘cheaper’ alternative to achieve the same goal; IN-LAW as a ‘cultural practice’ (the Asian way); IN-LAW as procedurally or substantially superior to ‘outdated’ formal lawmaking practices).

Reasonable people will no doubt disagree on whether to put a particular reason for IN-LAW in the first (pejorative) or second (positive) category. Yet, notwithstanding this difficulty of drawing a fine line between these two types of reasons, we do believe

³³ As J. Klabbers has noted, albeit in a different context: “Globalization seems to have bypassed the discipline of international law completely”. Jan Klabbers, *The Idea(s) of International Law*, in *THE LAW OF THE FUTURE AND THE FUTURE OF LAW* 71(S. Muller, S. Zouridis, M. Fishman & L. Kistemaker eds., 2011).

that thus distinguishing between rationales for the creation and rise of IN-LAW has clarifying power.

3.1 Pejorative Reasons for IN-LAW (IN-LAW Perceived as ‘Second-Best’)

1. **Formal lawmaking is ‘too burdensome’** both internationally and domestically: IN-LAW is resorted to in order to overcome impediments linked to ‘formal’ international lawmaking³⁴, in particular, (i) formal *state consent* between *all* target countries at the *international* level³⁵ and (ii) *domestic* ratification and related (super-)majorities in national parliaments or domestic regulatory processes such as internal consultation or administrative notice and comment procedures. Regarding process informality, informal processes too may be selected over formal intergovernmental organizations when the latter are perceived as too burdensome, that is too bureaucratic or too slow in getting things done.
2. **Formal lawmaking is ‘un-attainable’** due to high uncertainty related to the issue area and/or high diversity amongst negotiating parties. Especially IN-LAW on the output-informality axis is more likely when ‘uncertainty’ as to the issues involved or ‘diversity’ of interests between actors is high (think, for both elements, of climate change). When interests are certain and sufficiently aligned amongst a critical mass of countries, ‘formal’ law is more likely.³⁶

Similarly, IN-LAW is often resorted to when countries are not ready to bind themselves formally given that formal lawmaking adds costs in case of defection (such costs can be linked to sanctions or retaliation, reciprocity or loss of reputation).³⁷ For realists, this means that IN-LAW is meaningless (since not

³⁴ LIPSON, *supra* note 16.

³⁵ See KLABBERS, *supra* note 33, 75: IN-LAW/soft law “discards the function of law which, in all plausibility, is precisely to simplify those existing political configurations and turn them into workable mechanisms, where behavior is either legal or it is not, and one is either in breach of an obligation or one is not”.

³⁶ David Trubek & Louise Trubek, *Hard and Soft law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR.L.J. 343, 353 (2005).

³⁷ ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (Oxford University Press, 2008).

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binding).³⁸ Others have argued that even IN-LAW (or soft law) can be effective due to reputational costs³⁹ or socialisation of norms.⁴⁰ Based on our studies, the latter view is more convincing: informal law both internationally and domestically has on many (though certainly not all) occasions proven to be effective or at least to substantively change behaviour: countries implement it (e.g. Basel II), actors comply with it (ISO, internet standards) and even courts, both international and domestic, refer to it (ICJ in *Pulp Mills* dispute, WTO Appellate Body when applying the SPS/TBT agreements).

On this view, IN-LAW is on the rise in a multi-polar world (no hegemons who are willing to pull formal lawmaking structures like the GATT/WTO, UN or Kyoto Protocol were pulled by the US or Europe), where many problems of cooperation involve serious distributional effects or scientific or other technical or economic uncertainties. From this perspective, IN-LAW is often seen as normatively second-best to formal law: if only countries could address uncertainties or overcome diversity, they would/could enact formal law.⁴¹

3. **Formal lawmaking is ‘technically impossible’:** The rise of the administrative or ‘disaggregated’ state. Whereas countries were traditionally represented on the international scene by Heads of State or Foreign Ministries, controlled by national Parliaments, within countries powers have increasingly been delegated to administrative agencies and regulators. These agencies and regulators, by necessity, also have to tackle cross-border questions and, within the regulatory mandate accorded to them by national Parliaments and/or governments, have started to act on the international scene.

Under traditional international law, these new actors of the ‘disaggregated’ national state cannot normally represent the state (unless they were specifically accredited). Therefore, instead of resorting to formal lawmaking, by necessity (no

³⁸ George Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INTERNATIONAL ORGANIZATION 379 (1996).

³⁹ GUZMAN, *supra* note 37.

⁴⁰ Martha Finnemore & Kathryn Sikkink, *International Norms and Political Change*, 52 INTERNATIONAL ORGANIZATION, 887 (1998); CHECKEL JEFFREY ed., INTERNATIONAL INSTITUTIONS AND SOCIALIZATION IN EUROPE (Cambridge University Press, 2007).

⁴¹ ROBERT KEOHANE, AFTER HEGEMONY (Princeton University Press, 1984); STEPHEN D. KRASNER ed. INTERNATIONAL REGIMES (Cornell University Press, 1983)

domestic mandate to bind the state; no international recognition as legal persons), these new actors use IN-LAW. Here IN-LAW is used by technical necessity and this even though the participants might have been able to tie their hands more strictly under formal law. From this perspective, IN-LAW is a 'second-best' choice in that 'real' lawmaking is simply not available. It is not so much the subject matter or diversity of interests between states that dictates the choice for formal or informal lawmaking, but rather the very nature of the participants.⁴²

One solution is for traditional international law to adapt itself, e.g. by formally recognizing domestic agencies or regulators as legal persons that can bind states under international law (as Slaughter and Zaring have proposed⁴³). Another solution is to set-up cross-border agency cooperation as activity outside formal international law and governed by, for example, a new set of rules such as Global Administrative Law.⁴⁴

4. **IN-LAW to favour the powerful:**⁴⁵ Informality can benefit powerful players who will find their way out in case of pressures for defection. Weaker actors, in contrast, may, in practice, be as constrained by informal law as they are by formal law. This *rationale* for IN-LAW (powerful actors want it) may be in tension with another reason above, arguing that high diversity or multi-polarity (rather than hegemony) lead to more IN-LAW. Further, IN-LAW bodies among powerful, developed states enable those states to escape the veto power of developing countries in traditional IOs. In addition, the question remains whether informal law reflects power more than formal law or whether all norm-making is (equally)

⁴² That said, if the actors involved would consider it necessary or important, they could involve the higher, political level that has the capacity to conclude treaties on their behalf. However, there may be many reasons why both sides may prefer not to do so (regulators because they want to keep the power delegated to them; the higher, political level because they have no expertise or when it comes to highly scientific or technical topics, because the political level prefers to keep its hands off a topic except where big problems arise or where major interests are involved).

⁴³ Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOVERNMENT AND OPPOSITION 186 (2004); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEXAS INTERNATIONAL LAW JOURNAL 281, 327-328 (1998).

⁴⁴ Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15 (2005).

⁴⁵ Eyal Benvenisti, *supra* note 15; DANIEL DREZNER, *ALL POLITICS IS GLOBAL: EXPLAINING INTERNATIONAL REGULATORY REGIMES* (Princeton University Press, 2007).

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influenced by power. Many transgovernmental regulatory networks are limited in their partnership to a small group, or ‘club’ of countries. While in the years that have passed since they were first set up their effects have gone beyond their membership, when they were set up around two decades ago (e.g. Basel Committee, ICH), the topics were of concern to a limited number of countries only and, hence, the intergovernmental organizations with their (almost) universal membership (such as the IMF or WHO) were perceived as inappropriate venues.

5. **IN-LAW to counter formal lawmaking:**⁴⁶ IN-LAW is, in this situation, not a complement or alternative to formal lawmaking but rather resorted to as an antagonist, to undermine existing hard or formal law (IN-LAW to soften hard law). This making of IN-LAW can go hand in hand with forum-shopping: actors unhappy with an existing framework create a competing one in another forum. This competition may play out especially when powerful countries cannot agree and there are important distributional effects to cooperation (e.g. in case of standard-setting, the need for cooperation is acknowledged but precisely whose standard will be adopted as international standard has important distributional effects). IN-LAW as antagonist can also be resorted to by weaker, outsider countries who disagree with a regime set up by powerful players so as to thwart the existing regime.
6. **IN-LAW as an irreversible process.** Parties that have started out cooperating in an informal process may decide over the life cycle of the process whether a binding agreement is necessary or not. If they see that the parties are complying with the non-binding agreement, a binding agreement (whose completion is always resource and time expensive) becomes unnecessary. In some IN-LAW mechanisms a certain re-formalization of the mechanism can also be observed, for example in order to give it legitimacy under international law. This ‘lack of international legitimacy’ might be one of the reasons to choose formal over informal lawmaking.

⁴⁶ Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINNESOTA LAW REVIEW 706 (2010).

3.2 Positive Reasons for IN-LAW (IN-LAW Perceived as ‘First-Best’)

1. **IN-LAW as ‘cheaper’ alternative to achieve the same goal:** Here, informal lawmaking is perceived as ‘optimal’ and normatively superior (rather than inferior) to formal lawmaking: the goal sought can be achieved effectively and in an accountable manner without the costs of formal lawmaking.

Certain IN-LAW may occur exactly in those areas where there is full alignment of interests (*low diversity*) and/or technical/expert agreement (*low uncertainty*) so that ‘formal’ lawmaking (and the costs involved) is not even required to achieve cooperation.

Here IN-LAW is likely to be the normatively first-best option (no need to set up costly, formal mechanisms). It is resorted to not because formal lawmaking is un-attainable as some ideal solution, but because IN-LAW is just more appropriate or cheaper to attain a particular goal.

Similarly, certain IN-LAW on the process-informality axis (e.g. actors getting together in a loose network rather than an IO) is more likely when there is club-style like-mindedness between a limited number of countries. Here, IN-LAW also comes hand in hand with *low* (rather than high) diversity.

That said, although there may be no need to have formal law to ensure cooperation and IN-LAW may, in this sense, be optimal in terms of effectiveness that does not necessarily mean that it is also optimal in terms of accountability (discussed below).

2. **Formal lawmaking as ‘outdated’;** IN-LAW as superior both procedurally and substantively.

IN-LAW is increasingly resorted to not because formal law was un-attainable as some ideal solution but because informal cooperation was simply seen as better and more appropriate both procedurally and substantively. The IN-LAW route can then be chosen not as part of some dark conspiracy to avoid the democratic strictures of formal lawmaking, but rather because IN-LAW is more (rather than less) accountable or responsive to a broader audience and better adapted to modern norm development. Here as well IN-LAW is perceived not as a second-best fall-back option but as the normatively superior track with which formal law has difficulties competing. This raises the question not so much of

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what is wrong or needs to be reformed on the side of IN-LAW, but what should be reconsidered on the side of formal, traditional international law (should, for example, the Vienna Convention on the Law of Treaties be revised to take account of modern standards of norm-making set out in, for example, the ISEAL Code of Good Practice for Setting Standards⁴⁷?). Here, IN-LAW can often be more (rather than less) accountable, transparent and responsive as compared to formal lawmaking.

There are some common elements of IN-LAW that can make IN-LAW more (rather than less) attractive *procedurally*:

- *decision by 'rough consensus'*⁴⁸: Rough consensus rather than individual state consent with a veto or opt-out for each individual country (no matter how small or important) may not only be easier to obtain (more effective). The way 'consensus' is defined and operates can also be more representative or responsive to a broader group of stakeholders in accordance with their respective weight and importance (and therefore be more accountable or democratic).⁴⁹
- IN-LAW is not to be ratified and implemented in a one-off exercise: *domestic input is an ongoing process* and even after adoption of the standard the interplay continues (the idea of a '*running code*' relates to ex post testing of a standard: if it works and is accepted as legitimate, the standard becomes effective; if not, it is put aside and adjusted). Traditional international law is not only difficult to ratify domestically (senate majorities; administrative law requirements). It is also a static, one-time process of all or nothing. IN-LAW methods, in contrast, allow for more

⁴⁷ ISEAL, CODE OF GOOD PRACTICE FOR SETTING STANDARDS (*available at www.isealalliance.org/code*).

⁴⁸ GRAF PETER CALLIES & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (Hart publishing, 2010).

⁴⁹ See, for example, definition of 'consensus' in the ISEAL standard (making reference also to ISO definition): "General agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests. NOTE – Consensus should be the result of a process seeking to take into account the views of interested parties, particularly those directly affected, and to reconcile any conflicting arguments. It need not imply unanimity - (based on ISO/IEC Guide 2:2004)". This definition was recently referred to with approval by a WTO panel (*United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated on 15 September 2011, § 7.676).

continuous interaction and adjustments between the international and the domestic level (continuous review, ongoing monitoring, formal or informal complaints mechanism as opposed to fixed nature of treaty making and implementation where amendments normally have to go through the same, long process of ratification thereby stifling adaptations to quickly changing environments).

- *The flexibility of IN-LAW also allows for the mechanism at the international level to adapt itself to new developments*, be it new players or new issues to be incorporated or reforms to be implemented (e.g. on transparency, openness or inclusion of outsiders).
- Domestic regulators, subject to domestic administrative law procedures (such as notice and comment), allow for greater citizen involvement in the transgovernmental rule making process – more than would be possible in the traditional settings (e.g. by diplomats in IOs or in treaty negotiations).

There are also some common elements of IN-LAW that can make IN-LAW more (rather than less) attractive *substantively* (substantive quality of norms):

- emerging general principles for the elaboration of IN-LAW (initiation of new standard; notice & comment; several drafts sent back and forth between stakeholders, clarity of rules, etc.) is likely to lead to norms that are *more transparent, inclusive, clear and effective* as compared to how traditional international law is made. Here as well, IN-LAW is not the little stepsister of formal law; it can be normatively superior. Put differently, it is, on those occasions, not so much formal law that is to give ‘accountability lessons’ to informal law but the other way around. These emerging IN-LAW principles can lead not only to input legitimacy but also output legitimacy in that norms are enacted that ‘work’ and solve the problem that voters or constituencies wanted action on.
- Because the IN-LAW elaboration process allows input from all stakeholders, *consistency of norms across regimes* may be easier to

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achieve (as compared to formal lawmaking where e.g. WTO negotiators conclude a treaty without being aware of environmental or human rights treaties). Against that, however, is the argument that formal lawmaking passes through the State Department or other oversight ministry which is supposed to check cross-regime consistency (whereas IN-LAW may be made by narrowly-focused regulators with no idea what the state is committed to elsewhere).

3. **IN-LAW as a ‘cultural practice’ (the Asian Way).**⁵⁰ The East Asian region has frequently been characterized as a principal example of soft legalization. It is generally believed that countries in this region have preferred non-binding measures to binding measures.

Interesting questions arise in this context. Could the rise of IN-LAW be partly related to, or further accelerate due to, the emergence on the international scene of Asian countries, including China? Is the alleged preference for informal mechanisms in the region actually correct? Is there data showing that these mechanisms have worked better (IN-LAW as first-best option) or can we point also at failures of IN-LAW even in the Asian context?⁵¹

4. **IN-LAW as ideally suited for highly technical matters .** In these cases the reason to opt for IN-LAW is related to the technical expertise needed to regulate a particular area. In such areas (e.g. the regulation of medical products, nano-technology or standards to fight cybercrime) regulation is basically drafted by experts and there may be little or less room for political (governmental) considerations. As one observer held, this is “governance by technical necessity”.⁵²
5. **IN-LAW as a reflection of domestic practices.** Within regulatory authorities in the US, EU and other highly developed countries there has been a shift, for some time already, towards informality and preference for ‘guidance

⁵⁰ RANDY PEERENBOOM, THE FUTURE OF LAW IN A MULTI-POLAR WORLD: TOWARD A GLOBAL NEW DEAL IN THE LAW OF THE FUTURE AND THE FUTURE OF LAW 43 (MULLER, ZOURIDIS, FISHMAN & KISTEMAKER eds., *supra* note 33),.

⁵¹ TAKAO SUAMI, INFORMAL INTERNATIONAL LAWMAKING AND EAST ASIA – AN EXAMINATION OF APEC FROM THE VIEWPOINT OF IN-LAW (draft *available at* www.informallaw.org).

⁵² HARTWICH, *supra* note 31.

documents' over legally binding regulations. Without going into the reasons for these domestic processes, the use of IN-LAW in transnational activities often reflects a 'bottom up' application of domestic practices.

6. **IN-LAW as a pragmatic choice to include private actors.** The rise in the international political power of private actors, and the desire of governments to include them in regulatory processes, has shifted cooperation away from intergovernmental organizations and/or formal treaties as these formal processes and output would not allow for their inclusion.
7. **IN-LAW as a result of European practices.** In some cases, the origin of the regulatory network model can be traced back to a European regulatory network. For example, without any previous experience in international cooperation, the drug regulatory authorities, which joined forces in the ICH to harmonize their pharmaceuticals registration rules, copied the network model, which had been previously developed in the context of European pharmaceutical harmonization. This could be explained by historical institutional, or path dependency theory.
8. **IN-LAW as a temporary project.** When states consider a project to be temporary they may prefer an informal setting over a formal, institutionalized one.
9. **IN-LAW to maintain national sovereignty.** 'Non-binding' rules allow each of the parties to maintain their sovereignty and to adapt the agreed upon rules to their local capacities and needs.
10. **INLAW to allow for dynamic development.** On scientific matters parties do not want to bind themselves as science is constantly changing, and by the time a binding rule is concluded, it would need to be amended. Moreover, if scientific rules would be binding the parties could find themselves under a duty to comply with out-dated rules.

4. Accountability of Informal International Lawmaking⁵³

As stated above,⁵⁴ informal international lawmaking processes take place in a broad array of more or less informal international bodies composed of public officials (who may or may not be supplemented by private actors) who come together outside the formal framework of the decision-making process of an international organization or diplomatic conference to develop potentially binding norms in areas of public policy. Besides mapping the creation and operation of IN-LAW, it is necessary to pinpoint some difficulties holding IN-LAW bodies accountable (*infra*, § 4.2). Based on this analysis, we will assess a selection of possibilities for strengthening the accountability of IN-LAW bodies (*infra*, § 4.3).

4.1. The concept of accountability in an IN-LAW context

As with the notion of IN-LAW itself, we take a broad view of accountability. Our general approach is problem-oriented: we are more interested in trying to tackle what are, *or are perceived to be* (rightly or wrongly), problems of accountability related to IN-LAW (see section 4.2), and less interested in making (yet another) attempt at defining what precisely accountability is.⁵⁵ There is no single definition of accountability. 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”.⁵⁶ 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, a broad and multi-faceted notion of accountability also offers a welcome canvass to think ‘out of the box’.

⁵³ See more extensively Tim Corthaut, Bruno Demeyere, Nicolas Hachez & Jan Wouters, *Operationalizing Accountability in Respect of International Informal Lawmaking Mechanisms* (PAUWELYN, WESSEL & WOUTERS, *supra* note 9).

⁵⁴ See Section II: Defining Informal International lawmaking.

⁵⁵ On the elusiveness and multiple attempts at defining accountability, see Mark Bovens, *Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism*, 33 WEST EUROPEAN POLITICS 946 (2010).

⁵⁶ Ruth Grant & Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29 (2005).

When specifying the contours of accountability in an IN-LAW context, a crucial clarification must be made: accountability must be examined both at the international level (e.g. participatory decision-making, transparency, the existence of a complaints mechanism at the level of the IN-LAW body) and at the domestic level (e.g. domestic administrative or political control over the participants in the IN-LAW process, domestic review and notice and comments procedures before international guidelines are implemented, etc.).

The question of accountability only arises to the extent public *authority* or *power* is being wielded under IN-LAW. This goes back to our definition of ‘public authority’ (*supra*) as action by public entities which unilaterally “determines” or “reduces the freedom of” others. Indeed, empirical studies in the IN-LAW project revealed the exercise of public authority in many sectors.⁵⁷ As the International Law Association (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”.⁵⁸ In other words, if no public authority or power is being wielded by IN-LAW, a problem of accountability is unlikely to arise. The operationalization of accountability is intended to counterbalance the exercise of granted and implied powers of IN-LAW bodies. This is what Bovens⁵⁹ identifies as the *constitutional function* of preventing the abuse of power. Next to this, accountability has a *democratic function*, i.e. the representativeness or responsiveness towards elected officials and the people, and a *learning function*, whereby it functions as an opportunity for learning through improvement upon earlier mistakes, or through public exposure of failure.

‘Accountability’, applied to the specific phenomenon of IN-LAW, is ultimately about ‘responsiveness’ to people or, put negatively, ‘disregard’ of people. As Slaughter argued, “[i]n its broadest sense, accountability means responsiveness. Accountability in a

⁵⁷ See for an example in the internet sector: Ramses A. Wessel, *Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors*, in REGULATING TECHNOLOGICAL INNOVATION: A MULTIDISCIPLINARY APPROACH (M.A. Heldeweg & E. Kica eds., 2011 (77-94)).

⁵⁸ INTERNATIONAL LAW ASSOCIATION, REPORT, at 225.

⁵⁹ Mark Bovens, *Analysing and Assessing Accountability - A Conceptual Framework*, 13 EUROPEAN LAW REVIEW, 447, 462-465. See also Mark Bovens, Deirdre Curtin & Paul ‘t Hart, *Studying the Real World of EU Accountability: Framework and Design*, in THE REAL WORLD OF EU ACCOUNTABILITY – WHAT DEFICIT? 49-52 (Oxford University Press 2010).

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democratic society means responsiveness to the people – the responsiveness of the governors to the governed”.⁶⁰ Conversely, as Stewart has pointed out, when people refer to “accountability gaps” it is, ultimately, a diagnosis of a larger problem of “disregard ... the disregard by global decisional bodies of the interests of affected but marginalized states, groups, and diffuse economic, environmental and other societal interests”.⁶¹ The notions of responsiveness and disregard have both substantive and procedural meaning: substantive, in the sense that IN-LAW ought to respond to and promote the values, goals and aspirations of people (here, accountability and effectiveness go hand in hand, and could be said to culminate in what is often referred to as *output* legitimacy); procedural, in the sense that IN-LAW ought to be transparent and open to and take account of the views expressed by people (leading to so-called *input* legitimacy).

Accountability, traditionally used, also has a narrow meaning. Bovens defines accountability as

*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.*⁶²

This definition is narrow in two ways: (1) it covers only *ex post* activity where information is given about, and judgment is passed on, actions already taken; (2) it requires an institutionalized relationship, governed by rules and procedures, between an ‘actor’ to be held accountable and a ‘forum’ holding the actor accountable, whereby the actor has certain obligations toward the forum and the forum has certain rights and powers to impose sanctions or other consequences on the actor.⁶³

For the purposes of our project we distinguish between accountability mechanisms strictly defined, pre-conditions for such accountability and other accountability-

⁶⁰ SLAUGHTER, *supra* note 24, at 523.

⁶¹ STEWART, *supra* note 27, at 1.

⁶² BOVENS, *Analysing and Assessing Public Accountability*, *supra* note 59, at 450.

⁶³ Or as STEWART points out, *supra* note 27, at 15: “accountability is a relational concept. At a minimum, an accountability mechanism meets four basic requirements: (1) a specified accountant, who is subject to being called to provide account including, as appropriate, explanation and justification for some specified aspect or range of his conduct; (2) a specified account holder or accountee; (3) authority on the part of the accountee, to demand that the accountant render account for his performance; and (4) the ability and authority of the account holder to impose sanctions or secure other remedies for performance that he judges to be deficient, or, in some cases, to confer rewards for superior performance”.

promoting measures. Time-wise, we refer to ex ante control, ongoing control and ex post control. Taking this broader approach, we define accountability as:

A dual relationship (operationalized through norms and procedures) between the public and a body, through which the latter 'takes account' of the interests, opinions and preferences of the former prior to making a decision (responsiveness), and through which it 'renders account' a posteriori of its activities and decisions, with the possibility of facing sanctions (control). The effectiveness of such relationship requires other meta-principles to exist, such as transparency and reason-giving (which are enablers, but not components of accountability).

4.2. Framing accountability problems of IN-LAW bodies

In light of our problem-oriented approach we aim at identifying some of the difficulties relating to the accountability of IN-LAW mechanisms. A preliminary point in this respect is that a tension exists between, on the one hand, *informal* networks or IN-LAW (focusing on its process-informality axis) and, on the other hand, ex post *institutionalized* or formalized accountability mechanisms. If it is the very nature of IN-LAW to be informal, how could it include formal, institutionalized accountability mechanisms? More in particular, the following uncertainties can be observed.

Actors involved in the operationalization of accountability of IN-LAW bodies

A first difficulty relates to questions of *actors*. In the IN-LAW context this encompasses three sub-questions: which actors must be held accountable, to whom must they be held accountable and who is responsible for holding relevant actors accountable. The accountability of IN-LAW could be invoked by two sets of actors. First, accountability could be owed to actors who entrusted the makers of IN-LAW with the power to do so (think of participating countries, the responsible ministers in those countries or the people/parliament who elected those ministers). This could be seen as *internal* accountability, that is, accountability to those (principals) who set up and ultimately control the IN-LAW entity. Given the informal nature of IN-LAW, especially at the international level, little authority (if any) is formally delegated by national participants (principles) to an international body (agent or trustee). Therefore, internal or delegation

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accountability is less likely to play out internationally as opposed to domestically (e.g., domestic regulators participating in IN-LAW being held accountable by their supervising domestic ministries or parliaments). As an important number of the actors are in one way or another linked to governmental bodies, at the domestic or international level, they are likely to be held accountable by the various (internal) techniques these bodies have developed for this purpose.⁶⁴ On the other hand, at least in some of these bodies there is also room for participation by private actors – most notably NGOs, business associations or companies. The flip side of the complexity caused by the number of actors is the problem of the ‘many eyes’.⁶⁵ Each of the actors – civil servants, diplomats, NGO representatives, business leaders – involved in IN-LAW bodies have their own constituency to whom they may be held accountable, most likely through a number of what Grant and Keohane describe as ‘delegation’ mechanisms – whereby the informality of the body may require a trust relationship (leaving some discretionary power to the trustee) rather than a strict principal-agent relationship.⁶⁶

Accountability could also be owed to actors who are affected by IN-LAW. Grant and Keohane refer to a *participation* model of accountability. Such participation model could be seen as *external* accountability in the sense that those who are holding IN-LAW accountable are not within the system of IN-LAW but rather stakeholders affected by it, be it public or private beneficiaries, victims, observers or third states who do not participate in the IN-LAW body but, for some reason, implement or abide by its guidelines. The need could be felt to ensure some degree of accountability vis-à-vis such broader external stakeholders as consumers, farmers, workers, or the public at large. At this level, where questions about democratic legitimacy and accountability need to be addressed, network governance traditionally scores rather poorly.⁶⁷ However, this notion of ‘accountability’ shows weaknesses: the ‘general public’ may be such a broad, diffuse and abstract notion that, at the end of the day, true accountability only comes

⁶⁴ Julia Black, *Constructing and contesting legitimacy and accountability in polycentric regulatory regimes*, 2 REGULATION & GOVERNANCE 142 (2008).

⁶⁵ BOVENS, *Analysing and Assessing Public Accountability*, *supra* note 59, at 455-457. See also, BOVENS, CURTIN, 'T HART, *Studying the Real World of EU Accountability*, *supra* note 59, at 44; Y. Papadopoulos, *Problems of Democratic Accountability in Network and Multilevel Governance*, 13 EUROPEAN LAW JOURNAL 469, 473-476 (2007).

⁶⁶ GRANT & KEOHANE, *supra* note 56, at 30-33.

⁶⁷ PAPAPOULOS, *supra* note 65, at 470.

alive in a bilateral relationship between a constituency, on the one hand, and the powers that represent it on the other. This problem of ‘external’ accountability of the network and its participants towards countries and other actors or sectors outside the network but that are influenced or affected by IN-LAW output, seems to be the most serious accountability problem of IN-LAW at the international level.

The search for actors responsible for holding the relevant actors accountable takes the discussion another step further. It is indeed possible that the task of holding persons or bodies accountable on behalf of one group or even ‘the world community’ is delegated to a specific entity, often with more expertise, such as courts, disciplinary boards, external consultants, ombudspersons or auditors. This entity may hold persons accountable on behalf of the broader group. In turn, it may itself be subject to certain accountability mechanisms vis-à-vis the broader group. This is particularly so in the context of IN-LAW bodies if the entities that must hold the (relevant actors of the) IN-LAW body accountable are themselves subject to democratic accountability mechanisms.⁶⁸

The organization of accountability in an IN-LAW context

The second group of difficulties encompasses questions of how and when accountability needs to be rendered. IN-LAW bodies are increasingly widespread, likely because they help to deliver results for their principals, and, hopefully, for the broader society. While process-informality contrasts IN-LAW to traditional IOs, it does not preclude the existence of formal rules and procedures. Moreover, some IN-LAW networks do have legal personality under domestic law (e.g. ICCAN, ISOC) or may have legal personality even under international law if one follows a functional approach (e.g. if there is de facto autonomy or exercise of power, legal personality may exist to the same extent). Other IN-LAW networks may have no legal personality at all. Yet, even to the extent that certain *ex post*, institutionalized accountability mechanisms may be absent (e.g. legal accountability for lack of legal personality of the IN-LAW network as such), these can be

⁶⁸ This applies more to the public actors in the network who ultimately have a broader democratic constituency, whereas shareholder-model control is far less democratic, as is control by the constituencies of NGOs.

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compensated by other control mechanisms at both the international and domestic level (and are, in any event, not normally available either for formal IOs). Here as well, the lack of one type of accountability mechanism (*ex post* legal accountability) can be made up by other types of accountability (*ex ante*, ongoing, *ex post*). Organizing accountability in an IN-LAW context, however, is not self-evident.

First of all, it must be clarified for which IN-LAW matters accountability is due. In order to improve the output legitimacy of an IN-LAW body⁶⁹ there should be accountability as to (i) the policies developed by the IN-LAW body and (ii) the options that were rejected concomitantly or the issues that were never taken up (i.e. accountability for not doing something). Next to this there are likely also issues as to the legitimacy of the process by which decisions are (or are not) reached that must be accounted for. However, one should not overlook that there may also be some differences between the globally-oriented agenda of the body as a whole, and the domestically-defined agenda of the participants in the body (e.g. individual public officials or NGO representatives).

Furthermore, the relevant standards for accountability may depend on the actor, the subject at issue and the context.⁷⁰ Account must be given about two different issues, each requiring a separate standard. On the one hand, there is the substance of the decisions made by the body. On the other hand, there is the functioning of the IN-LAW body in making decisions, i.e. the 'process'. When it comes to the substantive outcome, this may be assessed in reference to higher substantive norms (principle of *review*) or in reference to predefined political objectives. When it comes to the process, there may be a number of internal rules of the IN-LAW mechanism that play a role, supplemented by the law of international organizations or domestic law, depending on the forum that is chosen to reflect the functions or the legal shape of the IN-LAW body.

⁶⁹ I.e. the 'quality, efficiency or general acceptability of the norms that have been created, regardless of the merits or demerits of the decision-making process and those involved in it; FRITZ WILHELM SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 6-28 (Oxford University Press, 1999); for an application to transgovernmental networks, see *inter alia* G. De Búrca, *Developing Democracy Beyond the State*, 46 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* 102, 145 (2008).

⁷⁰ The accountability model of Bovens and its variant in the IN-LAW project framing paper both put forward the idea that a forum will pass 'judgment' – a notion which reinforces our view that this definition is overly focused on an analogy with courts - in response to the account given by the person held accountable.

It should be made clear at what stage of the IN-LAW process accountability mechanisms should be installed or further elaborated. As indicated above, it is often held that accountability is an *ex post* process.⁷¹ This should not detract from the fact that often international lawmaking, whether formal or informal, takes the form of a continuing process. Under these circumstances, notice and comment procedures, regular feedback on agenda setting, interim conclusions and policy outcomes may be part of an accountability mechanism. The focus however remains on reporting *ex post*, in that account is given of certain developments about the international lawmaking processes that have taken place in the past. Accountability nevertheless should not solely be seen as a retrospective process.

The implementation of accountability for IN-LAW bodies remains complex. Accountability of IN-LAW raises questions and offers possible solutions both at the international and the domestic level although at times, it becomes difficult to clearly distinguish between the two levels. Grant and Keohane identify no less than seven mechanisms of accountability which are tailored to the context of global politics⁷², on the one hand, while sufficiently general in order to equally have domestic implications, depending on the actor and/or the forum, on the other. These mechanisms are hierarchical (exercised by leaders of an organization), supervisory (exercised by states), fiscal (exercised by funding agencies), legal (exercised through complaints or by courts), market (exercised by equity and bond-holders or consumers), peer (exercised by peer organizations) and public reputational (exercised by peers and the diffuse public). In the light of the plurality of both actors and relevant fora in IN-LAW bodies, all these various mechanisms may play a role in operationalizing accountability. Accountability, applied to IN-LAW, is of a multi-faceted nature: there will likely not just be a single forum, but rather a number of fora and mechanisms that only taken together may ensure a sufficient level of accountability.

The core difficulty one is faced with when operationalizing accountability in general, and in respect of IN-LAW bodies in particular, is that it may be difficult for any actor to be fully accountable. The same mechanisms that are in place to ensure independence may also hamper responsiveness towards external officials or limit the possibilities for

⁷¹ GRANT & KEOHANE, *supra* note 56, at 29-30.

⁷² GRANT & KEOHANE, *supra* note 56, at 35-37.

revoking their mandate. Respect for the rules may lead to results that are politically undesirable. Transparency may have to be balanced against the need for efficient decision-making.⁷³ Depending on the function that is being stressed, other mechanisms may have to be put forward to reflect these concerns when operationalizing the concept of accountability, and probably some balancing – compromising on one form of accountability in favour of another – will have to take place.

4.3. Strengthening accountability of IN-LAW bodies

Preliminary remarks

Against the background of the above observations we now turn our attention to the question of how IN-LAW bodies may be made more accountable. It seems appropriate to identify a number of building blocks (transparency, delegation accountability, democratic oversight, participation and cooperation) that may contribute to strengthening the accountability of IN-LAW bodies without putting forward a single straightjacket that would likely sit very uneasily, if only because of the informal and varied nature of such mechanisms. A combination of techniques should be applied taking into account the actors and stakeholders involved, on the one hand, and the level (domestic, international or global) at which accountability must be given.⁷⁴ That said, if the IN-LAW network directly affects individual rights (e.g. listing as a terrorist, usage of personal data that affects privacy rights) then at a very minimum some form of judicial or administrative redress must be made available (internationally or domestically).

⁷³ In his case study on ICANN, Koppell goes as far as speaking of ‘pathologies of accountability’ when detailing the struggle of bureaucracies to ‘concomitantly satisfy hierarchical superiors, behave consistently with all laws, norms, and obligations, and respond to the demands or needs of constituents’; Jonathan Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”*, 65 PUBLIC ADMINISTRATION REVIEW 94 (2005).

⁷⁴ Admittedly, this is not entirely without risk, as multiple accountability mechanisms (with differing standards) increase complexity and could potentially lead to what Koppell vividly describes as ‘multiple accountabilities disorder (MAD)’, a concept which he has tested in respect of ICANN; KOPPELL, *supra* note 73, at 94-95.

Strengthening transparency

Whatever accountability mechanism one would like to devise, a crucial element always returns as a building block, namely transparency.⁷⁵ With transparency we mean in particular the possibility for the forum to which accountability is due to receive and gather sufficient information on the objectives, process and outcomes of the actor that is being held accountable.

A number of challenges may be identified in this respect. First, in order for accountability to take place the relevant stakeholders must know of the very existence of the IN-LAW mechanism. Lack of visibility of the IN-LAW mechanism may hamper both its functioning and its accountability. In addition, an IN-LAW mechanism must be transparent as to its objectives. In order to know what the relevant stakeholders are, but also in order to allow these, once identified, to effectively make sure that no *mission creep* occurs, it is important to set forth from the start the exact objectives pursued by the IN-LAW body.⁷⁶ Furthermore, there must be transparency as to agenda-setting. On the one hand, the forum that will hold the IN-LAW mechanism accountable should be able to assess *ex ante* what exactly will be put on the agenda of the mechanism. On the other hand, transparency as to agenda-setting also implies that the relevant forum is informed as to the issues which have not made it onto the agenda, and the reasons – if any – for their exclusion. Depending on the complexity of the matter, there may also be a need for transparency as to the process, in the double sense of the word, i.e. both in terms of procedure and in terms of progress. Finally, information must be available about the outcome. Again, this involves both a clear account of what has been decided and a reasoned account of those options that have been rejected over the course of the process.

Strengthening delegation accountability

The classic model for accountability rests on some kind of principal-agent relationship, whereby the forum instructs the relevant actor. Subsequently, the latter has to give

⁷⁵ On this, see Thomas N. Hale, *Transparency, Accountability, and Global Governance*, 14 GLOBAL GOVERNANCE 73 (2008).

⁷⁶ See in this respect the rejection of principal-agent accountability and a corresponding plea for ‘deliberative polyarchy’ in Joshua Cohen & Charles Sabel, *Global Democracy?*, 37 INTERNATIONAL LAW AND POLITICS 763, 773-774 (2005).

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account of his actions and/or the results achieved by the bodies he is acting in. The public officials that are participating in IN-LAW bodies are normally subject to some form of hierarchical supervision at the domestic level, or at the level of the international organization to which they report (e.g. being subject to the disciplinary authority of the organization's Secretary-General or Director).⁷⁷

At high-level fora, such as the G20, the actors are ministers or even heads of state or government, who are likely to be subject to political accountability, or are - at least in western democracies - supposedly answerable in some form, directly or indirectly, to parliament and the electorate⁷⁸. In the case of less visible, often more technocratic, IN-LAW mechanisms, at least the actors on the public authorities' side are usually civil servants or diplomats originating from domestic public administrations or participating international organizations. These persons are subject to the hierarchical supervision within their respective domestic order: someone has authorized them to be at these meetings during their working hours, has paid their expenses, has likely instructed them within certain bounds what (not) to do and say, and is thus expecting some kind of result in accordance with the instructions provided. Moreover, the person holding them to account is likely to be, in turn, equally accountable higher up in the chain of command, until we end up - at least in democratic states - with the parliament or a directly elected official and hence arrive at the electorate, thus leaving some room for democratic accountability.⁷⁹ The same mechanism that helps states to steer diplomatic efforts within *formal* international lawmaking mechanisms in a democratically legitimate manner, may therefore also play a major role in respect of *informal* international lawmaking mechanisms.

In addition, domestic actors may commit to seek to respect as far as possible domestic procedures, even when they take action through an IN-LAW mechanism. Accordingly, the Food and Drug Administration (FDA) applies the same notice and

⁷⁷ On the accountability of international civil servants within international organizations, see Jan Wouters, Nicolas Hachez & Pierre Schmitt, *Managerial Accountability: What Impact on International Organisations' Autonomy?* (Leuven Centre For Global Governance Studies, Working Paper 43) available at http://www.ggs.kuleuven.be/nieuw/publications/working%20papers/new_series/wp43.pdf.

⁷⁸ But even then surprises cannot be excluded, as is demonstrated by the sudden breakthrough in the debate on the reform of the IMF at the meeting of G20 finance ministers in Seoul in November 2010, whereby the deal, especially on the EU side, may well not have been talked through fully with the affected national governments.

⁷⁹ BLACK, *supra* note 64, at 142.

comment procedures it uses for domestic decision making to its position vis-à-vis standards developed within the context of an IN-LAW mechanism such as the ICH⁸⁰.

Strengthening domestic democratic oversight

To strengthen domestic democratic oversight, the first step should be to strengthen the possibility for parliamentary control within the various domestic legal orders of foreign and transnational policy. Attempts to strengthen democratic oversight may result in both heightened supervisory accountability and stronger fiscal accountability, as parliaments traditionally have the power of the purse provided they actually dare to use it. Next to this, it should be noted that much of the international activity that is taking place is engaged in by ministries and agencies. Accordingly, their oversight takes place in their respective policy areas. Another step would be to strengthen the administrative legal system so as to increase the domestic oversight and accountability measures that apply to the international activities of regulatory authorities or agencies, such as by ensuring participation of affected stakeholders in the IN-LAW process, and securing domestic judicial review (although there may be questions of immunity and scope of judicial review).

Strengthening participation

On a parallel track it should also be possible to strengthen some form of democratic accountability at the international level. The problem, as suggested above, is to identify a global demos on which democracy could be based. It should nevertheless be possible to provide at the very least for some form of democratic participation at the global level, either through some aggregation of the various peoples – as in the case of classic international organizations – or by ensuring maximal appropriate participation of all significantly affected stakeholders.

To keep IN-LAW accountable at the international level towards participants (and the constituents they represent), in a first step, the level of autonomy (*de jure* or *de facto*) enjoyed (or needed) by the IN-LAW body as such ('internal' accountability),

⁸⁰ Ayelet Berman, *The Accountability of Transnational Regulatory Networks: The Case of the International Conference on the Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH)* 86 et seq (Paper submitted to the 15th *Ius Commune* Congress held in Leuven, November 25 and 26, 2010).

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needs to be checked and determined ‘justified’. Based on the level of autonomy needed, attempts to keep IN-LAW accountable must focus on ‘ongoing control’ (in case of low autonomy) and *ex ante* and *ex post* control in case of (justified) high levels of autonomy (where ongoing control is difficult, given the need for a certain level of autonomy or independence). This way both (i) the need to give some autonomy to IN-LAW bodies in order for these bodies to be effective and make accurate or overall welfare enhancing decisions and (ii) the need to keep IN-LAW activity accountable, can be combined. The following guideline can be put forward: the need for accountability mechanisms at the international level rises proportionally with the degree of autonomy exercised (de jure or de facto) by the IN-LAW network.

Strengthening cooperation

In terms of ‘external’ accountability of the body and its participants toward countries and other actors or sectors outside the body that are influenced or affected by IN-LAW output, the following suggestions can be made. External accountability can be strengthened by establishing links to other IN-LAW bodies, international organizations, regional groupings, outside countries as observers (all of which are ‘public actors’) as circumstances demand and evolve. Such cooperation between IN-LAW bodies and outside countries or other public actors can not only enhance accountability but also effectiveness of action in that it can fulfill a coordination function, across functional divides, to set more coherent policies and action so as to effectively tackle the cooperation problem. Second, the involvement of the private sector, NGOs, civil society at the international level (all of which are ‘private actors’), is considered crucial, specifically since their audience can be much broader than the interests represented by domestic public actors. To avoid capture or selective (over)representation of certain private interests, there seems to be a trend in favour of procedural input through consultation and notice & comment procedures, and a move away from actual involvement of private interests in decision-making.

Note, however, that in some IN-LAW networks outsiders would be all too happy to join the network (think of The Netherlands and the G-20⁸¹). In other networks, in contrast, outsiders may not want to become full members because of the costs involved both in terms of resources (budget, sending experts, etc.) and regulatory burden or ensuing responsibilities. Next to this, public agencies operating at the international level remain controlled through domestic procedures while this often remains unclear for private actors or NGOs. Accountability towards ‘external stakeholders’ is therefore best addressed at the international level: the deficit in external accountability at the domestic level (foreigners do not normally vote) can be partly made up by external accountability mechanisms at the international level.

4.4. Preliminary conclusion

It is neither feasible nor desirable to develop a ‘one-size-fits-all’ approach to hold informal international lawmaking mechanisms accountable. In practice a combination of techniques should be applied taking into account the actors and stakeholders involved, on the one hand, and the level (domestic, international or global) at which accountability must be given. This is not a simple exercise, and the difficulties multiply if we attempt to also strengthen the democratic accountability of IN-LAW mechanisms. Moreover, there is a distinct risk that the multi-actor character of these mechanisms results in excessive and conflicting accountability mechanisms. Paradoxically, a crucial locus for strengthening the accountability of IN-LAW mechanisms appears to be at the domestic level, which holds the key to holding the public actors within the network accountable, including through mechanisms of parliamentary oversight and hierarchical accountability. Whereas the practical design of networks along these principles will very much depend on the particular context, the underlying principles of transparency, rationality and openness of the participatory mechanisms should serve as powerful beacons in increasing the democratic accountability of IN-LAW mechanisms.

⁸¹ See for example the efforts made by the Dutch government to be invited to the Fifth G-20 Summit in Seoul, November 2010 and the Sixth G-20 Summit in Cannes. See: http://www.koreatimes.co.kr/www/news/biz/2010/09/301_73469.html ; http://www.dutchnews.nl/news/archives/2011/02/no_g20_invite_for_the_netherla.php ; <http://www.fd.nl/artikel/21424893/jager-teleurgesteld-nederland-niet-mag-deelnemen-g20-top> . The Netherlands were invited to the four previous G-20 Summits.

It should be kept in mind that strengthening domestic or international accountability measures may come at the cost of effectiveness of the IN-LAW process, and we must carefully consider when and whether such enhancement is beneficial. When making suggestions to enhance the accountability of IN-LAW we must, in particular, guard against accountability overload or too much principals' control. Too much procedural accountability (e.g. ongoing control) can undermine substantive accountability (e.g. non-performance of mandate).

5. Conclusion: Consequences of Informal International Lawmaking and Suggestions for Further Research

There is nothing new in arguing that 'regulation beyond the state' seems to have replaced traditional forms of legal governance. In legal science, however, the impact of this development is much larger than in, for instance, public administration. Lawyers tend to work with 'legal systems' that are neatly separated and have their own source of norms. While the debate on 'multilevel governance' can said to have taken place *within* the academic disciplines of political science and public administration, the phenomenon of 'multilevel regulation' challenges the very foundations of law itself.

The notion of 'informal international lawmaking' aims to find a way out of the tension between traditional legal science (with its focus on 'sources', 'jurisdiction' and 'competences') and the factual reality of norms being enacted by actors and through procedures that are unfamiliar to the traditional lawyer. Yet, the impact – even in a legal sense – of these norms may be larger and more widespread than formal treaty law or decisions by international intergovernmental organizations.

While the transfer of competences to formal international organizations is a careful process guided by strict rules and principles (such as the 'principle of the attribution of powers'⁸²), in a parallel process competences have been transferred to or

⁸² See H.G. SCHERMERS & N.M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY IN DIVERSITY* 155 (Martinus Nijhoff Publishers, 2003) "A rule of thumb is that, while states are free to act as long as this is in accordance with international law [...], international organizations are competent only as far as powers have been attributed to them by the member states. [...] International organizations may not generate their own powers, They are not competent to determine their own competence."

created by more informal bodies. Again, this is not new,⁸³ but the extent to which large parts of society are now regulated in ‘informal’ ways triggered a debate on the consequences (in terms of legitimacy and accountability, or more generally upholding the rule of law) and possible solutions (ranging from the introduction of constitutional principles at the global level, the development of Global Administrative Law, or the acceptance of the plurality of legal orders and the fragmentation of international law).⁸⁴

In any case, it is clear that there is no way back and that ‘global governance’ is developed, either in the shadow of existing arrangements, or simply ‘bottom up’ through cooperation between national regulators. Despite our modest aim to draw attention to a phenomenon, our analysis produced quite a long list of reasons to engage in IN-LAW. Legal science is only at the beginning of accepting the reality of this development. At the same time this offers an opportunity to reassess the traditional foundations of international law. Indeed, legal discipline stands at a cross-roads: we either rethink certain traditional aspects of international law to take on board normative processes with similar effects as binding legal norms; or, we accept that international law is increasingly by-passed by informal processes and learn to live with a more modest role for the academic discipline of international law.

One purpose of this contribution was to provide reasons to argue that international lawyers should try and remain connected to the ‘real world’. This would not only call for an acceptance of informal processes that play a role in lawmaking, but also for a need to apply fundamental constitutional notions (such as accountability) to IN-LAW processes and output. In doing so it helps to take account of the work on global governance that has been conducted in other academic disciplines, such as political science and public administration as many of the traditional legal tools may be less useful.

⁸³ Cf. the *Lex Mercatoria* governing transnational trade. See for instance L.M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STANFORD JOURNAL OF INTERNATIONAL LAW 347 (2001).

⁸⁴ See more extensively on this issue: Ramses A. Wessel, *Reconsidering the Relationship between International Law and EU Law: Towards a Content-Based Approach?*, in INTERNATIONAL LAW AS LAW OF THE EUROPEAN UNION, (E. Cannizzaro, P. Palchetti and R.A. Wessel, 2011 (7))