

## CTEI Working Paper

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# Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness<sup>a</sup>

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### Biography

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# PROJECT FRAMING PAPER

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*Today, we need to be clear-eyed about the strengths and shortcomings of international institutions that were developed to deal with the challenges of an earlier time.*

*... strengthening bilateral and multilateral cooperation cannot be accomplished simply by working inside formal institutions and frameworks.*

*... We need to spur and harness a new diversity of instruments, alliances, and institutions in which a division of labor emerges on the basis of effectiveness, competency, and long-term reliability.<sup>1</sup>*

## I. Project objectives

The project entitled *Informal International Lawmaking*<sup>2</sup> was initiated in response to a tender by the Hague Institute for the Internationalisation of Law (HiiL) under the research theme of *Transnational Constitutionality: Democracy and Accountability in the Context of Informal International Public Policy-Making*.<sup>3</sup> The project, sponsored by HiiL and the three participating universities in Geneva, Leuven and Twente, was launched in November 2009 for a two-year period.

The project's aim is to be empirical and solutions-oriented. We want to gauge whether there is a problem related to “informal international public policy-making” (which we renamed “informal international lawmaking” and abbreviate to IN-LAW) and, if so, to think about how to solve this problem in a way that can assist policymakers and their stakeholders. Our starting point is the following, perceived problem, passed on to us by the HiiL Tender document:

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<sup>1</sup> U.S. National Security Strategy, 27 May 2010, available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>2</sup> For further project information see [www.informallaw.org](http://www.informallaw.org).

<sup>3</sup> The Hague Institute for the Internationalisation of Law (HiiL) Call for Research Proposals, HiiL Research Theme on Transnational Constitutionality: Democracy and Accountability in the Context of Informal International Public Policy-Making (September 2008), available at [http://www.hiil.org/assets/204/HIIL\\_n6434\\_v21\\_Hiil\\_Constitutional\\_Law\\_Project\\_-\\_Tender\\_Document.pdf](http://www.hiil.org/assets/204/HIIL_n6434_v21_Hiil_Constitutional_Law_Project_-_Tender_Document.pdf) (hereafter “the Tender document”).

*Informal international lawmaking is on the rise. It seems to fall outside the strictures of both domestic law as well as international law. Hence, this activity raises questions of accountability deficit.*<sup>4</sup>

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

Secondly, to the extent the problem is real, how can we increase accountability and do so in a way that does not undermine the effectiveness of informal international lawmaking? How can we improve accountability at the domestic level? How can we set up accountability mechanisms at the international level? What is the role of what has been referred to as “transnational constitutional standards”<sup>5</sup>?

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

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<sup>4</sup> This paraphrases paras. 29-36 of the Tender document, *supra* note 3. See also, in the broader context of global administrative law, B. Kingsbury and R. 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* (Spyridon Flogaitis, ed., Esperia, 2008), at 1: “The shift of regulatory authority and activity from domestic to global bodies has outstripped traditional domestic and international law mechanisms to ensure that regulatory decision makers are accountable and responsive to those who are affected by their decisions”.

<sup>5</sup> HiiL Revised Concept Paper, *Constitutions in the Age of Internationalisation: Towards Transnational Constitutional Standards*, May 2008, at p. 4, available at [http://www.hiil.org/assets/147/1-6850-Microsoft Word - HiiL\\_n5567\\_v4 Revised Concept paper\\_9 May 2008.pdf](http://www.hiil.org/assets/147/1-6850-Microsoft Word - HiiL_n5567_v4 Revised Concept paper_9 May 2008.pdf): “transnational constitutional standards are considered to be neither a matter of purely domestic law, nor an exclusive matter of international treaties, but as standards which transcend both. They are intended to fill the gap where, in the context of internationalisation, domestic law offers insufficient protection and where international law standards cannot fully compensate for the loss. If formulated in a workable manner, transnational constitutional standards could become ‘smart’ standards which would allow domestic courts and political institutions in several states at once to enforce high levels of protection without resorting to ‘nationalist’ remedies against international action”.

the international and the domestic level with the aim to enhance IN-LAW accountability and effectiveness.

Informal international lawmaking is here to stay. To the extent the 2010 *U.S. National Security Strategy* (quoted on the title page) reflects a trend, IN-LAW may well emerge as the international cooperation of choice. With this reality in mind, this project does not aim at condemning, let alone halting IN-LAW, but rather attempts to assess its performance, to improve it along the fine line between effectiveness and accountability and to give it its rightful place at the intersection of national and international law.

## **II. What do we mean with “informal international lawmaking”?**

### **1. Informal**

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*.<sup>6</sup> It is exactly this “circumvention” of formalities under international and/or domestic procedures that generated the claim that IN-LAW is not sufficiently accountable.<sup>7</sup> 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”.<sup>8</sup> On this basis, we define our object of analysis

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<sup>6</sup> See the Tender document, *supra* note 4, at para. 29: “This relative informality concerns the identity of the decision-makers, the character of the decision-making procedure as well as the character of the decisions actually adopted”.

<sup>7</sup> See *supra* note 4 and also, for example, Eyal Benvenisti, ‘Coalitions of the Willing’ and the Evolution of Informal International Law in Coalitions of the Willing - Avantgarde or Threat? 1 (C. Calliess, C. Nolte, G. Stoll, eds., 2008). Kingsbury and Stewart, *supra* note 4, at 5, 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”.

<sup>8</sup> Charles Lipson, *Why Are Some International Agreements Informal?*, 45 International Organization 1991, 495-538 at 500.

(IN-LAW) not with the goal of encapsulating *all* of the novel trends in global governance (informality is, to be sure, but one of many new trends), but in order to discuss a particular problem (accountability) related to one specific trend (informality), and how this particular trend interacts with, and affects, the traditional, formal fields of international law and domestic law.

*a. Output informality*

Firstly, in terms of *output*, international cooperation may be “informal” in the sense that it does not lead to a formal treaty or any other traditional source of international law<sup>9</sup>, but rather to a guideline, standard, declaration or even more informal policy coordination or exchange. Aust, for example, defines an “informal international instrument” as “an instrument which is not a treaty because the parties to it do not intend it to be legally binding”.<sup>10</sup>

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”.<sup>11</sup> 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.<sup>12</sup> In

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<sup>9</sup> 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).

<sup>10</sup> Anthony Aust, *The Theory and Practice of Informal International Instruments*, 35 ICLQ 1986, 787-812 at 787.

<sup>11</sup> See U.S. State Department website, Circular 175 Procedure, at <http://www.state.gov/s/l/treaty/c175/>. Similarly, the U.S. constitutional rule that “treaties” must be adopted in the Senate by 2/3 majority does not apply to what in U.S. law are known as “international agreements” (distinguished from “treaties”). This explains why today the large majority of U.S. international cooperation takes the form of “executive agreements” rather than “treaties” (to avoid the hurdle of 2/3 majority in the Senate). Such “international agreements” are, however, subject to Circular 175. That said, if a document is not legally binding (i.e., not an “international agreement” under the specific criteria of Circular 175), even the limited obligations in Circular 175 do not apply.

<sup>12</sup> *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

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”.<sup>13</sup>

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 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 Secretariat<sup>14</sup> etc.

Unlike the Tender document -- which presumes that IN-LAW output is *not* “regulated by either national or international (public) law” -- we do not want to prejudge this question. 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. In any event, to define a legal order as limited to legally binding norms only is, in our view, too narrow. Along the same lines, the fact that the project’s title refers to international *law*-making should not be read as implying that IN-LAW output is, by definition, law. It may be law or be regulated by law, but may also fall outside law but still be part of a law- or norm-making process or simply have legal or normative effects without being law. One of the core challenges of the IN-LAW project is, indeed, to define and assess the line and interaction between law and non-law, formal law and informal law, the legal and the para-legal.

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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”.

<sup>13</sup> Gemeinsame Geschäftsordnung der Bundesministerien, para. 72, available at

[http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund\\_21072009\\_O113120018.htm](http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_21072009_O113120018.htm).

<sup>14</sup> 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”.

*b. Process informality*

Secondly, in terms of *process*, international cooperation may be “informal” in the sense that it occurs in a loosely organized network or forum rather than a traditional international organization (IO). Think of the 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).

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”.<sup>15</sup> 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

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<sup>15</sup> Anne-Marie Slaughter, *Agencies on the loose? Holding government networks accountable*, in Transatlantic Regulatory Cooperation, Legal Problems and Political Prospects (eds. G. Bermann, M. Herdegen and P. Lindseth, 2000), 521 at 525.



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 thus being a subject or having legal personality may be that some IN-LAW groupings or networks can be held accountable as separate entities and may fall under the control (albeit partly) of international law. A possible drawback of such independent status may, however, be that it enhances the power of the grouping or network and may, in turn, make it more difficult rather than easier to hold the IN-LAW body accountable (participating national actors may, for example, hide behind the IN-LAW entity as a legal person when it comes to responsibility; independent international status may enhance the power of the network 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 (or, in her words, “transgovernmental networks”) may also be *more* accountable to domestic constituencies than traditional IOs. Slaughter’s argument is that in transgovernmental networks input and output is channeled directly through domestic actors with a shorter accountability chain back to the people, and no independent international body exists to which authority has been delegated or which could impose its will on participants.<sup>16</sup>

That said, even where accountable to domestic constituencies and, in this sense, accountable to *internal* stakeholders, the question remains whether IN-LAW networks are sufficiently accountable to *external* actors including broader societal interests and countries outside the network (but where network output is *de facto* implemented, as is the case of ICH<sup>17</sup> guidelines in many non-ICH member countries).

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<sup>16</sup> ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton University Press, 2004), Chapter 6.

<sup>17</sup> ICH stands for “International Conference on Harmonization of Technical Requirement for Registration of Pharmaceuticals for Human Use”.

As Richard Stewart pointed out, “the problem is often not lack of accountability, but disproportionate accountability to some interests and inadequate responsiveness to others”.<sup>18</sup>

c. *Actor informality*

Thirdly, in terms of *actors involved* international cooperation may be “informal” in the sense that it does not engage traditional diplomatic actors (such as heads of state, foreign ministers or embassies) but rather other ministries, domestic regulators, independent or semi-independent agencies (such as food safety authorities or central banks), sub-federal entities (such as provinces or municipalities) or the legislative or judicial branch.<sup>19</sup> Under Article 7 of the Vienna Convention on the Law of Treaties, for example, only heads of state, heads of government, foreign ministers, heads of diplomatic missions or specifically accredited representatives are presumed to have so-called full powers to represent and bind a state.

The non-traditional nature of the actors involved in 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 (see below) and is the subject of another HiiL Project.<sup>20</sup>

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.,

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<sup>18</sup> Richard Stewart, *Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance*, Draft paper, January 2008, available at <http://www.iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf>, p. 27, 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”.

<sup>19</sup> 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*).

<sup>20</sup> See <http://www.hiil.org/research/main-themes/private-actors/background-and-overview/>.

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.<sup>21</sup> 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.<sup>22</sup>

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*.

## 2. International

Informal international lawmaking is “international”, as opposed to domestic, in the sense that the cooperation must include two or more actors in different countries. It also includes cooperation between international organizations. Given that the IN-LAW we will focus on in particular is between regulators or agencies in different countries (rather than the traditional diplomatic actors which usually conclude formal treaties, see “actor formality” discussed above) and may include private actors, reference could have been made also to “transnational” or

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<sup>21</sup> Circular 175, 1 U.S.C. 112a, 112b, para. 181.2, 5(b): “*Agency-level agreements*. Agency-level agreements are international agreements within the meaning of the Act and of 1 U.S.C. 112a if they satisfy the criteria discussed in paragraph (a) of this section. The fact that an agreement is concluded by and on behalf of a particular agency of the United States Government, rather than the United States Government, does not mean that the agreement is not an international agreement. Determinations are made on the basis of the substance of the agency-level agreement in question”.

<sup>22</sup> Website of the French Ministry of Foreign Affairs, <http://www.doc.diplomatie.gouv.fr/pacte/index.html>: « Les arrangements administratifs conclus par un ministre français avec son homologue étranger ne sont pas répertoriés dans la base de données documentaire. En effet, il ne s’agit pas de traités ou d’accords internationaux ... Cette catégorie n’est pas reconnue par le droit international. La circulaire du 30 mai 1997 relative à l’élaboration et à la conclusion des accords internationaux recommande aux négociateurs français de ne recourir à ce type d’arrangements qu’exceptionnellement et souligne que les effets qu’ils produisent sont incertains »

“transgovernmental” lawmaking. Suffice it to say that, as with the notion of “informal”, we take a flexible approach and include as “international” all cross-border cooperation, be it inter-national or trans-national, and with or without the participation of private actors or international organizations.

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

### **3. Lawmaking**

IN-LAW refers to “lawmaking” in the sense of norm-setting or public policy making by public authorities. We use the term “law” to connote the involvement of public authorities in the process, 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 (as in many of the internet-related networks that the project will look at), but excludes cooperation that only involves private actors. A separate HiiL project examines private regulation.<sup>23</sup>

As discussed earlier (under “output informality”), our reference to *law*-making does not imply that IN-LAW output is, by definition, part of domestic or international law. Here we use the term “law” in a broader sense including statements or guidelines that may not, strictly speaking, be part of law but merely have legal effects

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<sup>23</sup> See <http://www.hiil.org/research/main-themes/private-actors/background-and-overview/>.

or fit in the context of a broader legal or normative process (hence our reference to informal international “lawmaking” rather than informal international “law”).

When it comes to defining “lawmaking” beyond referring to *who* is acting (public authorities) we are guided by the definition of “exercise of international public authority” offered by von Bogdandy, Dann and Goldman: “any kind of governance activity by international institutions [for our purposes, including informal networks or fora] ... [which] *determines* individuals, private associations, enterprises, states, or other public institutions”.<sup>24</sup>

#### **4. Summary definition of IN-LAW**

Given our flexible, problem-oriented approach, we are open to count as IN-LAW any activity which is “informal” in any of the above three ways (output, process or actors involved). This means that IN-LAW can be informal in different ways and to different degrees and that both in detecting deficiencies and finding policy remedies one size will not fit all. That said, our focus is mainly on IN-LAW which is informal in *all three ways*: output, process (or forum) and actors involved. We will, more particularly, focus on regulatory or agency networks which do not issue legally binding documents.

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).*

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<sup>24</sup> von Bogdandy, Dann and Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 German Law Journal 1375, at 1376, italics added. “Determines” is further clarified as “reduce their freedom” or “unilaterally shape their legal or factual situation”, adding that “determination may or may not be legally binding” (at p. 1381-2).

### III. What do we mean with “accountability” and “effectiveness”?

#### 1. Accountability

Besides mapping the creation and operation of IN-LAW, this project’s main task is to assess whether IN-LAW suffers from an accountability deficit. As with the notion of IN-LAW itself, we take a broad and flexible view of accountability, in line with the project’s problem-oriented approach. 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, and less interested in making (yet another) attempt at defining what precisely accountability is.<sup>25</sup> We realize that no one definition of accountability exists and that its broad and flexible meaning (in some languages, such as French, there is not even a precise word for it) may well explain its popularity when it comes to thinking about controlling, enhancing trust in or improving the quality of international cooperation or, in the (more limited) words of Grant and Keohane, preventing “abuses of power in world politics”.<sup>26</sup> Since it is now commonly accepted that traditional checks and balances and democratic mechanisms under domestic law cannot simply be replicated at the international level, the broad and multi-faceted notion of accountability offers a welcome canvass to think “outside the box”.

At the same time, we do need to specify the notion somewhat if only to delimit our work and to be sufficiently precise when it comes to identifying IN-LAW deficiencies (the disease) and proposing concrete IN-LAW reforms (the cure).

At the outset, one crucial clarification must be made: this project examines accountability both at the international level (e.g. participatory decision-making, transparency, the existence of a complaints mechanism at the level of, for example, the Basel Committee or ICH) and at the domestic level (e.g. domestic administrative or political control over central banks active at the Basel Committee or health

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<sup>25</sup> 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 (2010) 946 — 967.

<sup>26</sup> Ruth Grant and Robert Keohane, *Accountability and Abuses of Power in World Politics*, 99 American Political Science Review (2005) 1-15.

regulators involved in the ICH, domestic review and notice and comments procedures before international guidelines are implemented, etc.).

Moreover, our starting point is that the question of accountability, for our purposes, only arises to the extent public *authority* or *power* is being wielded under IN-LAW. This goes back to our definition of “public authority” (referred to above under “lawmaking”) as action by public entities which unilaterally “determines” or “reduces the freedom of” others.<sup>27</sup> 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”.<sup>28</sup> In other words, if no public authority or power is being wielded by IN-LAW, a problem of accountability is unlikely to arise.

*a. The broad v. narrow definition of accountability (responsiveness v. ex post justification)*

Our starting point is that the fashionable, catch-all phrase of “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 democratic society means responsiveness to the people – the responsiveness of the governors to the governed”.<sup>29</sup> 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”.<sup>30</sup>

Crucially, 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

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<sup>27</sup> See *supra* note 24.

<sup>28</sup> ILA report, p. 225.

<sup>29</sup> Slaughter, *Agencies on the loose?*, *supra* note 15, at 523.

<sup>30</sup> Stewart, *Accountability*, *supra* note 18, at 1.

and open to and take account of the views expressed by people (leading to so-called *input* legitimacy).

Though broadly speaking about responsiveness and disregard (both substantive and procedural), accountability, traditionally used, also has a narrow meaning. The most widely cited, narrow definition of accountability is that of Bovens who 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.*<sup>31</sup>

Bovens' 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.<sup>32</sup> We will refer to this *ex post*, institutionalized definition of Bovens as the "strict" or "narrow" definition of accountability.

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

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<sup>31</sup> M. Bovens, *Analysing and Assessing Public Accountability: A Conceptual Framework*, 13 European Law Review, 447 at 450.

<sup>32</sup> Or as Stewart points out, *supra* note 18, at 15: "accountability is a relational concept. At a minimum, an accountability mechanism meets four basic requirements: (1) a specified accountor, 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 accountor 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".



*b. Accountability to whom? (internal v. external)*

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). Grant and Keohane refer in this respect to a *delegation* model of accountability to which they apply theories of principal-agent or trusteeship. This delegation model of accountability could also 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 (there is no traditional IO in place), little authority (if any) is formally delegated by national participants (principles) to an international body (agent or trustee). Therefore, internal or delegation accountability is 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).

Second, accountability could be owed to actors who are affected by IN-LAW. Grant and Keohane refer to a *participation* model of accountability. Such participation model could also 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 and observers or third states who do not participate in the IN-LAW network but, for some reason, implement or abide by the guidelines issued by the IN-LAW network. A good example is ICH guidelines: only the EU, USA and Japan are formal ICH members; yet ICH guidelines are de facto implemented across the globe. This raises the question of how the ICH as an IN-LAW network can be held accountable to, for example, Switzerland, Brazil or China as *external* actors affected by (but not an actual part of) the IN-LAW activity.

*c. Functions of accountability (democratic, constitutional, learning)*

Bovens distinguishes between a democratic dimension of accountability, a constitutional dimension and a learning dimension.<sup>33</sup> The democratic dimension follows the delegation model of accountability explained above. The idea is that IN-LAW should ultimately be accountable to the people who originally conferred decision-making powers to their elected officials who, in turn, set up IN-LAW. The HiiL Tender document that originally defined our project clearly stresses the democratic function of accountability as our focal point. This is important since there may be accountability without any democratic element (e.g. a regulatory agency may be under an obligation to disclose its internal finances to an audit office, neither of which may be democratically elected or controlled).<sup>34</sup> As Stewart points out, “accountability is not itself a theory of legitimacy but a family of mechanisms for control of power; independent normative principles ... must answer the basic substantive questions of who is accountable to whom for what, with what sanctions, and under what standards and procedures if any”.<sup>35</sup> Bovens makes the distinction between accountability “as a virtue” (normatively prescribing how public actors ought to behave) and accountability “as a mechanism” (merely describing how an actor can be held to account by a forum).<sup>36</sup>

In our assessment of accountability of IN-LAW we will, therefore, pay special attention to IN-LAW’s democratic accountability, that is, its representativeness or responsiveness towards elected officials and the people.

That said, accountability also has a constitutional function (which partly overlaps with the democratic dimension) in the sense of preventing the abuse of power and imposing checks and balances on power wielders. The learning function of accountability, finally, is where the notions of accountability and effectiveness of IN-LAW may meet: accountability, in this sense, offers an opportunity for learning through improvement upon earlier mistakes or public exposure of failure. Making an organization more accountable in this sense can also make it more effective.

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<sup>33</sup> See Bovens (2007) and also Aucoin and Heintzman, *The Dialectics of Accountability for Performance in Public Management Reform*, 66 *International Review of Administrative Sciences* 45.

<sup>34</sup> See HiiL Inventory Report, p. 8.

<sup>35</sup> Stewart, *supra* note 18, at 15.

<sup>36</sup> Bovens (2010).

*d. Mechanisms of accountability v. preconditions and other accountability-promoting measures*

Accountability can occur or be exercised in different ways. As noted earlier, we want to address the accountability of IN-LAW both at the international level (e.g. where regulators from different countries meet and coordinate policy) and at the domestic level (e.g. where regulators may be controlled, and agreed upon policy may be implemented or subject to domestic administrative or judicial control and review).

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

Stewart's list of accountability mechanisms is limited to what we defined earlier as Bovens' narrow, *ex post*, institutionalized definition of accountability, namely: electoral, hierarchical, supervisory, fiscal and legal accountability. In Stewart's view, other mechanisms (such as markets, peer review or public reputational consequences) are not strictly speaking accountability mechanisms since they lack the requisite structure or degree of institutionalized relationships discussed above.<sup>37</sup> He refers to such other mechanisms as "other responsiveness-promoting measures". In this context, it may, therefore, be useful to distinguish between

- (i) accountability mechanisms strictly defined as *ex post* and institutionalized (essentially: electoral, hierarchical, supervisory, fiscal and legal<sup>38</sup>);

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<sup>37</sup> Stewart, *supra* note 18, at 15-17.

<sup>38</sup> See Stewart, *supra* note 18, at 15-17. As between the five accountability mechanisms identified, Stewart distinguishes between (i) delegation-based accountability mechanisms (namely: electoral, hierarchical, supervisory and fiscal accountability) where "the purpose of the holding to account is to ensure that the grantee/accountor has acted consistently with the terms of the grant and appropriately in the interests of the grantor or a third party beneficiary", and (ii) legal accountability which "involves conduct by the accountor that the law prohibits or for which it requires payment of compensation or other redress". Crucially, whereas some cases of legal accountability involve preexisting fiscal, hierarchical or supervisory relations between the parties, in other cases, including many tort cases, the parties are strangers and the accountability relation falls outside any model of delegation or principle-agent theory (e.g. under its Inspection Panel procedure, the World Bank can be held "legally

- (ii) preconditions which are required to enable or make accountability mechanisms possible (such as information sharing or transparency or certain participation rights); and
- (iii) other accountability-promoting measures, not covered by the strict definition of accountability, which promote responsiveness or accountability in the broad sense, including *ex ante* appointment procedures and decision-making rules and non-institutionalized mechanisms such as market-based sanctions, peer pressure or public reputational consequences.

This project is open to an assessment of problems and possible reform proposals at all three levels (preconditions; accountability mechanisms as such; other accountability-promoting measures). That said, the focus will be on accountability mechanisms as such and, since this is a law-focused research project, in particular those mechanisms (be it at the international or domestic level) governed by formal rules or procedures (and not, for example, accountability through markets or peer review).

*e. Timeline of accountability (ex ante, ongoing and ex post activity)*

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

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accountable” towards entities which had nothing to do with setting up the specific World Bank project but were adversely affected by it).

Busuioc identifies three stages at which control can be exercised<sup>39</sup>: (i) *ex ante* control (e.g. when a network's mandate is set), (ii) ongoing control (e.g. involvement of principals or stakeholders in the development of international standards) and (iii) *ex post* control (that is, accountability in its narrow, *ex post*, institutional sense referred to earlier). On this view, a network or agency can be "independent", in that it is not subject to ongoing control (think of a central bank or food safety agency), yet subject to *ex ante* and *ex post* control and therefore still be "accountable". Accountability does not preclude independence, nor does it require direct or ongoing control.<sup>40</sup> Put another way, an accountability deficit or risk of "agencies on the loose" only arises if (i) the network or agency has some degree of independence or discretion to wield power in the first place (direct or ongoing control is loosened) and (ii) no sufficient *ex post* control or accountability mechanisms are in place. Hence, even if a particular IN-LAW network misses specific *ex post* accountability mechanisms, no accountability deficit would exist in the absence of any type of formal or de facto delegation. If principals continue to exercise direct, ongoing control, the question of accountability is less relevant, if not moot.

As discussed earlier, our narrow or strict definition of accountability is limited to *ex post* activity. Yet, since we want to offer a broad, problem-oriented picture and tackle the underlying question of responsiveness and disregard, this project is not limited to *ex post* accountability but also considers *ex ante* matters and questions of ongoing control, such as the establishment of the legal basis or mandate of the different actors involved, their appointment procedures, decision-making rules and participation rights both domestically and at the international level.

The One World Trust, an NGO which monitors the accountability of global organizations (including private companies, IOs and NGOs) and issues the "Global Accountability Report" takes a similarly broad view, covering *ex ante*, ongoing and *ex post* activity. Departing from our strict definition of accountability, it defines accountability as

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<sup>39</sup> M. Busuioc (2009), 'Accountability, Control and Independence : The Case of European Agencies', *European Law Journal*, 15 (5), 599-615.

<sup>40</sup> *Ib.*, ("Independence and accountability can and actually, should co-exist. Accountability becomes relevant precisely in situations where a body is independent and the delegating body has relinquished direct control").

*the process through which an organization makes a commitment to respond to and balance the needs of its diverse stakeholders in its decision making processes and activities, and delivers against this commitment.*<sup>41</sup>

*f. Summary approach and challenge*

Taking on board the above elaborations, we can now offer a more complete approach to accountability as we will use it in this project:

- First, we focus on democratic accountability.
- Second, we examine accountability at both the international and the domestic level.
- Third, we will assess both delegation or internal accountability (amongst actors within an IN-LAW network) and participation or external accountability (towards stakeholders outside but affected by the IN-LAW network).
- Fourth, we distinguish between accountability in the broad sense (responsiveness) and accountability in the narrow sense (*ex post*, institutionalized justification). We define accountability in the narrow sense using Bovens' definition, expanded in the IN-LAW context as follows:

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

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<sup>41</sup> One World Trust, 2008 Global Accountability Report, p. 10, available at [www.oneworldtrust.org](http://www.oneworldtrust.org) and further dividing accountability in four elements: transparency, participation, evaluation and complaints mechanisms. For another, practical approach to accountability, see AccountAbility (<http://www.accountability.org>), a not-for-profit organization which promotes accountability innovations for sustainable development and has its own AA1000 Standards.

- Fifth, we distinguish between accountability mechanisms strictly defined, pre-conditions for such accountability and other accountability-promoting measures; time-wise, we refer to *ex ante* control, ongoing control and *ex post* control. On this premise, Corthaut et al. later in this volume define the broader approach to 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).
- Sixth, accountability is not a one-size-fit all prescription. Depending on its subject matter, legal mandate, organizational structure, output, etc., one type of IN-LAW may require higher or different types of accountability as compared to another.<sup>42</sup> For example, accountability should be commensurate with the extent of power or degree of autonomy possessed.

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

*[Multilevel governance (MLG) networks] generate novel forms of accountability, but undermine its democratic dimension mainly for the following reasons: the weak visibility of MLG networks, their selective composition and the prevalence of peer over public forms of accountability.*<sup>43</sup>

Slaughter has summarized the accountability critiques of government networks, a subset of IN-LAW, into three broad claims: (i) invisibility, “and hence lack of access for groups affected by decisions and policies emanating from regulatory network”, (ii) the substantive charge of bad government decisions, “made by bureaucrats without popular input ... narrowly focused, less deliberative, less responsive to the full range of affected constituencies”, and (iii) illegitimacy, “fuelled not only by exclusion of

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<sup>42</sup> See, for example, Fabian Ambtenbrink, *The Democratic Accountability of Central Banks* (Hart Publishing, 1999).

<sup>43</sup> Yannis Papadopoulos, Problems of Democratic Accountability in Network and Multilevel Governance, 13 *European Law Journal* 2007, 469.

affected groups ... but also by the very existence of a ‘network’ rather than a formal governmental institution”.<sup>44</sup>

On the other extreme, one must also be aware of accountability “overload”, a risk pointed at in particular in the context of the EU where certain forms of enhanced control and reporting are said to have reduced effectiveness without substantively improving responsiveness.<sup>45</sup> As Bovens remarks:

*Political accountability in particular tends to be characterised by high levels of politicisation, which may result in scapegoating, blame games, and defensive routines, instead of policy reflection and learning. Overly rigorous democratic control may squeeze the entrepreneurship and creativity out of public managers and may turn agencies into rule-obsessed bureaucracies. Similarly, too much emphasis on administrative integrity and corruption control can lead to a proceduralism that seriously hampers the reflexivity, and hence also the efficiency and effectiveness, of public organisations.*

It is statements like these – on both sides of the spectrum of accountability “deficit” and accountability “overload” -- that this project aims to examine, based on empirical evidence. And to the extent they are justified this project hopes to offer remedies.

## **2. Effectiveness**

As pointed out earlier, one of the main attractions of IN-LAW as opposed to traditional, formal international law making is that it offers “a device for minimizing the impediments to cooperation, at both the domestic and international levels”.<sup>46</sup> Enhancing the chances for international cooperation to occur is one crucial element of what we understand with effectiveness. The other element of effectiveness we plan to examine relates to how this cooperation – once it has been established – is actually implemented or complied with. For example, IN-LAW at the international level may be soft or informal, but implemented domestically as either hard or soft law. In turn, be it at the international or domestic level, nothing guarantees that formal or hard law will be complied with more rigorously than IN-LAW or soft law. This may depend

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<sup>44</sup> Slaughter, *Agencies on the loose?*, *supra* note 15, at 525.

<sup>45</sup> See, for example, M. Busuioc (2010), *The Accountability of European Agencies: Legal Provisions and Ongoing Practices*, Delft: Eburon, J. Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder”* 65 *Public Administration Review* (2005) 94-95 and, more broadly, Michael Power, *The Audit Society: Rituals of Verification*, OUP, 1997.

<sup>46</sup> Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *International Organization* 1991, 495-538 at 500.



on the monitoring and sanctions systems in place or existing social networks. Another dimension of effectiveness we want to assess is the extent to which IN-LAW actually addresses the original problem and whether it does so in a cost-effective way.

These four dimensions of effectiveness could be summarized as follows: (1) does cooperation materialize; (2) does it stick; (3) does it solve the problem; (4) does it solve the problem in a cost-effective way.

It is often presumed that, by definition, increased effectiveness requires a reduction in accountability or that more accountability will necessarily hamper effectiveness. We plan to further examine the relationship between effectiveness and accountability. Yet, as pointed out earlier, there are certainly times where accountability and effectiveness go hand in hand. One such example is under the learning dimension of accountability whereby *ex post* accountability mechanisms that expose failures or mistakes can lead to improvement and more (rather than less) effectiveness of action. In addition, accountability in the broad sense of responsiveness to people has, as pointed out earlier, a substantive element, namely: to be responsive to the values, goals and aspirations of people (also referred to as *output* legitimacy). In this sense as well, accountability and effectiveness go hand in hand: if the people express a need for certain international cooperation and IN-LAW fails to effectively respond to that need, the IN-LAW activity can be said to be both ineffective and non-responsive (or un-accountable) to the people. Finally, to the extent IN-LAW is not legally binding, for it to be effective, addressees will need to be *convinced* to follow its normative guidelines, more so than with legally binding norms whose effectiveness is backed-up by formal sanctions. To this extent, IN-LAW or soft law requires more (not less) consultation and input from stakeholders than hard law, and for IN-LAW to be effective it also needs to be responsive or accountable.

#### **IV. This project as compared to other, related projects**

This project is different from the Global Administrative Law (GAL) project originating in NYU Law School.<sup>47</sup> In terms of scope, GAL covers activities that are

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<sup>47</sup> See <http://www.iilj.org/GAL/>.

much broader than informal international lawmaking and includes, for example, formal and legally binding output by traditional IOs. Activity does not have to be “informal” to be subject to a GAL analysis. On the other hand, a lot of IN-LAW is below the radar screen of the GAL project, focused as it is on more formal activity. Indeed, even if we might detect and/or propose GAL type solutions to keep IN-LAW accountable (such as transparency or due process), our focus on “informal” international cooperation clearly distances itself from GAL. Whereas the very idea of GAL is to describe and/or impose formal, legal strictures analogous to those found in domestic administrative law, the *raison d’être* and perceived problem of IN-LAW is exactly the avoidance of formal, legal strictures under domestic and/or international law. In this sense, GAL is a particular, law-based *solution*; IN-LAW is a perceived *problem* where actors move away from law.

Our Project is different also from the work of the International Law Association (ILA) Committee on *Accountability of International Organizations*<sup>48</sup>, the Netherlands Yearbook of International Law special issue on *Accountability in the International Legal Order*<sup>49</sup> or the Max Planck Institute’s research project on *The Exercise of Public Authority by International Organizations*.<sup>50</sup> Even if each of these projects focus on accountability (or control over public authority) and can contribute a great deal to our analysis, none have addressed the special problem of “informal” international law or cooperation (in the sense of output, process and actor informality defined earlier). Indeed, their focus is on formal international organizations and output or activity that is (most of the time) legally binding.

Finally, our Project follows in the footsteps of the burgeoning international relations (IR) scholarship on “transgovernmental networks”, initiated by Keohane and Nye in 1971<sup>51</sup> and expanded by Slaughter in the late 1990s<sup>52</sup> and beyond.<sup>53</sup> Where

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<sup>48</sup> See, in particular, Final Report of the International Committee on the Accountability of International Organizations, adopted by the ILA in 2004 (ILA, *Report of the Seventy-first Conference, Berlin 2004* (London, ILA 2004), p. 164-234.

<sup>49</sup> 36 Netherlands Yearbook of International Law, December 2005.

<sup>50</sup> Von Bogdandy, Wolfrum, von Bernstorff and Dann, *The Exercise of Public Authority by International Organizations; Advancing International Institutional Law*,

<sup>51</sup> JOSEPH S. NYE & ROBERT O. KEOHANE, *Transnational Relations and World Politics: An Introduction*, 25 International Organization 329 (1971).

<sup>52</sup> See, in particular, ANNE-MARIE SLAUGHTER, *The Real New World Order* 76 Foreign Affairs 183 (1997), ANNE-MARIE SLAUGHTER, *Agencies on the Loose? Holding Government Networks*

we hope to add to this literature is in terms of (i) more detailed empirical analysis of a wide range of IN-LAW<sup>54</sup>, (ii) legal (as opposed to IR) analysis, (iii) normative prescriptions for reform and possible solutions to enhance accountability rather than description of the phenomenon, its causes and typology and (iv) an assessment not only of international accountability mechanisms but also questions of domestic implementation, control and accountability.

## V. Case study selection

Our first cut at identifying informal international lawmaking was based on the following criteria:

1. Cross-border cooperation related to the global economy
2. Activity in or close to the three sites involved in the project (Geneva, Leuven/Brussels, Twente/The Netherlands) so as to enable in-depth research and interviews.

To narrow down the list of case studies and to make it manageable within the relatively small budget allocated, we subsequently added the following criteria:

3. Fall within broadly identified clusters. For Geneva: medicines, the internet and IO cooperation; for Twente: finance; for Leuven: standards, border activity and G-20.
4. Preference for “informal” international lawmaking in all three senses of output informality, process informality and actor informality

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Accountable (1999), ANNE-MARIE SLAUGHTER, *A New World Order* (Princeton University Press. 2004) and ANNE-MARIE SLAUGHTER, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 *Government and Opposition* (2004).

<sup>53</sup> See, in particular, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Virginia Journal of International Law* (2002-2003); DAVID ZARING, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 *Chicago Journal of International Law* 547 (2004-2005); PIERRE-HUGUES VERDIER, *Transnational Regulatory Networks and Their Limits* 34 *Yale Journal of International Law* 113 (2009) and Kenneth Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 *Vanderbilt Journal of Transnational Law* (2009), 501-578.

<sup>54</sup> Lack of empirical analysis has been one of the critiques voiced against Slaughter's work. See, for example, Anderson, K. "Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks (Review of Anne-Marie Slaughter, *a New World Order*), January 2005, *Harvard Law Review* 118.

5. Have some level of institutionalization (website, address, formal meeting place etc.) and create output beyond mere meetings or exchange of information (such as declarations, standards or guidelines).
6. Have some level of success or impact so that they “matter” and at least raise possible questions of accountability.
7. Offer a broad selection of different types of IN-LAW activity, e.g., with and without private participation, new activity versus long-established activity.

On this basis, the following case studies were selected (although, of course, additional ones may be addressed in the conceptual papers contributed to this project):

#### Medicines-cluster

1. International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products (VICH)
2. International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH)
3. The Global Harmonization Task Force (GHTF - medical devices)
4. International Cooperation on Cosmetic Regulation (ICCR)
5. International Conference of Drug Regulatory Authorities (ICDRAs)

#### Internet-cluster

6. Global Cybersecurity Agenda (GCA) of the ITU
7. Governmental Advisory Committee of ICANN (GAC) and other public policy making in ICANN
8. Internet Engineering Task Force (IETF)
9. Internet Society (ISOC)
10. Internet Governance Forum (IGF)
11. World Telecommunication Policy Forum (WTPF) of the ITU and other ITU activity

#### IO-cluster

12. Chief Executive Board (UN coordination)
13. Aid-for-Trade Initiative

#### Standards-cluster

14. ISO
15. UN Global Compact
16. Codex Alimentarius
17. Voluntary Principles on Security and Human Rights (security forces in mining sector)
18. Kimberley Scheme on Conflict Diamonds

Border-cluster

19. WCO Harmonized System
20. SAFE Framework of Standards to Secure and Facilitate Global Trade (WCO)
21. The Proliferation Security Initiative (PSI)

G-cluster

22. G-20

Finance-cluster

23. Basel Committee on Banking Supervision
24. OECD Principles of Corporate Governance
25. OECD Financial Action Task Force (FATF)
26. Financial Stability Board (FSB)
27. International Organization of Securities Commissions (IOSCO)

Other networks examined by IN-LAW researchers:

28. Asia Pacific Economic Cooperation (APEC)
29. International Competition Network (ICN)
30. Central American Group of Competition
31. Andean Committee for the Defence of Competition
32. International Swaps and Derivatives Association
33. Santiago Principles / OECD Code on Sovereign Wealth Funds
34. United Nations Principles for Responsible Investment (UNPRI)
35. Hyogo Framework for Action and Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief
36. International Code of the Marketing of Breast Milk Substitutes (WHO) – International Baby Food Action Network (IBFAN)

Although far from exhaustive, we are convinced that an examination of these case studies can assist in helping us better understand the creation and operation of IN-LAW, the accountability problems that it raises and how these problems can be solved.