

The Legal Form and Status of Informal International Public Policy Making Bodies: Transgovernmental Regulatory Networks and International Agencies

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1. Introduction

1.1 Regulation Beyond the State

International organizations and informal international regimes and networks are increasingly engaged in normative processes that, *de jure* or *de facto*, impact on States and even on individuals and businesses.² Decisions of international organizations are increasingly considered as a source of international law,³ and it is quite common to regard them in terms of international regulation or legislation.⁴ In addition, and apart from regular international organizations, an increasing number of other fora and networks have been recognised to play a role in international or transnational normative processes. Irrespective of the legal status of

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² See A. Føllesdal, R.A. Wessel and J. Wouters (Eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Leiden, Boston: Martinus Nijhoff Publishers, 2008.

³ See also I.F. Dekker and R.A. Wessel, *Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 215-236 (Ige F. Dekker & Wouter G. Werner eds., 2004).

⁴ Whereas 'regulation' is the more comprehensive term used in this contribution, 'legislation' has a more narrow connotation, as 'legislative power' has been said to have three characteristics: (1) a written articulation of rules that (2) have legally binding effect as such and (3) have been promulgated by a process to which express authority has been delegated *a priori* to make binding rules without affirmative *a posteriori* assent to those rules by those bound.⁴ An even more distinguishing element, perhaps, is that such rules imply future application to an indeterminate number of cases and situations. See also A.J.J. de Hoogh, *Attribution or Delegatio of (Legislative) Power by the Security Council?*, 7 Y.B. INT'L PEACE OPERATIONS 1, 27 (2001). Cf. Stein, *supra* note 15, at 212-13.

the norms that are the result of these non-traditional processes, there is some agreement on the idea that even “law-making is no longer the exclusive preserve of states”.⁵

As far as regular formal international organizations are concerned, their competence to take binding decisions vis-à-vis their Member States is undisputed. They may even exercise sovereign powers, including executive, legislative and judicial powers.⁶ Thus, apart from the European Union and the United Nations,⁷ organizations with such a competence to take legally binding decisions include the World Health Assembly of the World Health Organization (WHO), the Council of the International Civil Aviation Organization (ICAO), the Organization of American States, the Western European Union (WEU), North Atlantic Treaty Organization (NATO), the Organisation for Economic Co-operation and Development (OECD), Universal Postal Union (UPU), World Meteorological Organization (WMO) and the International Monetary Fund (IMF).⁸ As José Alvarez notes, more and more technocratic international organizations “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.”⁹ Thus, Alvarez’s survey includes standard setting by the International Maritime Organization (IMO), the Food and Agriculture Organization (FAO), the ICAO, the International Labour Organization (ILO), the International Atomic Energy Agency (IAEA), United Nations Environmental Programme (UNEP), the World Bank, and the IMF. In addition, many international conventions – including the United Nations Convention on the Law of the Sea (UNCLOS) and a number of World Trade Organization (WTO) agreements – incorporate generally accepted international “rules, standards, regulations, procedures and/or practices.”¹⁰ Alvarez points to the fact that this effectively may transform a number of codes, guidelines and standards created by international organizations and bodies into binding norms. Indeed, irrespective of the fact that in most cases standard setting is accomplished through softer modes of regulation, this may leave the subjects of regulation “with as little effective choice as some Security Council enforcement actions.”¹¹ Nevertheless, most types of law-making by international organizations generally are directed towards the organization’s own members, viz., States, albeit that either *de jure* or *de facto* they may become part of the

⁵ A. Boyle and C. Chinkin, *The Making of International Law*, Oxford: Oxford University Press, 2007, at vii (emphasis added). See for a non-legal approach: M.J. Warning, *Transnational Public Governance: Networks, Law and Legitimacy*, Palgrave Macmillan, 2009.

⁶ See D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005.

⁷ On decisions of the EU, see e.g., Armin von Bogdandy et al., *Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis*, 23 Y.B. EUR. L. 91 (2004).

⁸ Cf. PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* (2001); HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* (2003); JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* (2004); C.F. AMERASINGHE, *PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS* (2d rev. ed. 2005); N.D. WHITE, *THE LAW OF INTERNATIONAL ORGANISATIONS* (2005).

⁹ J. Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005), at 217.

¹⁰ *Id.*, ch. 4.

¹¹ *Id.* at 218.

domestic legal order of the Member States and directly or indirectly affect citizens and/or businesses within those States.¹²

While in most States the decisions of international organizations and bodies typically require implementation in the domestic legal order before they become valid legal norms, the density of the global governance web has caused some interplay between the normative processes at various levels. For EU Member States (and their citizens), this can imply that the substantive origin of EU decisions (which usually enjoy direct effect in, and supremacy over, the domestic legal order) is to be found in another international body.¹³ In many areas, ranging from security to food safety, banking, health issues or the protection of the environment, national rules find their basis in international and/or European decisions. In those cases, decisions may enter the domestic legal orders as part of European law. However, international decisions also may have an independent impact on domestic legal orders. This is not to say that international decisions have a direct effect in the sense we are accustomed to in EU law. From the point of view of international law, while “primacy is a matter of logic as international law can only assume its role of stabilizing a global legal order if it supersedes particular and local rules,” at the same time it “allows for an undefined variety of combinations based either upon the doctrine of monism or the doctrine of dualism.”¹⁴ However, the fact that many domestic legal orders do not allow their citizens to directly invoke international norms before national courts does not mean that these norms are devoid of impact.¹⁵ As the norms usually are based on international agreements and/or decisions of international organizations, States will simply have to follow the rules of the game in their international dealings. This implies that even domestically they may have to adjust to ensure that the rules are observed by all parts of the administration. The *de facto* impact of the – often quite technical – norms and the need for consistent interpretation¹⁶ may thus set aside more sophisticated notions of the applicability of international norms in the domestic legal order.

¹² See R.A. Wessel and J. Wouters, ‘The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres’, *International Organizations Law Review*, 2007, No. 2, pp. 257-289.

¹³ For a survey of the relations between the EU and other international organizations, see generally Frank Hoffmeister, *Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies*, 44 COMMON MKT. L. REV. 41 (2007). See also E. Chiti and R.A. Wessel, ‘The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?’, in N. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy*, Routledge, 2010 (forthcoming)

¹⁴ Thomas Cottier, *A Theory of Direct Effect in Global Law*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS DIETER EHLERMANN 99, 102, 104 (Armin von Bogdandy et al. eds., 2001).

¹⁵ For a survey of the different legal systems in Europe, see IUS PUBLICUM EUROPAEUM, BAND I: STAATLICHES VERFASSUNGSRECHT IM EUROPÄISCHEN RECHTSRAUM [National Constitutional Law in a European Legal Space] (A. von Bogdandy et al. eds., 2007).

¹⁶ See *id.* at 109-10 (discussing the impact of the doctrine of consistent interpretation in relation to the domestic effect of WTO law).

These interactions between national and international legal spheres, including the European legal sphere for EU Member States, have intensified and gained increased visibility over the past few years. It is becoming ever more difficult to draw dividing lines between legal orders: international law is increasingly coming to play a role in national (and EU) legal orders, whereas national (and EU) legal developments are exerting a bottom-up influence on the evolution of the international legal order.¹⁷ This has led some observers to argue that the “central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rule-making are ever more widespread, the sovereign equality of states is gradually undermined, and the basis of legitimacy of international law is increasingly in doubt.”¹⁸ Similar to the notion of multilevel governance as developed in political science and public administration, from a legal perspective the interactions between global, European and national regulatory spheres lead to the phenomenon of ‘multilevel regulation’.¹⁹ ‘Regulation’ is then defined in a broad sense here, referring to the setting of rules, standards or principles that govern conduct by public and/or private actors. Whereas ‘rules’ are the most constraining and rigid, ‘standards’ leave a greater range of choice or discretion, while ‘principles’ are still more flexible, leaving scope to balance a number of (policy) considerations.²⁰

1.2 Informal International Public Policy Making (IIPPM)

The above analysis points to the recognition of norms that while being enacted *beyond* the state may nevertheless have an impact *within* the state. Indeed, domestic legal systems – traditionally, by definition, caught in national logic – increasingly recognise the influence of international and transnational regulation and law-making on their development.²¹ Legal scholars attempt to cope with the proliferation of international organisations and other entities contributing to extra-national normative processes.²² Within this broader debate the

¹⁷ On the phenomenon of what can be cautiously referred to as a new ‘Europeanisation’ of international law, see *THE EUROPEANISATION OF INTERNATIONAL LAW: THE STATUS OF INTERNATIONAL LAW IN THE EU AND MEMBER STATES* (J. Wouters et al. eds., The Hague: T.M.C. Asser Press, 2008).

¹⁸ Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1, 1 (2006).

¹⁹ See Follesdal, Wessel and Wouters, *op.cit.*

²⁰ Wessel and Wouters, *op.cit.*

²¹ See generally The Hague Institute for the Internationalisation of Law (HiIL), Research Programme (2007), <http://www.hiil.org/uploads/File/Research%20Programme%20DEF.pdf> (providing an analysis of the main trends). See also J. Nijman and P.A. Nollkaemper, *New Perspectives on the Divide between National & International Law*, Oxford University Press, 2007.

²² See Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425 (1999). In his book *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, José Alvarez reveals that the role of international organizations in law-making not only increased, but also that international law is not always well equipped to handle this development. See generally JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005). Cf. DAN SAROOSHI, *op.cit.*. For earlier examples, see *NEW TRENDS IN INTERNATIONAL LAWMAKING – INTERNATIONAL “LEGISLATION” IN THE PUBLIC INTEREST* (J. Delbrück ed., 1996). On the development of the (sub-) discipline of the law of international organizations

current project focuses on one particular dimension: the *informal* international public policy making. IIPPM is ‘informal’ in the sense that it dispenses with certain formalities traditionally linked to international law making. These formalities may have to do with *output*, *process* or the *actors involved*.²³ In the framework of the project, IIPPM is defined as:

*Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or legally enforceable commitment (output informality).*²⁴

IIPPM may thus be seen as reflecting the phenomenon of ‘regulation beyond the state’ as described above. However, it is novel in the sense that it goes beyond the ‘law-making by international organizations’ debate by focusing on other public authorities and normative outcomes,²⁵ and differs from the more ‘formal procedure-creating’ approach of Global Administrative Law.²⁶ In terms of the focus on the exercise of public authority, it resembles some of the characteristics of the Max Planck project on the ‘Exercise of International Public Authority’.²⁷ At the same time, it shares some notions with the concept of ‘multilevel regulation’ as defined above, both in terms of the actors involved and the effects the normative output may have at different levels (global, regional (EU), domestic).

Finally, it should be made clear that the formal project title – ‘New International Law’ – is based on the presumption that international cooperation, albeit less formal, falls within the remit of international law, on the ground that international law has, even traditionally, been defined with reference to its *subjects* (e.g. inter-state relations) rather than its *object* (be it

in general, see Jan Klabbers, *The Life and Times of the Law of International Organizations*, 70 *NORDIC J. INT’L L.* 287-317 (2001).

²³ See J. Pauwelyn, ‘Informal International Public Policy Making (IIPPM): Mapping the Action and Testing Concepts of Accountability and Effectiveness’, Project Framing Paper, 31 May 2010, p. 1.

²⁴ Ibid, at p. 4.

²⁵ Alvarez, *op.cit.*

²⁶ See recently B. Kingsbury and L. Casini, ‘Global Administrative Law Dimensions of International Organizations Law’, *International Organizations Law Review*, 2009, No. 2, pp. 319-356, as well as other contributions to the special issue of *IOLR* on *Global Administrative Law in the Operations of International Organizations*. Earlier: Krisch and Kingsbury, *op.cit.*; as well as B. Kingsbury, N. Krisch and R. Steward, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15-61, at p. 29; C. Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *EJIL* 197-214; B. Kingsbury, ‘The Concept of Law in Global Administrative Law’ *EJIL* 20(1) (2009) 23-57.

²⁷ See A. Von Bogdandy, R. Wolfrum, J. Von Bernsdorff, Ph. Dann and M. Goldmann (Eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Heidelberg, etc.: Springer, 2010. See also M. Goldmann, ‘Inside Relative Normativity: From Sources to Standards Instruments for the Exercise of International Public Authority’, 9 *German Law Journal* (2008) 1865 and A. von Bogdandy, P. Dann and M. Goldmann, ‘Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities’, 9 *German Law Journal* (2008) 1375.

subject matter or the particular form or type of output).²⁸ In that sense, the IIPPM project may indeed manifest “an impact-based conception of international law”.²⁹

1.3 *The Place of this Paper in the Project*

The final step is to frame the current contribution in the overall project. With a view to the key characteristics of IIPPM (*process informality*, *actor informality* and *output informality*), the present contribution sets itself the task of further defining the bodies and networks involved in IIPPM. In terms of the IIPPM working definition presented above, it thus focuses on *cross-border cooperation between public authorities in a forum other than a traditional international organization* (process informality). ‘Cross-border’ is then defined as to include normative processes not only between different states, but also between different regulatory levels of authority (*multilevel regulation*).

As indicated in the project’s framing paper,³⁰ 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). Indeed, as argued by Pauwelyn, such process or forum informality does not prevent the existence of detailed procedural rules, permanent staff or a physical headquarter. Nor does process informality exclude IIPPM in the context or under the broader auspices of a more formal organization, as we will see *infra*. The result is that IIPPM takes place in fora of different forms and shapes. In this paper we will both look at fora in the form of actual ‘bodies’ and at networks operating within a less institutionalised setting. In all cases, the international legal status of the fora is important to be able to define the applicability of (general) international law.³¹ So, as indicated in the Framing Paper,³² a possible advantage of having legal personality may be that some IIPPM groupings or networks can be held accountable as separate entities and may fall under the control (albeit partly) of international law. A possible drawback of such independent status may, however, be that it enhances the power of the grouping or network and may, in turn, make it more difficult rather than easier to hold the IIPPM accountable (participating national actors may, for example, hide behind the IIPPM when it comes to responsibility; independent international status may reduce the need for domestic implementation and the domestic control that comes with it). We hope to be able to clarify some of these issues by analyzing the legal status of the fora involved in IIPPM.

²⁸ Ibid, at pp. 4-5.

²⁹ J. D’Aspremont, ‘Informal International Public Policy Making: From a Pluralization of International Norm-Making Processes to a Pluralization of our Concept of International Law’, paper presented at the Geneva workshop, 24 June 2010.

³⁰ J. Pauwelyn, Framing Paper, *op.cit.*, at 5.

³¹ As is the legal status of the normative *output*. See J. D’Aspremont, *op.cit.*

³² J. Pauwelyn, Framing Paper, *op. cit.*, pp. 6-7.

2. Forms of IIPPM Fora

2.1 Defining the Scope

As indicated in the Framing Paper, IIPPM covers only ‘public’ policy making in the sense that public authorities must be involved. IIPPM can include private actor participation, but excludes cooperation that only involves private actors. It has been noted that we cannot exclude that public authorities delegate public policy making to private entities, and in that sense what these private entities are doing could still be called ‘public policy making’. Moreover, it may also be that private regulation is, in effect, setting public policy, that is, imposing regulations or behavior on the public at large rather than engage in pure self-regulation of an industry or sector.³³

The bottom-line, however, is that the key questions underlying the project (related to accountability) become relevant in particular in case ‘public authority’ is exercised. Von Bogdandy, Dann and Goldman defined 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”.³⁴ The authors believe that this concept enables the identification of all those governance phenomena which public lawyers should study. Irrespective of its focus on ‘governance activity by international institutions’, we feel that this definition may also be applied to the informal fora addressed in the present contribution.

This would lead to a large number of potential fora involved in IIPPM. First of all, what has been set out above already indicates that governance, and by the same token regulation, has become a multi-actor game; apart from intergovernmental organisations, non-governmental and transnational actors are playing an increasing role in global governance.³⁵ In some issue areas, there is intense co-operation between State and non-State actors. One could point to the Codex Alimentarius Commission (see also *infra*), or to ICANN (Internet Corporation for Assigned Names and Numbers), which governs the internet.³⁶ In some areas, States even have even ceased to play a role in governance, and transnational actors have taken over. A prime example is the International Standardization Organization (ISO), which by now has produced some 13,000 rules on the standardisation of products and processes.³⁷ These rules often are adopted by regular international organisations, such as the WTO, which allows them to

³³ Ibid., p. 9.

³⁴ A. Von Bogdandy, Ph. Dann and M. Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in Von Bogdandy et al, *The Exercise of Public Authority by International Institutions*, *op.cit.*, pp. 3-32, at 5.

³⁵ Anne-Marie Slaughter regards these networks as a better way of world governance than the traditional state-centric approach. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

³⁶ See M. Hartwich, ‘ICANN – Governance by Technical Necessity’, in Von Bogdandy et al (eds, *op.cit.*, pp. 575-605.

³⁷ See *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* (R.B. Hall & Th. J. Biersteker eds., 2002).

indirectly affect national legal orders (cf. the notion of *multilevel regulation*, described earlier).³⁸ A similar situation arises in relation to the norms set by the World Anti-Doping Agency.³⁹ It is clear that individuals or companies may be confronted by rules that were adopted without any direct influence by their national legislature or that simply have to be adopted at the national level in order to be able to participate in international co-operation.

Something like global law without the State⁴⁰ does exist, and in some areas, States do not play any role in global regulation or they are represented by non-governmental or less traditional representatives. What one witnesses is a transnational co-operation that already has led to a complete set of rules on the use of the internet: the *lex digitalis*, comparable to the *lex mercatoria* related to transnational trade.⁴¹ Other well-known examples include the Basel Committee, in which the central bank directors of a limited number of countries harmonise their policies in such a way as to result in a *de facto* regulation of the capital market,⁴² and the International Organization of Securities Commissions (IOSCO), which deals with the transnationalisation of securities markets and attempts to provide a regulatory framework for them.⁴³ National agencies thus participate in global (or regional) regulatory networks as largely independent, autonomous actors and are, in turn, often required to implement international regulations or agreements adopted in the context of these networks at the national level.⁴⁴ As early as a decade ago, Slaughter termed this phenomenon the “nationalization of international law.”⁴⁵

Apart from non-governmental bodies and national agencies making their own international deals, a relatively new development is the proliferation of international bodies that are also not based on an international agreement but which are nevertheless closer to an international organization since they were established on the basis of a decision of an international organization. According to some observers, these new international entities even outnumber

³⁸ S. Shapiro, *International Trade Agreements, Regulatory Protection and Public Accountability*, ADMIN. L. REV. 435 (2002).

³⁹ Cf. L. Casini, ‘Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)’, *International Organizations Law Review*, 2009, No. 2, pp. 421-446.

⁴⁰ For the contribution to the fragmentation of law, see generally Fischer-Lescano & Teubner, *infra* note 112, at 1009.

⁴¹ On the *lex digitalis*, see Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675 (2000). On the *lex mercatoria*, see e.g., Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT’L L. 347 (2001).

⁴² See David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT’L L. REV. 281 (1998); Michael S. Barr & G.P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT’L L. 15 (2006).

⁴³ See Barr & Miller, *supra*, at 15; Jayasuriya, *supra*, at 449.

⁴⁴ See Jayasuriya, *supra* note 4, at 440. See also S. Picciotto, *The Regulatory Criss-Cross: Interaction Between Jurisdictions and the Construction of Global Regulatory Networks*, in INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES 89 (W. BRATTON et al. eds., 1996).

⁴⁵ Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF. 183, 192 (1997).

the conventional organisations.⁴⁶ International regulatory co-operation often is conducted between these non-conventional international bodies.⁴⁷ We will deal with these bodies under the heading 'international agencies'.

2.2 Transgovernmental Regulatory Networks

2.2.1 Defining Transgovernmental Regulatory Networks (TRNs)

Transgovernmental networks have been defined by Anne Marie Slaughter as “informal institutions linking actors across national boundaries and carrying on various aspects of global governance in new and informal ways”.⁴⁸ These transgovernmental networks exhibit “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere”.⁴⁹ They allow domestic officials to interact with their foreign counterparts directly, without much supervision by foreign offices or senior executives, and feature loosely-structures, peer-to-peer ties developed through frequent interaction.⁵⁰ The networks are composed of national government officials, either appointed by elected officials or directly elected themselves, and they may be among judges, legislators or regulators.⁵¹ According to Jayasuriya, these new regulatory forms have three main features: (1) they are governed by networks of State agencies acting as independent actors rather than on behalf of the State but; (2) they lay down standards and general regulatory principles instead of strict rules; and (3) they frequently contribute to the emergence of a system of decentralised enforcement or the regulation of self-regulation.⁵² This paper focuses on networks that take place between regulators, referred to, therefore, as *transgovernmental regulatory networks*. In short, a transgovernmental regulatory network is basically cooperation between regulatory authorities of different countries.

Slaughter’s definition appears to suggest that TGNs are composed of regulatory authorities only. But this would not capture all of the modes in which regulators network with each other.

⁴⁶ See C. Shanks et al., *Inertia and Change in the Constellation of International Governmental Organizations, 1981-1992*, INT’L ORG. 593 (1996).

⁴⁷ Cf. C. Tietje, *Global Governance and Inter-Agency Cooperation in International Economic Law*, J. WORLD TRADE 501 (2002).

⁴⁸ ANNE-MARIE SLAUGHTER & DAVID ZARING, *Networking Goes International: An Update*, 2 Annual Review of Law and Social Science 211(2006). P. 215.

⁴⁹ ANNE-MARIE SLAUGHTER, *A new world order* (Princeton University Press. 2004). P. 14

⁵⁰ SLAUGHTER & ZARING, *Networking Goes International: An Update*. P.215; KAL RAUSTIALA, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Virginia Journal of International Law 1(2002-2003). P. XXX; T. RISSE-KAPPEN, *Introduction*, in *Transnational Relations Back In* (T. Risse-Kappen ed. 1995).

⁵¹ SLAUGHTER, *A new world order*.P.3-4 .

⁵² See Jayasuriya, *supra*, at 453. On the regulation of self-regulation in particular, see generally G. Teubner, *Substantive and Reflexive Elements in Modern Law*, L. & Soc’y 239 (1983). Elements of this development are also addressed by Anne-Marie Slaughter, *op.cit.* Slaughter seems to use the term ‘transgovernmental networks’ to point to what we would call IIPPM. Slaughter, *op.cit.*, Chapter 6.

In practice, regulators often cooperate with other regulators in networks that are not limited to regulators alone. Rather, in some of the networks, regulators collaborate on an equal footing with the private sector too. For example, in the International Conference on Harmonization, drug regulatory authorities as well as pharmaceutical industry associations are members with almost identical powers. Despite the inclusion of private members, regulators maintain a central and direct role in the governance and operations of these networks. Thus, in our use in this paper of the term ‘transgovernmental regulatory networks’ we diverge from Slaughter’s limited definition and include also those networks in which regulators cooperate with another kind of party, to the extent the regulators maintain their dominant role.⁵³

The paper does not purport to cover so-called ‘global public policy networks’, in which regulators have a more modest role, and they cooperate with IOs, NGOs and other private actors.⁵⁴ However, many of the conclusions regarding the legal status of international agencies and TRNs discussed below could arguably apply equally to them too.

2.2.2 Legal Characteristics of Transgovernmental Regulatory Networks

a. Membership

In line with the above-mentioned definition, TRNs are composed of regulatory authorities or agencies from different countries. For example, the International Cooperation on Cosmetics Regulation is comprised of cosmetic regulatory authorities from the United States (Food and Drug Administration), Europe (EC DG Enterprise and Industry), Japan (Ministry of Health, Labour and Welfare) and Canada (Health Canada).⁵⁵ The Financial Stability Board brings together national authorities responsible for financial stability.⁵⁶ In some cases, the relevant private sector will be a member too. For example, ICH is comprised of drug regulatory authorities and drug industry associations from the USA, EU and Japan.⁵⁷ The World Association of Investment Promotion Agencies is open to government agencies as well as private bodies whose prime function is to promote a country as a destination for investments.⁵⁸

The membership spectrum of TGNs is quite broad. Whereas some TRNs tend to be ‘club-like’ with a limited number of participants, others are quite inclusive. For example, on one side of the range is the Global Harmonization Task Force, which consists of drug regulatory authorities

⁵³ Cooperation between public authorities and private bodies such as is taking place in the ICH could perhaps also be defined as a “public-private partnerships “. ***[This delineation issue is a point that must be further examined, and ideally raised at the workshop.]***

⁵⁴ SLAUGHTER, A new world order.P.4.

⁵⁵ Section 1 of “Terms of Reference for ICCR”, available at <http://www.fda.gov/InternationalPrograms/HarmonizationInitiatives/ucm114522.htm>.

⁵⁶ See <http://www.financialstabilityboard.org/about/overview.htm>, and <http://www.financialstabilityboard.org/members/links.htm>.

⁵⁷ <http://www.ich.org/cache/compo/276-254-1.html>

⁵⁸ Article III, WAIPA Statutes, available at http://www.waipa.org/pdf/WAIPA_STATUTES.pdf.

and industry associations from the USA, Europe, Japan, Canada and Australia.⁵⁹ The International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH) is even smaller, with the US, Europe and Japan as only full members.⁶⁰ On the other side, the International Organization of Securities Commissions (IOSCO), a network of securities regulators, brings together over a 100 [check] securities regulators. WAIPA (World Association of Investment Promotion Agencies) too enjoys broad global membership.⁶¹ The International Conference of Drug Regulatory Authorities is comprised of drug regulatory authorities of all WHO member states.⁶²

Having said that, due to increased interest by outsiders, some of the ‘club like’ TRNs have opened up and allowed greater participation of other countries in their work. For example, the ICH, founded by the USA, Europe and Japan has in recent years set up a ‘Global Cooperation Group’ and a ‘Regulators Forum’ in order to cooperate with other regional harmonization networks and drug regulatory authorities, respectively.⁶³ The Basel Committee, originally founded by the G-10 industrial economies, and comprised of central bankers, has also expanded and now includes significant emerging economies such as China and Brazil. Moreover, in many of these organizations, observership or different levels of membership with different rights attached is also common. For example, Switzerland, Canada and the WHO (representing the interests of developing countries), are observers in ICH.⁶⁴

b. *The Legal Basis for their Cooperation*

Under traditional international law, regulatory authorities —being sub units of the state —lack independent international legal personality (we discuss this further below). As such, they lack the capacity to conclude binding international treaties on behalf of the state. Consequently, transgovernmental regulatory cooperation is often conducted on the basis of ‘non-binding’ agreements, such as Memoranda of Understanding (MOU).⁶⁵ These are signed by regulators as non-binding statements of their intent to cooperate.⁶⁶ Sometimes the cooperation is in the form of informal initiatives, without any sort of MOU between the regulators involved.⁶⁷ For

⁵⁹ Section 2.1. of “GHTF Roles and Responsibilities Document”, available at http://www.ghrf.org/documents/sc/sc_n2r10.pdf.

⁶⁰ See <http://www.ich.org/cache/compo/276-254-1.html>.

⁶¹ See <http://www.waipa.org/members.htm>

⁶² See http://www.who.int/medicines/areas/quality_safety/regulation_legislation/icdra/en/index.html.

⁶³ Regarding the Global Cooperation Group, see <http://www.ich.org/cache/compo/276-254-1.html>

⁶⁴ See <http://www.ich.org/cache/compo/276-254-1.html>.

⁶⁵ ANNE-MARIE SLAUGHTER, *Governing the Global Economy through Government Networks*, in *The Role of Law in International Politics: Essays in International Relations and International Law* (Michael Byers ed. 2000).P.189.; SOL PICCIOTTO, *Constitutionalizing multilevel governance?*, xx *International Journal of Constitutional Law* 1(2008). P. 6. SOL PICCIOTTO, *Regulatory Networks and Global Governance* (2006). P. 13. RAUSTIALA. P.22. ANNE-MARIE SLAUGHTER, *Government Networks: The Heart of the Liberal Democratic Order*, in *Democratic Governance and International Law* (Gregory H. Fox & Brad R. Roth eds., 2000).214-215.

⁶⁶ SLAUGHTER, *Governing the Global Economy through Government Networks*, (P.189-190).

⁶⁷ Id. at (

example, in the case of the ICH and GHTF (Global Harmonization Task Force), the basis for their cooperation is a 'Terms of Reference' issued by the parties.

c. The Organizational Framework in which TRNs Operate

TRNs operate in different contexts. Some operate within the framework of an international organization, whereas others operate autonomously at the international level, independently of any traditional framework.

As regards those taking place within an international organization, the Blood Regulators Network, is an example. It is comprised of regulatory authorities that have responsibility for the regulation of blood products, and takes place within the auspices of the WHO.⁶⁸ *[To include more examples such as bodies in the OECD and others]*

The second kind —those that operate outside of IOs—are the focus of this section. The Basel Committee on Banking Supervision, a network of central bankers, and the International Organization of Securities Commissions (IOSCO), a network of securities regulators, are typical examples in the financial field. Other examples include the World Association of Investment Promotion Agencies (WAIPA), a network of domestic investment promotion agencies, and the International Competition Network (ICN), a network of competition authorities. In the health field, examples include the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), a network of drug regulatory authorities and pharmaceutical drug associations, the Global Harmonization Task Force (GHTF), a network of drug regulatory authorities and medical devices industry associations, the International Cooperation on Cosmetic Regulation (ICCR), a network of cosmetic regulators, and the International Cooperation on Harmonization of Technical Requirements for Registration of Veterinary Medicinal Products (VICH).

d. Internal Structure and Governance

Transgovernmental regulatory networks may operate at different levels of institutionalization. While some may be extremely unstructured, some have become more institutionalized.⁶⁹ For example *[provide examples of unstructured networks]*. On the other side of the range, TRNs such as ICH, VICH, and GHTF are highly institutionalized, and could rightfully be considered to be transgovernmental regulatory *organizations* (TROs).⁷⁰ They have many of the characteristics typical of an organization: They are made up of a Steering Committee and Working Groups.⁷¹ They have Secretariats and organize public conferences. They have constitutional-like documents setting out the governance and the structure of the organization, and so forth.⁷²

⁶⁸ <http://www.who.int/bloodproducts/brn/en/>

⁶⁹ See on this point also SLAUGHTER & ZARING, *Networking Goes International: An Update*. P. 215

⁷⁰ Zaring refers to the Basel Committee and IOSCO as "international financial regulatory organizations". See DAVID ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 Texas International Law Journal 281(1998).

⁷¹ [Include references].

⁷² [Include references]

Having said that, the TGOs level of institutionalization is still relatively light in comparison to traditional IOs: Their secretariats tend to be rotating among the members (such as in GHTF), or small and relying on a secretariat of an IO or of an industry association. For example, the Basel Committee's secretariat services are provided by the Bank of International Settlements (BIS), and the ICH's secretariat is located in the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA). They have few employees, if at all, and other than regular meeting schedules, no permanent presence. They have a small budget or no budget at all, with members usually each covering their own costs.⁷³

Finally, many TROs have developed administrative features that are traditionally marked as features of democratically governed domestic systems of administrative law.⁷⁴ For example, the governance and the operation of the ICH, VICH, GHTF and ICCR, are set out in constitutional-like documents that determine the rights and duties of the parties, and the rules of the organization.⁷⁵ Moreover, these documents set out an explicit guideline drafting procedure, which requires consultation with domestic stakeholders.⁷⁶ The ICH Procedure, for instance, requires that a draft guideline prepared by the ICH be released for normal domestic regulatory consultation.⁷⁷ More generally, transparency and participation principles have become entrenched in the working of these organizations. In VICH, for example, transparency and communication with external stakeholders have been embraced as guiding principles.⁷⁸ And in general, all of them have extensive websites that provide minutes of meetings, framework documents and so forth

[To further develop this point on the administrative mechanisms.]

e. *The output*

The guidelines and documents issued by TRNs are typically not considered legally binding.⁷⁹ Nevertheless, members are expected to implement the guidelines into their domestic legal system. In the GHTF, for example, "Founding Members will take appropriate steps to implement GHTF guidance and policies within the boundaries of their legal and institutional constraints."⁸⁰ Similarly, the accords of the Basel Committee are not formally binding, but the members have agreed to implement the accords within their own domestic system.⁸¹ And

⁷³ See, for example, [include reference].

⁷⁴ See on this topic also SLAUGHTER & ZARING, *Networking Goes International: An Update*.215; DAVID ZARING, *Informal Procedure, Hard and Soft, in International Adminsitration*, 5 *Chicago Journal of International Law* 547(2004-2005). P. 571-572,594.

⁷⁵ See VICH Guiding Principles.

⁷⁶ [Include reference to the documents].

⁷⁷ Step 3, "Formal ICH Procedure", available at <http://www.ich.org/cache/compo/276-254-1.html>.

⁷⁸ [Include reference]

⁷⁹ ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*. P. 303-304.

⁸⁰ Article 2.1, "GHTF Roles and Responsibilities Document", available at http://www.ghtf.org/documents/sc/sc_n2r10.pdf.

⁸¹ SLAUGHTER, *Government Networks: The Heart of the Liberal Democratic Order*, (P.216; ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*. 281.

indeed, in practice the guidelines enjoy widespread compliance and considerable normative force,⁸² which puts their 'non-legally binding' character in perspective.

The normative effect of the guidelines extends beyond the member regions. In practice, the guidelines are often adopted by non-members. For example, more than 100 states have implemented the Basel Accords to a greater or lesser degree.⁸³ Similarly, ICH guidelines, setting out rules for approval of new medicines, have been adopted by non-members such as Switzerland, Australia and Canada, and selectively adopted by some emerging countries.

[There is a lot to be said about this point, so it could be further developed later on.]

2.2.3 Other Characteristics of TRNs

a. What do TRNs do?

Transgovernmental regulatory networks bring regulators together and are an important forum for the exchange of information, experience and best practices. In some cases, TRNs provide training programs and technical assistance to members and to third parties. For example, the ICH provides training sessions to non-member third countries on ICH guidelines. Finally, some networks (and arguably the most interesting ones) engage in standard-setting and harmonization. For example, the Basel Committee issues guidelines on capital adequacy, and the ICH issues guidelines that harmonize the requirements for the registration of new medicines. *[To include more examples.]*

b. Policy Areas

TRNs have been identified in a broad range of policy areas. Most of them concern highly technical topics that require the expertise of regulators rather than the diplomacy of foreign affairs officials. Examples include airplane regulation,⁸⁴ tax cooperation,⁸⁵ antitrust cooperation,⁸⁶ food and drug regulations,⁸⁷ telecommunications,⁸⁸ and global crime.⁸⁹ Further,

⁸² PICCIOTTO, *Regulatory Networks and Global Governance*. P.11.

⁸³ MARIO SAVINO, *An Unaccountable Transgovernmental Branch: The Basel Committee*, in *GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES. Second Edition* (Sabino Cassese, et al. eds., 2008). P. 67

⁸⁴ J. SABA, *Aviation Safety in Crisis: the option of the international financial facility for aviation safety*, 30 *Transport Law Journal* 1(2002). GEORGE A. BERMANN, *Regulatory Cooperation with Counterpart Agencies Abroad: The FAA's Aircraft Certification Experience*, 24 *Law and Policy in International Business* 669(1993). **[To examine]**

⁸⁵ I. PAK, *International Finance and State Sovereignty: Global governance in the international tax regime*, 10 *Annual Survey of International and Comparative Law* 165(2004). **[To examine]**

⁸⁶ C. A. WHYTOCK, *A rational design theory of transgovernmentalism: the case of E.U.-U.S. merger review cooperation.*, 23 *Boston University International Law Journal* 1(2005); D. J. GERBER, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 26 *Houston Journal of International Law* 287(2004); C.W. SMITHERMAN, *The future of global competition governance: lessons from the transatlantic*, 19 *American University International Law Review* 769(2004); JOHN O. MCGINNIS, *The Political Economy of International Antitrust Harmonization*, 45 *William and Mary Law Review* 549(2003-2004); ANU PIILLOLA, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 *Stanford Journal of International Law* 207(2003); ELEANOR M. FOX, *Antitrust and Regulatory Federalism:*

in the context of the debate over accountability, a lot of scholarly focus has been devoted to networks of financial regulators, such as the Basel Committee on Banking Supervision, IOSCO, the International Association of Insurance Supervisors (IAIS), the Financial Stability Board, a network of national financial authorities (FSF), the International Accounting Standards Board (IASB), the Financial Action Task Force on Money Laundering (FATF), and others.⁹⁰

c. Regional TRNs

Finally, TRNs are not only a global phenomenon. In fact, there is an abundant number of regional TRNs. The most concentrated site for transgovernmental networks is the European Union.⁹¹ Another area of dense networking is in the transatlantic relationship between the U.S. and the EU.⁹²

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- Races Up, Down and Sideways*, 75 New York University Law Review 1781(2000). RAUSTIALA.P. 35-43. PIERRE-HUGUES VERDIER, *Transnational Regulatory Networks and Their Limits* 34 The Yale Journal of International Law 113(2009). P. 151-161. **[These all need to be examined.]**
- ⁸⁷ BARBARA A. NOAH, *Adverse Drug Reactions: Harnessing Experiential Data to Promote Patient Welfare*, 49 Catholic University Law Review 449(1999-2000). DAVID W. JORDAN, *International Regulatory Harmonization: A New Era in Prescription Drug Approval*, 25 Vanderbilt Journal of Transnational Law (1992); SHARON SMITH HOLSTON, *An Overview of International Cooperation*, 52 Food and Drug Law Journal (1997); JOSEPH G. CONTRERA, *The Food and Drug Administration and the International Conference on Harmonization: How Harmonized Will International Pharmaceutical Regulations Become?*, 8 Administrative Law Journal of the American University 927(1995); ROSEMARIE KANUSKY, *Pharmaceutical Harmonization: Standardizing Regulations among the United States, the European Economic Community, and Japan*, 16 Houston Journal of International Law 665(1994). **[These all need to be examined.]** BAERBEL R. DORBECK-JUNG, *Challenges to the Legitimacy of International Regulation: The Case of Pharmaceuticals Standardisation*, in Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes, in Follesdal, Wessel and Wouters, *op.cit.*
- ⁸⁸ GEORGE A. BERMAN, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*, 9 Administrative Law Journal of the American University 933(1995-1996). **[Needs to be examined]**
- ⁸⁹ P. ANDREAS & E. NADELMANN, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford University Press. 2006); MOISES NAIM, *Five Wars of Globalization*, 18 American University International Law Review 1(2002-2003). **[These all need to be examined.]**
- ⁹⁰ See ZARING, *Informal Procedure, Hard and Soft, in International Administration*. ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*. RAUSTIALA. P.28-35. VERDIER. SLAUGHTER, *Governing the Global Economy through Government Networks*, (; SOL PICCIOTTO, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 Northwestern Journal of International Law and Business 1014(1996-1997). P.1039-1045. MICHAEL S. BARR & GEOFFREY P. MILLAR, *Global Administrative Law: The View from Basel* 17 European Journal of International Law 15(2006).
- ⁹¹ SLAUGHTER, *A new world order*.43.
- ⁹² Id. at P.44. On networks in the context of transatlantic governance, see BERMAN, *Regulatory Cooperation between the European Commission and U.S. Administrative Agencies*; MARK A. POLLACK & GREGORY C. SHAFFER, *Transatlantic governance in the global economy* (Rowman&Littlefield 2001); DAVID VOGEL, *Benefits or Barriers?: Regulation in Transatlantic Trade* (The Brookings Institution. 1997). **[To examine]** GEORGE BERMAN, et al., *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press. 2001). ANNE-MARIE SLAUGHTER, *Global Government Networks, Global Information Agencies, and*

But TRNs are taking place in other regions too. For example, in pharmaceuticals, aside for the transnational ICH, there are regional regulatory networks working on the harmonization of requirements for the registration of drugs, and include the Association of Southeast Asian Nations Pharmaceutical Product Working Group (ASEAN PPWG), the Gulf Central Committee for Drug Registration (GCC-DR), the Pan-American Network for Drug Regulatory Harmonization (PANDRH), APEC and the Southern African Development Community (SADC).⁹³ Similarly, while the GHTF deals with the harmonization of regulations regarding the registration of medical devices, the Asian Harmonization Working Party works toward the harmonization in Asia.⁹⁴

[To provide further examples].

2.3 International Agencies

2.3.1 Defining International Agencies

A perhaps related, but nonetheless distinguishable development is the proliferation of international bodies that are not based on an international agreement, nor on a bottom-up cooperation between national regulators, but on a decision by an international organization. We feel that the specific characteristics of these ‘international agencies’, as we will call them, and their position between international organizations and member states justify a separate analysis.

It is not unusual for international agencies to exercise public authority. Here also, the tendency towards functional specialisation because of the technical expertise required in many areas may be a reason for the proliferation of such bodies and for their interaction with other international organizations and agencies, which sometimes leads to the creation of common bodies. International (regulatory) co-operation is often conducted between these non-conventional international bodies.⁹⁵ Whereas traditional international organizations are established by an agreement between states, in which their control over the organization and the division of powers is laid down,⁹⁶ the link between newly created international bodies and the states that established the parent organization is less clear. As one observer holds, this “demonstrates how the entity’s will does not simply express the sum of the member states’ positions, but reformulates them at a higher level of complexity, assigning decision-making

Disaggregated Democracy, 24 Michigan Journal of International Law 1041(2002-2003). ***[To be examined]***

⁹³ See <http://www.ich.org/cache/compo/276-254-1.html>.

⁹⁴ See <http://www.ahwp.info/>

⁹⁵ Ibid, p. 501.

⁹⁶ On the different dimensions of the relationship between states and international organizations cf. D. Sarooshi, *op.cit.*

power to different subjects, especially to the international institutions that promoted the establishment of the new organization.”⁹⁷

The aim of the present section is to identify the nature of these bodies, referred to by us as ‘international agencies’, by attempting to define them on the basis of possible common characteristics.⁹⁸

It is not entirely uncommon for international organizations to establish bodies with public law functions. Since these bodies are usually not based on a treaty, they do not qualify as international organizations themselves.⁹⁹ A first possibility is that these bodies are set up by one organization only, to help attaining the objectives of that organization. The most well-known examples include the institutions established by the UN General Assembly (such as UNCTAD, UNEP, UNIDO, UNCHS, UNFPA and UNDP). These bodies are usually referred to as ‘subsidiary organs’,¹⁰⁰ or as ‘quasi autonomous bodies’ (QABs).¹⁰¹ Special bodies were also set up by the UN ‘Specialised Agencies’ and other UN-related organizations.¹⁰² A case in point is the Al Qaeda and Taliban Sanctions Committee, a subsidiary organ of the UN Security Council, with its – well known – competence to place an individual on the consolidated list of terrorist suspects.¹⁰³

A second group of bodies is created by two or more international organizations in areas where the problems they face transcend their individual competences. While these bodies may be established on the basis of a treaty concluded between international organizations (as was the case with the International Center for the Improvement of Maize and Wheat (CIMMYT), created in 1988 by the World Bank and the UNDP; or the Vienna Institute, created in 1992 by

⁹⁷ C. Martini, ‘States’ Control over New International Organization’, *Global Jurist Advances*, 2006, pp. 1-25, at 25.

⁹⁸ This section is largely based on E. Chiti and R.A. Wessel, ‘The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?’, in N. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy*, Routledge, 2010 (forthcoming). That contribution also offers a number of examples of international agencies. Credit is due to Edoardo Chiti.

⁹⁹ In the law of international organizations the view is still held that international organizations should be based on an international agreement. Cf. H.J. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden: Martinus Nijhoff Publishers, 2003; J. Klabbers, *An Introduction to International Institutional Law*, Cambridge U.K.: Cambridge University Press, 2009.

¹⁰⁰ See D. Sarooshi, ‘The Legal Framework Governing United Nations Subsidiary Organs’, *British Yearbook of International Law*, 1997, pp. 413-478; and S. Torres Bernardez, ‘Subsidiary Organs’, in R.J. Dupuy (Ed.), *Manuel sur les Organisations Internationales – A Handbook on International Organizations*, Dordrecht: Martinus Nijhoff Publishers, 1998, 109-153.

¹⁰¹ P. Szasz, ‘The Complexification of the United Nations System’, *Max Plack Yearbook of United Nations Law*, 1999, pp. 1-57.

¹⁰² Examples include the Commission on Phytosanitary Measures (created by the FAO in 1997) and the Prototype Carbon Fund (instituted by the World Bank in 1997). See Martini, *op.cit.*, at 4-5.

¹⁰³ See on this nature of the Committee: C. Feinäugle, ‘The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?’, *German Law Journal*, 2008, pp. 1513-1538.

the BIS, EBRD, IBDR, IFM, OECD and – later – the WTO), more frequently they are the result of decisions taken by the respective organizations. It is not even exceptional for the above-mentioned ‘subsidiary organs’ to, in turn, act as a ‘parent organization’ for the newly created bodies (thus leading to what could be termed ‘third-level’ international bodies). Thus, in 1994 UNICEF, UNDP, UNFPA, UNESCO, the WHO and the World Bank instituted UNAIDS (the Joint United Nations Programme on HIV/AIDS) and earlier examples include the World Food Programme (WFP; created by the FAO and the WHO in 1961), the Codex Alimentarius Commission (a 1962 FAO and WHO initiative), the International Trade Centre (WTO and UNCTAD in 1968), the Intergovernmental Panel on Climate Change (WMO and UNEP in 1998), the Joint Group of Experts in the Scientific Aspects of Marine Environmental Protection (GESAMP, created by the IMO, the FAO, UNESCO and the WMO in 1969) and the Global Environmental Facility (GEF, created by the World Bank in 1991 and joined by the UNDP and UNEP).¹⁰⁴ An example is also formed by the World Heritage Convention (WHC), whose parties are the UNESCO member states that have ratified the convention itself, while states and intergovernmental or non-governmental organizations that are not UNESCO members may accede to the WHC, either as participants or as advisors.

2.3.2 Characteristics of International Agencies

Irrespective of our use of the term ‘international agencies’ for public law bodies established by international organizations, there seems to be a great deal of differentiation among the institutional designs and practices of the various agencies. The question is whether it is possible to identify some core legal features that are common to international agencies. Does the label simply refer to second generation international bodies, established by one or more international organizations? Or it is possible to distinguish a more articulated regulatory structure, based on a number of shared legal features?

a. Membership

The membership of most international agencies is usually strictly linked to the membership of the establishing organizations. Thus, membership is normally open to all member states and other members of the ‘parent organization’. At the same time, non-governmental organizations and international organizations that are not members of the establishing institutions may usually join the international agency as observers, in accordance with the relevant provisions of the parent organization.

b. Internal Structure

Though not always (but quite often) provided with legal personality (see *infra*), international agencies usually share a structure centred around four ‘pillars’, reflecting the mainstream of the establishing international organizations: a main collegiate body, composed of

¹⁰⁴ See Martini, *op.cit.*, for a more extensive analysis. Most examples used in this section are drawn from her survey. See on the interesting example of the GEF also L. Boisson de Chazournes, ‘The Global Environment Facility Galaxy: On Linkages among Institutions’, *Max Planck Yearbook of United Nations Law*, 1999, pp. 243-282); and E. Hey, ‘Exercising Delegated Public Power’, in R. Wolfrum and V. Röben (Eds.), *Developments of International Law in Treaty Making*, Berlin: Springer, 2006, pp. 437-462.

representatives of all members; an executive committee, made up of representatives of a limited number of members; several subsidiary bodies, responsible for specific tasks and usually composed of representatives of a limited number of members; and an administrative secretariat, made up of officials serving the international agency.

c. Relations with Member States

Member states participate in international agencies in two main regards. To begin with, the internal offices of international agencies are composed of member states' representatives; the main exception being the administrative secretariat, which is composed of international officials serving the international agency. All other offices have a plenary or selective transnational composition. This results in interesting dynamics: on the one hand, member states influence and condition the international agencies' decision-making procedures; on the other hand, they are in turn influenced and conditioned by the institutional contexts in which they express their voice. The agency's institutional context is capable of putting the will of single member states into perspective and the offices may represent an instrument for the international agency to penetrate the domestic orders, communicating with national administrations and directing them towards specific goals and objectives.

Member states participate not only in the internal structure, but also in the administrative proceedings taking place before international agencies themselves. As a matter of fact, international regulation lays down a number of administrative proceedings that require the intervention not only of the relevant international agency, but also of national and composite administrations. Administrative proceedings involving international agencies do not usually result from the introduction of new, international layers of procedure on top of pre-existing national procedures. Yet, they are 'composite' administrative proceedings and may involve and integrate a number of international, national and mixed authorities. Such composite administrative proceedings allow for a different form of participation of member states in the activities of international agencies. Whereas the voice of member states is usually expressed in collegiate bodies in which several strategies may be developed, composite administrative proceedings stabilize the cooperation between a number of national, international and mixed competent authorities.

d. Relations with other International Institutions

The relationship between international agencies and other global and regional institutions may differ from the one between the parent organization and other institutions. A TRN can participate in an international agency { examples}. In this case, the relevant global regulatory system participates in the international agency in the same way as member states do. Most commonly, however, global regulatory systems do not become members of an international agency, but acquire the status of observer or establish other forms of co-operation that are not necessarily formalized in an agreement. In both cases, the parent organizations exercise a strict control over the relations between the established agency and other international organizations.

e. *Involvement of Private Parties*

International agencies are public law bodies, established by international organizations and, presumably, subject to public law institutes and rules. Although some authors point to the hybrid private-public regime of some important international agencies, such as CAC, usually the interaction of private parties does not lead to any kind of hybrid nature of the international agency.¹⁰⁵ In most cases certain private parties are conferred some procedural guarantees in the administrative proceedings taking place before international agencies, to provide the latter further information and expertise. In a more limited number of cases, private parties have a formal representation within the internal structure of the relevant international agency, in particular in a collegiate body provided with advisory power.

f. *Powers and Administrative Law Mechanisms*

Finally, international agencies tend to converge as far as their powers are concerned. Again, we see a mixed picture. The powers granted to international agencies are often constructed either as simple coordination of member states' activities or as non-binding regulatory powers. And yet, such powers tend in practice to go well beyond mere coordination and gain a genuinely binding regulatory character.

This substantial evolution of the powers of international agencies is usually accompanied by the development of administrative law mechanisms. Such mechanisms vary considerably from case to case. Yet, in all cases they respond to the exigency to strengthen control over the functioning and operations of international agencies through the provision of a number of administrative principles and rules applying to decision-making. Their sources include treaties and general principles of public international law. More often, however, administrative law mechanisms are established by non-treaty law-making of the parent organizations as well as of international agencies themselves, including soft law measures. As for their content, the emerging administrative law principles and rules tend to converge around decisional transparency, procedural participation and reasoned decisions, while review by a court or other independent tribunal is normally excluded. In particular, international agencies develop a practice of transparency by releasing, generally on their web sites, administrative decisions, information on which they are based and material on internal decision-making. Moreover, participation in decision-making proceedings has been promoted. Notably, procedural guarantees are designed as rights of states and are granted to all member states, not only to those directly affected by regulatory decisions. Procedural guarantees are extended to civil

¹⁰⁵

See on this point B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, cit., p. 22. For a different view, see A Herwig, *Transnational Governance Regimes for Foods Derived from Bio-Technology and their Legitimacy*, in C. Joerges, I. Sand and G Teubner (eds), *Transnational Governance and Constitutionalism*, Oxford: Hart, 2004, p. 199 ff. At the same time it should be acknowledged that there are other relevant bodies, which have been said to perform 'public law' functions, but have a strong 'non-governmental' origin, such as the World Anti-Doping Agency (WADA) or the Internet Corporation for Assigned Names and Numbers (ICANN). See on these bodies recently L. Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (Wada)', *International Organizations Law Review*, 2009, No. 2 and D. Lindsay, *International Domain Name Law. ICANN and the UDRP*, Oxford: Hart, 2007.

society and private actors, although their effective role in the decision-making process is contested and their formal rights are often more limited than those granted to states.

2.3.3 The Autonomy of International Agencies

International organizations usually do much more with their authority than their creators intended and are even forced to do so. And, indeed, states have created international organizations also in cases where they themselves lack the necessary expertise. An its exactly their expertise that may form a source of the (exercise of public) authority of international agencies.¹⁰⁶ While international organizations *must* be autonomous actors to be able to fulfil their delegated tasks,¹⁰⁷ the assumption could be that their autonomy will only be strengthened when they use their mandate to set up international bodies that were not (explicitly) part of the original delegation.

In relation to international agencies, Martini argued that the loss of states' influence – and hence the autonomous position of international agencies – is reflected in at least three phenomena:¹⁰⁸ (i) the fact that the new entities emerge from the regular decisions of other organisations, rather than through the treaty-making process, compromises states' ability to influence not only their creation but also their further development; (ii) states may lose some powers to the parent organisations, such as the power to appoint the new entity's executive heads; moreover, they might have to share the power to define and manage the organisation's activities; and (iii) in the non-state-created organisations the international secretariat plays a greater role.

Many of the established bodies may exercise functions exclusively and independently from their parent organization(s). After all, the very reason to establish an agency is that the organization wishes to 'outsource' certain technical or operational tasks.¹⁰⁹ Decision-making in these areas should then not be subject to (political) control by states. The autonomy of the agency is then related to its relative independent position (as a 'bureaucracy') from the parent organization, and thus, form the member states of that organization.

In practice, however, the picture is, at best, mixed. Research reveals that international agencies continue to be dependent on member states, in so far as their internal architecture has an intergovernmental or multinational nature and they operate through administrative proceedings to which national authorities are called to participate. In functional terms, irrespective of their 'bureaucratic' character, many international agencies can even be seen as

¹⁰⁶ M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics*, Ithaca, London: Cornell University Press, 2004, at 24. A similar line of reasoning may be found in I. Venzke, 'International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law', *German Law Journal*, 2008, pp. 1401-1428.

¹⁰⁷ Ibid., at 22.

¹⁰⁸ Martini, *op.cit.*, at 24.

¹⁰⁹ See on 'technical bodies' also W. Edeson, 'The Role of Technical Bodies', in R. Wolfrum and V. Röben, *op.cit.*, pp. 63-92.

mechanisms of administrative cooperation and integration among domestic authorities.¹¹⁰ On the other hand, certain forms of autonomy towards member states are emerging, in particular in cases where scientific expertise plays a large role. Ironically, it may very well be their pivotal position in the global regulatory network – with tentacles that reach within domestic legal orders as well as towards global and regional institutions – that allow them to be key actors in IPPM.

3. The Legal Status of IPPM Bodies and Networks

3.1 *The Traditional Approach under International Law*

In this section we examine the traditional definitions of ‘international legal personality’ and ‘international organization’ (in the sense of intergovernmental organization), and how IPPM bodies and networks (so both TGNs and international agencies) fit in.

The current definitions of legal personality and IOs, as will become evident below, are all based on the assumptions of the traditional paradigm. The traditional paradigm is comprised of two main elements: (i) that sovereignty is held by unitary states; and (ii) international law is comprised of the sources of law as set out in Article 38 of the Statute of the International Court of Justice. TGNs, which are comprised of state organs and are incapable of creating binding Article 38 style ‘hard law’, naturally fail the traditional definitions and act ‘under the radar’. Thus, it is barely surprising that we will find that TGNs lack legal personality, and do not constitute IOs under the traditional definition. It should be noted that TGNs differ greatly — whether in their participants, the level of their institutionalization, their structure etc. Thus, in practice, a case by case examination would be warranted.

The situation may be different for international agencies. Established by international organizations, these agencies may have been granted a separate status under international law and may even be seen as a special type of international organization. Thus, Martini labelled these bodies ‘second-order international organizations’ as a dimension of, what she called ‘New International Organization’.¹¹¹ [to be expanded]

3.1.1 *International Legal Personality*

The traditional definition of a subject of international law is “entities which are capable of possessing rights and duties under international law.”¹¹² Since traditionally sovereignty is possessed by the state as a whole, and not by its component parts, the organs of the state, are not capable of possessing rights and duties at the international level. As a result, TGNs

¹¹⁰ See Chiti and Wessel, *op.cit.*

¹¹¹ Martini, *op.cit.*

¹¹² Reparation for Injuries case, (International Court of Justice). 179. [to examine] ; Christian Walter, “Subject of International Law”, in Max Planck Encyclopedia of Public International Law (updated May 2007), p.2.

composed of domestic agencies and regulators, do not have legal personality in international law.¹¹³

The problem with the definition of legal personality is that it is circular.¹¹⁴ An entity needs to have legal personality in order to hold rights and obligations at the international level, yet the existence of rights and obligations at the international level implies that an entity has legal personality.

This problem is evident in TGNs: For example, since they are considered as lacking legal personality, they do not conclude treaties, but rather non-binding agreements, such as MoUs. And since these agreements are not considered to set out international rights and obligations in the traditional Article 38 sense, it is impossible to derive legal personality from those actions.

This could be different when TGNs could be characterized as international organizations. We look to IOs because TGNs and IOs share one significant characteristic with each other: they are both entities derived from states. Thus, the criteria for recognizing the legal personality of a group of states independent from its founding members may be particularly instructive in our analysis of the legal personality of both TGNs and international agencies.

3.1.2 Intergovernmental Organizations

There is no universally accepted definition of what constitutes an IO, nevertheless there seems to exist general agreement regarding the defining elements.¹¹⁵ That is, in order to qualify as an IO, an entity must have the following characteristics: (i) its membership must be composed of states, (ii) it must be established by treaty or other instrument governed by international law (iii) it must have an autonomous will distinct from its members.

In this section we examine whether our IIPPM bodies and networks typically meet these criteria (a case by case approach is warranted).

a. State membership

The traditional definition of international organizations includes that an international organization may only be created by a treaty and its membership must principally be of states.¹¹⁶ For example, Bindschedler in a former version of the Encyclopedia of Public

¹¹³ See SLAUGHTER, 34, 152.

¹¹⁴ JAN KLABBERS, *The Concept of Legal Personality* 11 *Ius Gentium* (2005). 49

¹¹⁵ See for these criteria H.G. SCHERMERS & NIELS M. BLOKKER, *International Institutional Law: Unity Within Diversity* (M. Nijhoff 4th edition ed. 2003). P. 26; PHILLIPE SANDS & PIERRE KLEIN, *Bowett's Law of International Institutions* (Sweet & Maxwell, Thomson Reuters. 2009). P. 15-16; JAN KLABBERS, *An Introduction to International Institutional Law* (Cambridge University Press. 2002). P. 9-12; J. ALVAREZ, *International Organizations as Law-makers* (Oxford University Press. 2005). 6; SCHERMERS & BLOKKER. 26-39 [To examine]

¹¹⁶ ZARING; KLABBERS, *The Concept of Legal Personality* P. 305-307; DAVID ZARING, *Informal Procedure, Hard and Soft, in International Administration*, 5 *Chicago Journal of International Law* 547 (2004-2005). P. 569-570; ALVAREZ. 1 (Alvarez says that inter-governmental organizations (IGOs) or IOs are "typically collections of sovereign states that have banded together as states to create,

International Law stated that: “The term international organization denotes an association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organization...”¹¹⁷ Bettati adopts a similar approach, adding a number of criteria: “Une organisation internationale est une association d’Etats créée par traité, dote d’une constitution et d’organes communes et possédant une personnalité juridique distinct de celle des Etats membres.”¹¹⁸

Thus, the first criterion is that the organization be set up by (unitary) states. And in fact, Schermers and Blokker have specifically pointed out that “agreements between branches of different governments or between particular public authorities do not normally create international organizations.”¹¹⁹ The conclusion is quite clear: TGNs are set up by state organs — agencies, regulators, ministries etc. They, therefore, do not comply with this requirement. This, however, is different for international agencies, which as we have seen usually have states representatives as their members

Finally, some networks include non-governmental participants too. Can non-governmental actors be members of an IO, or does their participation have an impact on the classification of an entity as an IO? For example, the GHTE, VICH and ICH have industry associations as members. The common approach is that this does not cause a definitional problem. The participation of non-governmental entities is possible, and it has been acknowledged that nongovernmental entities may be parties to IOs.¹²⁰

b. Treaty based

TGNs are typically concluded on the basis of agreements that are not intended to be legally binding (such as a ‘memoranda of understanding’, a ‘gentlemen’s agreements’ or other informal agreements) by regulators and agencies. These agreements are necessarily non-

under a constitutive international agreement governed by international law usually known as a “charter” or a “constitution”, an apparatus, more or less permanent, charged with the pursuit of certain defined common ends.”)

¹¹⁷ R.L. BINDSCHIEDLER, *International Organizations, General Aspects*, in *Encyclopedia of Public International Law*, vol. 5 (International Organizations in General. Universal International Organizations and Cooperation) (R. Bernhardt ed. 1983). P. 120 [To examine]

¹¹⁸ MARIO BETTATI, *Creation et personnalité[with apostroph] juridique des organisations internationales*, in *Manuel sur les organisations internationales/ A Handbook on International Organizations* (R.J. Dupuy ed. 1998). P. 33 [To examine, as it also discusses in p. 34 whether the IPU is an international organization]

¹¹⁹ SCHERMERS & BLOKKER. (Book), p.29.

¹²⁰ ALVAREZ.5. Alvarez, who considers the Universal Postal Union and the Telecommunications Union to be IOs, even though they “accept as members not only states but also postal or telecommunications administrations, respectively, even when these administrative units are not within fully constituted states.” K. Schmalenbach, p.4. Also Schmalenbach, which has noted that entities without treaty making capacity are not excluded by definition from membership in international organizations (however she has said that within the traditional paradigm – that is that at least two members must possess treaty making capacity so as to comply with the condition that the entity be based on a treaty.

binding as under traditional international law, organs of the state are not considered to have the capacity to bind the state.¹²¹

Even if networks have documents that are 'constitutional' in content, they do not comply with the treaty requirement. For example, the GHTF Roles and Responsibilities Document (setting out the roles and responsibilities of the members and organs, the operational structure etc.), the GHTF Guiding Principles Document (setting out goals and objectives, as well as governing principles), and the GHTF Operating Procedures document (setting out the decisions making process). Similarly, VICH has an "Organizational Charter of VICH" (setting out the organization's objectives and principles, its operational structure, the roles and responsibilities of members and organs, the decision making procedure etc.), and a "VICH Strategy Phase II 2006-2010" (reiterating VICH's objectives and principles, organization etc.). The ICH has a "Terms of Reference" document, and other documents such as the "Formal ICH Procedure" document which sets out the decision making process. All of these organizations have a set of basic "constitutional" documents that set out their governance framework, but they all lack treaty status.

As far as the international agencies are concerned, it is not so much the nature of the agreement, but the lack of it that causes the problem. As we have seen, the main characteristic of these bodies is that they are established on the basis of a decision by an international organization.

c. Autonomy from Member States

Another criterion often mentioned is that the organization has a least one organ that is autonomous and has a distinct will from the founding member states. This condition requires that the entity is "capable of generating through its organs an autonomous will distinct from the will of its members".¹²² This condition ensures that the parties have "entrusted someone other than themselves with developing and maintaining a common will."¹²³

This element of a separate will is the defining element for an international organization to have legal personality,¹²⁴ and is used to distinguish IOs from other forms of institutionalized transboundary cooperation of states.¹²⁵ This is a point strongly made in the literature: Thus, one of the present authors has pointed out that "For an international entity to be regarded as existing separately from its Member States, the entity must have a decision making organ that is able to produce a 'corporate' will, as opposed to a mere 'aggregate' of the wills of the

¹²¹ SOL PICCIOTTO, *Regulatory Networks and Global Governance* (2006). P. 13. Picciotto refers to the work of McNair on the law of treaties. This work dates 1961! **[This is an inaccurate statement, as IL does not prohibit state organs to conclude treaties on behalf of the state. It is up to the state to decide who can represent it See Article 7 of the VCLT.]**

¹²² K. Schmalenbach, p.3.

¹²³ SCHERMERS & BLOKKER. 32-33 [To examine]; ALVAREZ. 6.

¹²⁴ NIGEL D. WHITE, *The Law of International Organisations*, Second edition (Manchester University Press. 2005). P. 1.

¹²⁵ Schmalenbach, A.2.(b)

Member States.¹²⁶ Schmalenbach also says that if an entity “merely expresses the consolidated will of its state parties”, it acts as a “collegial organ of the latter”.¹²⁷ Klabbbers similarly says that where the collectivity merely expresses the aggregate opinion of its members, it is not an IO.¹²⁸ Finally, White also notes that without personality, an organization is acting as an “unincorporated association”,¹²⁹ a collection of states with their own legal personalities, but with no rights, duties, powers and liabilities appertaining to the entity established by them.¹³⁰

But what are the indicators that an entity has the capacity to generate a will of its own? The *Reparations* case, which reflects the popular theory on legal personality, maintained that the legal personality of the IO depends on the intent of the founding states.¹³¹ This intent can be deduced from provisions of the constituent agreement (expressly or implicitly) or from subsequent practice.¹³²

If the constitution is silent, evidence of an entity’s capacity to generate an autonomous will distinct from its members can be derived from facts such as: decision by majority vote, the capacity to be a party to dispute settlements, and the capacity to enter into external relations.¹³³ Other evidence includes the capacity to conclude treaties or to send diplomatic missions.¹³⁴

We make the following observations looking at our case studies: In GHTF, ICH and VICH, none have explicitly stated in their basic documents (referred to above), that they lack personality. However, the parties did not intend to grant them autonomy: In an interview with an EC Steering Committee member to the GHTF, he stressed that the GHTF does not have and does not want to have legal personality.¹³⁵ He put it strongly when he said that “They [the political level] would never let ‘little me’ reach binding agreements on their behalf”.¹³⁶ The General Secretary of the VICH similarly stated that VICH lacks legal personality, is not independent and

¹²⁶ RAMSES A. WESSEL, *Revisiting the International Legal Status of the EU*, 4 European Foreign Affairs Review (2001). [To include page number]

¹²⁷ K. Schmalenbach, p.4.

¹²⁸ KLABBERS, *An Introduction to International Institutional Law*. P. 12.

¹²⁹ C.F. AMERASINGHE, *Principles of the Institutional Law of International Organizations* (Cambridge University Press. 1996). P. 70 [To examine].

¹³⁰ WHITE.P. 31.

¹³¹ This differs from the “objective theory” of legal personality supported by Finn Seyersted in the 1960;s, according to which personality flows from meeting certain requirements, and the intent of the founders is not taken into account. See KLABBERS, *An Introduction to International Institutional Law*. P. 54-55. ; See also KLABBERS, *An Introduction to International Institutional Law*.P. 53.

¹³² Schmalenbach, p.4.; *Reparations* case xx

¹³³ Schmalenbach, p.4.

¹³⁴ Schmalenbach, p.6.

¹³⁵ Interview with Laurent Selles.

¹³⁶ However, let us keep in mind that there is no prohibition in international law preventing state agencies from concluding binding treaties — the body authorized to represent the state in its international dealings is a matter of the internal constitution (the Vienna Convention on the Conclusion of Treaties xxx).

reflects the will of its members.¹³⁷ Moreover, while these TGOs have separate organs,¹³⁸ all of these organs reach their decisions based on consensus and express the consolidated will of the state parties, rather than an independent and distinct will.¹³⁹ Also the Secretariat has no independent powers. In VICH, the Secretariat only gives a physical seat, but it has no influence on the members.¹⁴⁰ In the GHTF, the Secretariat rotates between the regions and has no independent powers.¹⁴¹

Finally, it should be pointed out that these bodies do enjoy autonomy, but in an informal sense. What stands out most is that (i) they issue (non binding) guidelines, and that (ii) they have extensive external relations with other TGNs, International Organizations or non-member states. For example, the GHTF has strong relations with the Asian Harmonization Working Party, a regional transgovernmental regulatory network dealing with harmonization of medical devices in Asia. It also cooperates with ISO and the International Electro-technical Commission (IEC). The ICH cooperates with non-member drug regulatory authorities and has even established a “Global Cooperation Group” in charge of these relationships. Finally, the VICH has a very dense relationship with the OIE. However, all of these relations are “informal” , and not based on binding agreements. These are, therefore, not “external relations” in the traditional sense.

With regard to the international agencies, it has been noted that the existence of a ‘separate will’ is also debatable. As we have seen, the autonomy of international agencies is restricted, either because of their strong link with the parent organization, or because of the dominant role played by member states.

As demonstrated above, under the traditional paradigm, TGNs lack legal personality and do not meet the definitional criteria of IOs.¹⁴² The fact that some organizations, such as the GHTF

¹³⁷ Interview with Herve Marion.

¹³⁸ For example, the GHTF has a Steering Committee, the executive organ of the organization, comprised of regulatory authorities and industry representatives from the USA, Europe, Canada, Japan and Australia. The drafting work is conducted in Study Groups comprised of experts from the members. Moreover, they have a Secretariat. The ICH, similarly, has a Steering Committee comprised of regulatory authorities and industry associations from the US, Europe, and Japan. They also have Experts Working Group and a Secretariat. Finally, the VICH similarly has a Steering Committee, Expert Working Groups and a Secretariat.

¹³⁹ Interviews Laurent Selles, Herve Marion.

¹⁴⁰ Interview Herve Marion

¹⁴¹ Interview Laurent Selles.

¹⁴² This conclusion has also been reached by others. Compare with SOL PICCIOTTO, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, 17 *Northwestern Journal of International Law and Business* 1014(1996-1997). P. 1047; KAL RAUSTIALA, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Virginia Journal of International Law* 1(2002-2003). P.22; SLAUGHTER, 38, 43, 152. See also ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*. TONY PORTER, *States, Markets and Regimes in Global Finance* (St. Martin's Press. 1993).P. 305-307. **[To examine the latter]** Alvarez. at 613;

and ICH in the health area, or the Basel Committee, IOSCO and IAIS in the financial area, have become more formalized in their operations, does not change this conclusion, as they do not meet the criteria indicated above.¹⁴³

With regard to some international agencies, the situation seems to be different. Here the lack of a formal status as IO does not seem to block the granting of international legal personality. [examples...]

In general, however, the fact that entities active and significant at the global level have no apparent place in international law has left legal scholars at unease. The responses have been quite diverse, and we cover the different responses in the sections below.

3.2 *IIPPM Bodies have a ‘twilight existence’*

Some have considered TGNs, such as the IPU, to be NGOs.¹⁴⁴ Others have argued that TGNs are in a “twilight existence”, not being formally IOs, but comprised of state agencies. Seidl-Hohenveldern, for example, has said that “Es gibt eine ganze Reihe *formell nichtstaatlicher* internationaler Organisationen, die in der Rechtswirklichkeit eine merkwürdige *Zwitterstellung* einnehmen. Aus mancherlei Gründen ziehen es manche *Staaten* vor, unter einer solchen *nichtstaatlichen Flagge* zusammenzuarbeiten. Die *Vertreter* aus den verschiedenen Staaten, die sich in einer solchen Organisation zusammenfinden, werden von *staatlichen Stellen* der betreffenden Staaten *ernannt*, die auch ihr Verhalten in der Organisation bestimmen...Hierzu gehört...die *Interparlamentarische Union*...”¹⁴⁵ Zaring has taken a similar approach, referring to them as a having a “Twilight existence”.¹⁴⁶ Along similar lines, Schermers and Blokker argued that “Such organizations [referring to organizations of autonomous public authorities] are on the dividing line between governmental and non-governmental organizations.”¹⁴⁷ Others, such as Klabbbers have simply said that these entities “defy any attempt at definition and classification”,¹⁴⁸ and have simply referred to them as “soft organizations”.¹⁴⁹

¹⁴³ SLAUGHTER, 38, 43, 152. See also ZARING, *International Law by Other Means: The Twillight Existence of International Financial Regulatory Organizations*. PORTER, P. 305-307. **[To examine the latter]**

¹⁴⁴ As traditionally has been the case regarding the IPU. Since governments did not take part, the IPU was generally classified as a NGO. See SCHERMERS & BLOKKER, (Book) P.28. ; See Goodwin-Gill legal opinion; To include reference to IPU being considered an NGO for ECOSOC purposes.

¹⁴⁵ IGNAZ SEIDL-HOHENVELDERN & GERHARD LOIBL, *Das Recht der Internationalen Organisationen einschliesslich der Supranationalen Gemeinschaften* (Carl Heymans Verlag 6 Aufl. ed. 1996). Para. 0103a [To examine]

¹⁴⁶ David Zaring

¹⁴⁷ Schermers, H. G., Blokker, N.M. “International Organizations or Institutions, Membership”, in Max Planck Encyclopedia of Public International Law (article last updated January 2008), 2.

¹⁴⁸ KLABBERS, *An Introduction to International Institutional Law*. P. 12

¹⁴⁹ Klabbbers, *Soft Organizations in International Law*, 70 NJIL, 2001, P. 405.

International agencies somehow escaped academic attention. Nevertheless, it seems to us that their 'twilight existence', albeit for different reasons, may be comparable to 'soft organizations' in the sense that their status is somewhere between an international organization and a TGN.

3.3 *Broad interpretation of the definition of 'International Organization'*

There have been developments in the literature that have sought to accommodate, on the basis of broad interpretation methods, certain informal entities within the traditional "IO" definition. The work that stands out most is a legal opinion issued in 1999 by Ian Brownlie and Guy Goodwin-Gill on the international legal status of the Inter-Parliamentary Union (IPU). The IPU is an organization of parliaments from around the world which is not treaty based.¹⁵⁰ They concluded that the IPU possesses international legal personality and is an international organization *sui generis*.¹⁵¹ Brownlie and Goodwin-Gill stressed that an entity may lack the features of an international organization, but nevertheless have international legal personality.¹⁵² This legal opinion and the analysis proposed there is relevant, as the IPU is comprised of state organs rather than unitary states, and the organization is not treaty-based.

3.3.1 *State membership*

The revolutionary element of their legal opinion relates to their interpretation of the notion of "state membership" in IOs. They consider the IPU to be an international organization despite the fact that its members are state organs (parliaments) and not unitary states, since they consider the state to be an "indirect participant", granting "implicit consent". Or in their words: "The IPU enjoys a significant measure of international personality. While status as an international organization may generally imply, among others, 'a permanent association of States, with lawful objects, and equipped with organs', as well as a distinction, in terms of legal power and purposes, between the organization and its membership, in the case of the IPU, State participation is indirect, if clear, and State consent is implicit."¹⁵³

They further state that "...while the delegates of member parliaments participate in the work of the IPU on behalf of their respective parliament and obviously cannot be 'instructed' by the Executive Branch, (this not being compatible with the parliamentary function), nevertheless no parliament would be able to participate in the IPU without the explicit or implicit consent of

¹⁵⁰ The legal opinion is entitled "The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations". <http://www.ipu.org/finance-e/opinion.pdf>

¹⁵¹ <http://www.ipu.org/finance-e/opinion.pdf>, para.1.

¹⁵² IAN BROWNLIE, *Principles of Public International Law* (Oxford University Press Sixth edition ed. 2003). P. 650.

¹⁵³ <http://www.ipu.org/finance-e/opinion.pdf>, para. 16, p.20.

the Executive. In this respect, the membership of national parliaments in the IPU can be considered equivalent to participation by States in the work of the Organization.”¹⁵⁴

Moreover, they even go on to argue that as international relations has undergone transformation and are no longer merely diplomatic, there is no need by organs of the state to receive explicit or implicit consent by the Executive: “While traditionally international representation of the State is vested in the Head of State and carried out by his agents (diplomats), the world has evolved and international relations are no longer merely diplomatic. It may therefore be argued that if there is a need and a will by Parliaments to enter into international cooperation they can do it with that part of the State’s authority they embody and do not need the explicit or implicit consent of the Executive. This would seem to be the case in the US where Congress decided on its own that the United States will participate in the IPU.”¹⁵⁵

Thus, to conclude, rather than moving away from the requirement of state membership, they simply offer a broad interpretation of the term, allowing for membership by state organs to be considered state membership based on ‘implicit state consent’ or ‘indirect state participation’.

In the case of the GHTF, VICH and ICH harmonization efforts, as well as other harmonization networks including US agencies and European regulators, it could be argued that state consent is implicit. The Transatlantic Economic Partnership between the US and EU makes the removal of “3rd generation trade barriers”, that is, the removal of technical regulatory differences between the US and EU, a priority, and expects this work to be done between regulators.¹⁵⁶ The EC member to the GHTF mentioned in this regard that while the politicians are not involved in the nitty gritty of harmonization, their support provides the “umbrella” for their harmonization activities. Further, from time to time, the GHTF provides updates on the state of its harmonization efforts to the political level.¹⁵⁷

Other scholars have also argued that the notion of membership in international organizations goes beyond unitary states only,¹⁵⁸ and that there may be exceptions.¹⁵⁹

¹⁵⁴ IAN BROWNLIE & GUY S. GOODWIN-GILL, Opinion: The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations (1999).19.

¹⁵⁵ Id. at 19.

¹⁵⁶ GEORGE BERMAN, et al., Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects (Oxford University Press. 2001). [Insert specific reference]; Information on TEP from the internet.

¹⁵⁷ Interview with Laurent Selles/ EC member of GHTF Steering Committee.

¹⁵⁸ Schermers, H. G., Blokker, N.M. “International Organizations or Institutions, Membership”, in Max Planck Encyclopedia of Public International Law (article last updated January 2008), 1.

¹⁵⁹ BROWNLIE & GOODWIN-GILL, Opinion: The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations. P.1-2.

For example, as early as 1971 Morgenshtern referred to a controversial UN legal opinion, which argued that “it may well be that a new customary rule of international law is emerging under which...a legal person could be created by an agreement concluded solely by autonomous public entities, such an agreement being governed by international law pursuant to another new customary rule...”¹⁶⁰ Moreover, the International Law Commission, in the context of its work on the responsibility of international organizations, defined international organization as “an organization established by treaty or other instrument governed by international law and possessing its own legal personality. International organizations may include as members, in addition to states, other entities.”¹⁶¹

More recent work by Schermers and Blokker is particularly relevant, referring to participation by agencies, saying that “in some international organizations Member States are not represented by their governments but by a specific department of government. While normally agreements between branches of governments do not create international organizations, there are exceptions. The Bank for International Settlements (BIS) in Basel, for example, is composed of representatives of central banks, not of representatives of governments. Interpol is composed of police authorities. While these two organizations can be qualified as international organizations, they do not have States as members so much as autonomous public authorities. Such organizations are on the dividing line between governmental and non-governmental organizations.”¹⁶²

In light of the above, to conclude, there is an argument to be made that an intergovernmental organization can be construed of state organs and not only from unitary states, particularly if state consent can be explicitly or implicitly construed.

3.3.2 Criterion of treaty based organization

As regards the condition that an international organization be based on treaty, while formally treaty-based organizations may be the norm, most writers acknowledge that there may be exceptions and that there may be alternative modes of creation.¹⁶³ Thus, a treaty base is not a *sine qua non* to be an international organization,¹⁶⁴ and the source of the legal personality

¹⁶⁰ FELICE MORGENSTERN, Legal Problems of International Organizations (Grotius. 1986). 19, 21-2; (UNJYB 1971, 215, 218) [IPU opinion refers to this] [To examine both]

¹⁶¹ International Law Commission ‘Commentary to Draft Article 2’ in Report of the International Law Commission, 55th Session (5 May-6 May and 7 July-8 August 2003), GAOR 58th Session Supp 10, 38. [To check accuracy of reference]

¹⁶² Schermers and Blokker xxx

¹⁶³ BROWNIE & GOODWIN-GILL, Opinion: The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations. P.1-2-3. ; SCHERMERS & BLOKKER. P.27-25.

¹⁶⁴ BROWNIE & GOODWIN-GILL, Opinion: The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations. P. 4.

could equally be the resolution of a conference of states or a uniform practice.¹⁶⁵ Moreover, an entity may become an international organization “by way of evolution”,¹⁶⁶ or may be created by conferences.¹⁶⁷ In some cases, the decision of an international organization constitutes the constitutional basis of a new international organization.¹⁶⁸

For example, the Interpol, is not founded on a formal treaty and has been identified as an IO.¹⁶⁹

As mentioned above, organizations such as the GHTF, VICH and ICH do have “constitutional” documents, and they have been working for almost two decades, with considerable practice. Thus, according to this approach, the fact that they are not based on a treaty is not necessarily a hindrance for them to be considered an IO.

3.3.3 Autonomy of the Organization

In making the case that the IPU possess international legal personality, Brownlie and Goodwin-Gill stress that the primary test is functionality: “In its decision in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the International Court of Justice, when referring to treaties creating ‘new subjects of law’, captured the essence of international personality, namely, entities ‘with a certain autonomy, to which the parties entrust the task of realizing certain common goals’ (ICJ Rep., (1996), §19). The ‘primary test’ is functional...”¹⁷⁰

As mentioned above, the TGNs examined in our case studies have not been granted autonomy in the formal sense, and, therefore, do not have legal personality. Rather, they are simply a group of states acting in a collective fashion.

To sum up the essence of Goodwin-Gill’s and Brownlie’s approach: they consider autonomy to be the primary test in determining the legal personality of the entity, whereas they basically

¹⁶⁵ BROWNLIE, *Principles of Public International Law*. P. 650; (See also N.D. White, *The Law of International Organizations*, 1996, 4-5, 29. TO ORDER)

¹⁶⁶ BROWNLIE & GOODWIN-GILL, *Opinion: The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international organization in international law, and the legal implications of such status for the IPU's relations with governments and other international organizations*. P. 18. Examples of entities that evolved into IOs: The Conference on Security and Cooperation in Europe which over years acquired the structure and organs of an international organization and finally became known as the Organization for Security and Cooperation in Europe. (P. 18); the Commonwealth Secretariat did not start as an international organization, but evolved into one (P.18).

¹⁶⁷ MORGENSTERN. 19, 21-2 [To examine]; Kirsten Schmalenbach, “International Organizations or Institutions, General Aspects”, in *Max Planck Encyclopedia of Public International Law*, p.3.

¹⁶⁸ Kirsten Schmalenbach, “International Organizations or Institutions, General Aspects”, in *Max Planck Encyclopedia of Public International Law*, p.3.

¹⁶⁹ J. Sheptycki, “The Accountability of Transnational Policing Institutions: The strange case of Interpol”, *Canadian Journal of Law and Society*, Vol 19, No. 1, 2004, p. 107-134. She cites Paul Reuter as saying that and an NGO on different occasions. Paul Reuter has argued that “because of its function as an international vehicle for crime prevention that relies on cooperation between governments, it is an intergovernmental organization regardless of whether or not it was established without a treaty.”

¹⁷⁰ <http://www.ipu.org/finance-e/opinion.pdf>, para. 8, p.4.

put aside the other two traditional criteria. Thus, to the extent TGNs have a certain level of autonomy (see discussion above), they could be considered to have legal personality.

The important point to keep in mind here is that according to this approach, what counts in order to determine legal personality of TGNs is the intent of the state, whereas the criteria of state membership and treaty basis can easily be overcome through broad interpretation.

3.4 *Calls for recognizing the international legal personality of TGOs*

Several scholars have been taking a provocative approach, saying that the sovereignty of state organs should be recognized, and arguing accordingly that TGNs should have international legal personality. In contrast to the above approach which seeks answers within the existing “unitary state” sovereignty paradigm, this approach breaks away and basically calls for a major shift in paradigm.

Slaughter has been the main proponent of this approach, saying that transgovernmental networks should be considered subjects of international law that are subjected to international obligations. She argues that the traditional notion of sovereignty, as an attribute borne by an entire state, is inadequate to capture the complexities of today’s international relations.¹⁷¹ Therefore, she argues that each of the government units participating in networks should exercise a measure of sovereignty — sovereignty specifically defined and tailored to their functions and capabilities.¹⁷² She bases this argument on “the new sovereignty” defined by Abram and Antonia Chayes, which defined it as the capacity to participate in international institutions of all types. The new sovereignty is “when there is political capacity to connect to the rest of the world and to be an actor within it”.¹⁷³ Slaughter points out that this conception of sovereignty fits with a conception of a disaggregated world order: If the principal moving parts of that order are government agencies, officials and so forth, then they must be able to exercise some independent rights and be subject to some independent, or at least distinct, obligations.¹⁷⁴ She argues that these government institutions would be directly and independently subject to international legal obligations.¹⁷⁵

David Zaring has also argued that international law should make a place for these networks in its analytical framework, so that they would attain international legal personality.¹⁷⁶ Generally,

¹⁷¹ ANNE-MARIE SLAUGHTER, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 *Government and Opposition* (2004). 186.

¹⁷² *Id.* at 186.

¹⁷³ *Id.* at 186-187. ABRAM CHAYES & ANTONIA CHAYES, *The new sovereignty: compliance with international regulatory agreements* (Harvard University Press. 1995). P.4, 26 [To examine]

¹⁷⁴ SLAUGHTER, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*. 188.

¹⁷⁵ *Id.* at 188-189.

¹⁷⁶ ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*. P.327-328

the need to include new legal subjects with changing times has been acknowledged by many. For example, Hersch Lauterpracht has pointed out that “However, it is important...to bear in mind that the range of subjects of international law is not rigidly and immutably circumscribed by any definition of the nature of international law but is capable of modification and development in accordance with the will of States and the requirements of international intercourse.”¹⁷⁷ Similarly, in the *Reparations* case, the court said that : “throughout its history, the development of international law has been influenced by the requirements of international life” and that “the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.”¹⁷⁸ “Such new subjects of international law”, the Court explained, “need not necessarily be States or possess the rights and obligations of statehood”. Thus, new legal personalities may be added with changing times. And indeed, international law has seen a proliferation in the number of subjects added during the 20th century.¹⁷⁹

While the consequences of Slaughter’s approach are beyond the scope of this paper, one comment may be in place: It is difficult to see how this kind of sovereignty to sub-state actors could be imposed on states without their consent. In reality, while states may benefit in certain cases from giving up some of their sovereignty (as we witness at the international level with the setting up of international tribunals), that is not often the case (at least so far) in the relationship between the central government and its agencies.

However, we do agree that there is no hindrance *per se* in international law that would prohibit regulators to conclude binding agreements on the state’s behalf.¹⁸⁰ It is up to the state in question to determine whether it wants to grant that power to its organs. The state’s attitude to this question is reflected in its constitutional law, and so we would have to examine on a case by case basis a state’s constitutional law in order to determine whether it has granted its regulators the power to bind it at the international level. Whether such autonomy is granted is, therefore, a domestic question.

¹⁷⁷ HERSCH LAUTERPACHT, *The Subjects of International Law*, in *International Law*, Being the Collected Papers of Hersch Lauterpacht, Volume I: The General Works (E. Lauterpacht ed. 1970).Para. 48. P. 174.

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¹⁷⁹ For a description of subjects of international law currently accepted, see Walter, Section B.

¹⁸⁰ Article 7 of the VCLT assumes that heads of state etc. have full powers to conclude a treaty on behalf of a state, but is not limited to them. It says that if another person produces appropriate full powers or if it appears from the circumstances that the state intended him to represent it, he will be considered as lawfully representing the state. Thus, one can conclude that there is no prohibition *per se* on sub-state units to represent the state in treaty making. It all depends on the state’s intent, or more generally, on its domestic constitution.

3.5 Legal Personality and Accountability

3.5.1 Legal Personality is of little importance in the debate about accountability

The question as to the legal status of IIPPM fora under international law may be deemed by some scholars as uninteresting and not really relevant. As noted in the introduction to this paper, within the phenomenon typically referred to as ‘global governance’, we have witnessed the introduction of many new actors that do not fall within the traditional paradigm. TGNs are one example next to others such as public-private partnerships, global public policy networks etc.¹⁸¹ As is well known, this development has been accompanied with concerns about the accountability and legitimacy of these new actors, as well as regarding the traditional ‘formal’ intergovernmental organizations (IOs).

In the search for solutions for the accountability concerns, several groups of distinguished legal scholars have been attributing less importance to the doctrine of personhood. Rather, they have suggested legal frameworks that apply equally to formal and informal actors involved in the making of public policy. For example, the Global Administrative Law Project headed by Benedict Kingsbury and Richard Stewart, promotes the application of standards of accountability such as transparency and participation¹⁸² to all “global administrative bodies”, including both formal and informal bodies, such as international agencies and TGNs.¹⁸³ Similarly, the ‘Exercise of Public Authority by International Institutions’ project, headed by Armin von Bogdandy and Rüdiger Wolfrum seeks to apply a ‘public law’ approach to any exercise of “international public authority”, irrespective of whether it is conducted by formal or informal actors.¹⁸⁴

Thus, the question as to the international legal status seems to be an outdated question, put aside by the leading scholarship, at least in the context of the discussion on accountability. In response to this approach, there are still arguments to be made for the relevance of the question of legal personality. First, from a positivist point of view, the question as to the legal status of our IIPPM fora, remains important. Moreover, the legal source of the progressive GAL and Public Law approaches remains unclear. On the basis of what legal source would these obligations apply to the actors in question? General international law? At this stage, it appears

¹⁸¹ ALVAREZ. 613(Saying that a significant consequence of the proliferation of organizations is that “public international lawyers are no longer as certain as they once were that the ability to act on the international level requires actors to be formally accepted as ‘international legal persons’...We have now so many plausible “international legal persons” that we are no longer sure what that term implies.)

¹⁸² Standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. See, BENEDICT KINGSBURY, et al., *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15(2005) 17.

¹⁸³ Kingsbury, p. xxx

¹⁸⁴ ARMIN VON BOGDANDY, et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Armin von Bogdandy, et al. eds., 2009). P. 15. See more extensively Von Bogdandy, et al (Eds), *op.cit.*

more like a welcome exercise in domestic law analogy undertaken by scholars, but its legal basis in international law must still be established.

Finally, although the question as to whether TGNs are subjects of international law is theoretical in character, it could have important practical implications, particularly regarding the application of international law to TGNs. While the GAL approach focuses on procedural obligations in the decision making process, it does not deal with the substantive rights and duties that apply to actors. The existence of legal personality, therefore, is important in determining the extent to which IL applies to the entity in question. We discuss this next.

3.5.2 The Consequence of Legal Personhood for Accountability Concerns

A central claim against transgovernmental networks is that they exercise a *de facto* decision-making power beyond the reach of the accountability mechanisms traditionally associated with domestic or international law.¹⁸⁵ But would international legal personality of TGNs contribute in any manner to improving international accountability concerns (domestic accountability concerns are not covered in this paper)? Not necessarily.

First, even if TGNs had legal personality, many of the accountability principles (such as transparency, participation etc.) are arguably not part of international law, thus not applicable to formal and informal institutions alike.¹⁸⁶ To the extent it could be established that these principles have become imbedded in international law, the answer could be more complicated (see next).

Second, in line with the *Reparations* case, not all international rights and duties apply to IOs. There, the ICJ stressed that the legal personality of the UN differs from that of States. Whereas states possess the totality of international rights and duties recognized by international law, the rights and duties of an IO depend upon its purposes and functions as specified and implied in its constituent documents and developed in practice.¹⁸⁷ Thus, the question of what rights and duties IOs have is a relative question and varies from one IO to the other.¹⁸⁸ Furthermore, there is a considerable debate as to the extent to which certain customary rules and general

¹⁸⁵ See MARIO SAVINO, *An Unaccountable Transgovernmental Branch: The Basel Committee*, in GLOBAL ADMINISTRATIVE LAW: CASES, MATERIALS, ISSUES. S e c o n d E d i t i o n (Sabino Cassese, et al. eds., 2008). 69. PICCIOTTO, Regulatory Networks and Global Governance. 11. (Saying that networked governance disrupts the channels of democratic accountability) BENEDICT KINGSBURY, et al., *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15(2005). 16 (Saying that the growing exercise of transnational regulatory power has created an accountability deficit); Hiil tender .

¹⁸⁶ ZARING, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*.329-330 (saying that even if they were granted legal status, he is ambiguous as to whether international law in its current state has the capability to solve some of the central problems, such as regarding the administrative procedure.)

¹⁸⁷ Reparations case, 180 [To check]; Walter, paragraph 23; Schmalenbach, B.4; SCHERMERS & BLOKKER.(Book), P.993; SANDS & KLEIN. 477.

¹⁸⁸ SCHERMERS & BLOKKER.(Book), P.992-993.

principles of law are applicable to IOs.¹⁸⁹ Thus, the extent to which IIPPM networks and bodies would be covered by the rules of international law is open to debate, and it is unclear what rules would apply to them.

Third, even if many of the networks or bodies lack legal personality, the fear raised in the literature that they escape international law altogether is unwarranted. The reason is that regulators participating in the fora are subject to international law through the rules of State Responsibility. According to Article 4 of the Articles on State Responsibility, which reflects customary law,¹⁹⁰ acts by state organs, including regulators and agencies, even when acting independently from the central government,¹⁹¹ can be attributed to the state.¹⁹² It logically follows that all of the international legal obligations that apply to the State, apply to the regulators in their activities, where applicable. Consequently, the State may be held responsible if regulators, in their activities in the bodies, breach international obligations applicable to the State. Article 47 is also relevant, setting out the principle that several states may be responsible for the same internationally wrongful act, for example when they act jointly in respect of an entire operation.¹⁹³

In fact, whereas as independent legal subjects the extent of international law applicable to IIPPM bodies would be debatable (see discussion above), the entire set of international rights and duties that apply to states will continue to apply in their entirety, as applicable, to regulators participating in the fora. For example, it is clear that all international human rights applicable to a state, apply to the state organs in their IIPPM activities. As independent entities, this would be debatable. There may, therefore, even be some merits in this approach. Having said that, the significant practical consequence of accepting the international legal

¹⁸⁹ See *Id.* at (Book), P.994-995; Schmalenbach, p.16-17..

¹⁹⁰ JAMES CRAWFORD, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press. 2002). P. 94 [He refers there to a series of international judicial decisions.]

¹⁹¹ *Id.* at 97,98.

¹⁹² Article 4 entitled "Conduct of Organs of a State" provides that: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State." An organ may be a "person or entity", and it is understood in a broad sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority. See JAMES CRAWFORD, *International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press. 2002). Pages 98-99. He further comments that "It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and to whatever level in the hierarchy...", at P. 95

¹⁹³ CRAWFORD.272, 274. Article 47: "Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."

personality of our IIPPM bodies would be that they would be responsible for illegal acts performed by them —rather than the member states.

4. Conclusion

The present contribution purported to define the form and legal status of the bodies and networks involved in IIPPM. Our analysis confirms that even when international cooperation is informal (in the sense that it occurs in a loosely organized network or forum rather than a traditional international organization), this does not prevent a certain or even considerable degree of institutionalisation. At the same time it became clear that IIPPM takes place in fora of different forms and shapes, whci makes it difficult to draw general conclusions with regard to their international legal status and the applicability of (general) international law.

According to traditional international law, IIPPM bodies would lack international legal personality and do not fulfil the criteria of the definition of international organizations. Although the reasons may differ, both TGNs and international agencies do not fulfil the standard criteria defining international organizations. As we have seen, however, they have become significant actors at the global level. This discrepancy between their important global role and their non-recognition by international law has left many legal scholars in unease. The responses to this situation have been diverse and incoherent.

With regard to TGNs in particular, some, as Seidl-Hohenveldern, have argued that they have a ‘twilight existence’ between NGOs and IOs. Others, such as Goodwin-Gill and Brownlie, have sought to include them within the traditional paradigm though broad and liberal interpretation of the definitional criteria of ‘international organization’. Provocative suggestions have been raised too, for instance by Slaughter, who has called for the recognition of the sovereignty/legal personality of sub-state actors. Finally, scholars from the GAL or Public Law project have basically put the question aside, arguing for the application of accountability principles to formal and informal actors alike.

We argue, however, that the question of the separate legal status of both TGNs and international agencies is important for a number of reasons. As we have seen, in many cases norms are being agreed on on the basis of detailed procedural rules in an institutionalised setting. Irrespective of the fact that we are not dealing with traditional international organizations, in an number of cases these procedural rules lead to a normative output that *prima facie* comes close to international decisions and agreements.¹⁹⁴ This, arguably, has consequences in terms of accountability,¹⁹⁵ the application of general international law (both

¹⁹⁴ See on the possible difference between the two: I.F. Dekker and R.A. Wessel, *op.cit.*

¹⁹⁵ See the paper by Tim Corthaut, Philip De Man, Bruno Demeyere, Nicholas Hachez, Pierre Schmitt and Jan Wouters, ‘Operationalizing Accountability in Respect of International Informal

treaty law and the law of international responsibility) as well as in relation to the legal effects in the domestic legal orders.¹⁹⁶

As announced in the introduction of this paper, the “exercise of international public authority”, defined by Von Bogdandy, Dann and Goldman as: “any kind of governance activity by international institutions, be it administrative or intergovernmental [...] if it determines individuals, private associations, enterprises, states, or other public institutions”, has been leading in our selection of IPPM bodies.¹⁹⁷ [...]

[to be added: conclusion on the legal status of IPPM bodies]

Public Policy Making Mechanisms’ presented at this workshop as well as the contribution by Fabian Amtenbrink.

¹⁹⁶

See the contribution by Leonard Besselink to this workshop.

¹⁹⁷

A. Von Bogdandy, Ph. Dann and M. Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, in Von Bogdandy et al, *The Exercise of Public Authority by International Institutions*, *op.cit.*, pp. 3-32, at 5.