

Decisions of International Institutions: Explaining the Informality Turn in International Institutional Law

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Summary

Over the past century, the focus of legal research clearly shifted from understanding international organizations as new phenomena, to solving practical problems through for instance comparative research and to accepting a new and separate role of international organizations in the global legal order. International lawyers started to show an increased interest in attempting to describe and even explain normative processes that traditionally sit uneasy with international law. The present paper aims to highlight a 'turn to informality' and argues that the international legal order has radically transformed in the past. It also attempts to explain this turn and its relevance and assess some of its consequences.

1. Introduction

The question why states act through international organizations has been raised by many ever since the large scale emergence of international organizations since 1945. As this is not a traditional legal question, it has mainly been approached from the perspectives (and on the basis of theoretical insights) of other academic disciplines. Thus, Trachtman, for instance, articulated economic reasons for the international structure² and Abbott and Snidel pointed to the importance of *centralization* and *independence* and argued that these “two characteristics distinguish IOs from other international institutions: centralization (a concrete and stable organizational structure and an administrative apparatus managing collective activities) and independence (the authority to act with a degree of autonomy, and often with neutrality, in defined spheres.)”³ The focus of Abbott and Snidel was on formal intergovernmental

¹ This first draft mainly draws from insights developed in other research projects, undertaken jointly with colleagues. Credits are due in particular to Joost Pauwelyn and Jan Wouters as co-leaders of the 'Informal International lawmaking' project as co-authors of some of the publications used. References to relevant publications may be found throughout the text.

² J.P. Trachtman, *The Economic Structure of International Law*, Cambridge, MA: Harvard University Press, 2008. More recently, Trachtman analysed a more general set of reasons why states might move to cooperation: J.P. Trachtman, *The Future of International Law: Global Government*, Cambridge: Cambridge University Press, 2013, Chapter 2.

³ K.W. Abbott and D. Snidel, 'Why States Act through Formal International Organizations', *The Journal of Conflict Resolution*, 1998, pp. 3-32 at 9.

organizations and could be seen as a reaction to the vast literature on international regimes, initiated by authors such as Krasner and Keohane.⁴

Criticism on the theoretical depth of legal scholarship in this area is well-known and also summarized by Abbott and Snidel: it “continues to offer descriptive accounts of the history and institutional architecture of IOs, as well as doctrinal analysis of norms and texts, especially the normative output of organizations” or “addresses the constitutional law of IOs, including membership and voting rules, external relations, finance, and the authority of specific organs.”⁵ It seems fair to admit that legal studies on international organizations have only recently started to incorporate some of the insights on the emergence and functioning of global governance offered by other disciplines (in particular IR theory, political science and institutional economics). Explaining why and how international organizations work as they do has never been the main focus of legal analysis. The ‘law of international organizations’ as a sub-discipline of international law is rooted in the need to map the emergence and proliferation of very different international organizations, primarily on the basis of comparative analysis.⁶

Yet – as indicated by Klabbers – over the past century, the focus of legal research clearly shifted from understanding international organizations as new phenomena, to solving practical problems through for instance comparative research and to accepting a new and separate role of international organizations in the global legal order. While we currently witness a tendency to see international organizations as “inherently good”,⁷ at the same time the acceptance of international organizations as ‘autonomous actors’ triggered a debate on their legitimacy, accountability and legal responsibility. In fact, the new image of international organizations seems to have boosted more theoretical approaches, driven in particular by constitutionalist thinking.⁸ Moreover, Abbott’s and Snidel’s arguments – regarding *centralization* and *independence* – seem to work well in current legal debates. It is in particular the *institutionalisation* of the legal order and the *autonomy* of international organizations that has led to the adoption of ‘international decisions’ (used here to refer to the products of law-making by international institutions⁹). International organizations have found their place in global governance, and follow an agenda that is no longer fully defined by their Member States – which has

⁴ S.D. Krasner, *International Regimes*, Cornell University Press, 1983; R.O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton, N.J.: Princeton University Press, 1984.

⁵ Abbott and Snidel, *op.cit.*, at 7.

⁶ L.B. Sohn, ‘The Growth of the Science of International Organizations’, in K. Deutsch and S. Hoffmann (Eds.), *The Relevance of International Law*, [...] 1968, at 351-353.

⁷ J. Klabbers, ‘The Changing Image of International Organizations’, in J.-M. Coicaud and V. Heiskanen (Eds.), *The Legitimacy of International Organizations*, Tokyo etc.: United Nations University Press, 2001, pp. 221-255.

⁸ See J. Klabbers and A. Wallendahl, *Research Handbook on the Law of International Organizations*, Cheltenham/Northampton: Edward Elgar Publishing, 2011.

⁹ R.A. Wessel, ‘Institutional Law-Making: The Development of a Global Normative Web’, in C. Bröllman and Y. Radi (Eds.), *Research Handbook on the Theory and Practice of International Law-Making*, Cheltenham/Northampton: Edward Elgar Publishing, 2014 (forthcoming).

caused the latter to devote much of their time and energy to responding to what has been termed the 'Frankenstein problem'.¹⁰

In political studies, theoretical thinking is often devoted to understanding "why institutions exist, how they function and what effects they have on world politics have become increasingly refined and the methods employed in empirical work more sophisticated."¹¹ While it remains generally true that in international law "theoretical reflection in the field of international organizations has been limited",¹² not only the recognition of the increased role of international organizations, but in particular the acknowledgment of normative functions of *other* international bodies called for new legal theoretical approaches. However, here we see an interesting difference if we compare the resulting legal debates with those in political studies or IR-theory. According to Simons and Martin, the turn in the latter disciplines from the study of formal institutions to regimes "was instigated by the observation that much of what was interesting about world politics – especially during the Cold War period – seemed to take place among intensely independent actors but beyond the purview of formal interstate organizations."¹³ This insight only slowly starts to affect international legal doctrinal analysis. While Abbott and Snidel, felt the need to again stress the importance of the study of formal international organizations in an academic world which only seemed to have eyes for informal and transnational cooperation, legal science suffered from the fact that the focus was still on formal cooperation only. Mainstream international law focuses on traditional actors (states), processes (international (institutionalised) governmental negotiations) and instruments (treaties, custom). It certainly took a while to recognise international cooperation beyond the state and – frankly – it remains difficult to square the normative activities of non-state actors with the basic starting points of international law.

Yet, in the past decade international lawyers started to show an increased interest in attempting to describe and even explain normative processes that traditionally sit uneasy with international law. To name just a few (key) examples: Anne-Marie Slaughter drew our attention to 'transgovernmental regulatory networks';¹⁴ Benedict Kingsbury and others pointed to an emerging 'global administrative law';¹⁵ José Alvarez noted that more and more technocratic international bodies "appear to be engaging in legislative or regulatory activity in ways and for reasons that might be more readily explained by students of bureaucracy than by scholars of the traditional forms

¹⁰ A. Guzman, 'International Organizations and the Frankenstein Problem', *European Journal of International Law*, 2013, pp. 999-1025; Cf. also J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2009 (2nd ed.).

¹¹ B.A. Simons and L.L. Martin, 'International Organizations and Institutions', in W. Carlsnaes, Th. Risse and B.A. Simmons (Eds.), *Handbook of International Relations*, Sage, 2001, pp. 192-211 at 192. This publication offers a good overview of the different approaches in IR theory towards international institutions.

¹² H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden/Boston: Martinus Nijhoff Publishers, 2011 at 9.

¹³ Simons and Martin, *op.cit.*, at 204.

¹⁴ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004), Chapter 6.

¹⁵ Benedict Kingsbury, Nico Krisch and Richard B. Stewart, 'The Emergence of Global Administrative Law', 68 *Law & Contemporary Problems* (2005) 15-61.

for making customary law or engaging in treaty-making”;¹⁶ Armin von Bogdandy and others argued that international public authority may have different sources;¹⁷ the project on ‘Private Transnational Regulatory Regimes’ draws attention to transnational private actors;¹⁸ and all of this returns in the project on ‘The Architecture of Postnational Rulemaking’.¹⁹ The study of international institutional law (the law of international organizations) has moved from a very descriptive (and admittedly, occasionally quite dull) analysis of the set-up of the various existing international organizations, their organs and decision-making procedures, to a more conceptual analysis of the changing role of international institutions in global governance. Lawyers increasingly seem to be able to set aside their traditional hesitations by accepting a reality of many different forms, actors and processes in the formation of international norms. Obviously, to political scientists and international relations theorists, the existence of ‘transnational’ normative processes does not come as a surprise and, in a way, always formed part of their ‘reality of global governance’.²⁰

It is this turn in the study of international institutional law that forms the basis for the present paper. The question not only is, *how* we can fit what seem to be extra-legal phenomena into traditional legal thinking, but also *why* international actors would opt for more informal settings and output. While we do not see ‘informal’ rules as ‘non-legal’ rules,²¹ legal science continues to struggle with the new and extensive normative output in global governance: “we continue to pour an increasingly rich normative output into old bottles labelled ‘treaty’, ‘custom’, or (much more rarely) ‘general principles’”.²² At the same time it is increasingly recognised that we may not be able to capture all new developments by holding on to our traditional notions. One solution is to simply disregard all normative output that cannot be traced back to any of the traditional sources of international law. This approach, however, runs the risk of placing international legal analysis (even more) outside the ‘real world’ or, and perhaps even more frightening to some colleagues (including the present author), “to reduce law to a

¹⁶ Jose Alvarez, *International Organizations as Law-Makers*, Oxford: Oxford University Press, 2005, at 217.

¹⁷ A. von Bogdandy, R. Wolfrum, J. von Bernstorff, Ph. Dann, M. Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, 2010).

¹⁸ See ‘Private Transnational Regulatory Regimes’, <privateregulation.eu> and F. Cafaggi (ed.), *Enforcement of Transnational Private Regulation*, Edward Elgar, 2012.

¹⁹ See ‘The Architecture of Postnational Rulemaking: Views from International Public Law, European Public Law and European Private Law’, <www.uva.nl/architecture>

²⁰ J. G. S. Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (University of Chicago Press, 2010), Chapter 1. Koppell sketched – both empirically and conceptually – the ‘organization of global rulemaking’. Even in the absence of a centralized global state, the population of Global Governance Organizations (GGOs) is not a completely atomized collection of entities: “They interact, formally and informally on a regular basis. In recent years, their programs are more tied together, creating linkages that begin to weave a web of transnational rules and regulations”.

²¹ In contrast to other definitions; see for instance Trachtman (2013), who makes a difference between “types of international cooperation that seem better addressed through international law, as opposed to nonlegal, or informal cooperation.” (at 22). The legal nature of informal norms formed the basis for an extensive project under the label ‘Informal International Lawmaking’, the main results of which are laid down in J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), *Informal International Lawmaking*, Oxford: Oxford University Press, 2012. See further below.

²² Alvarez, *International Organizations as Law-Makers*, *op.cit.*

sub-branch of the social sciences”,²³ as there would not be much left for lawyers to deal with.²⁴ After all, in many cases non-traditional normative processes *de facto* have similar effects as traditional legal norms. Do lawyers then simply have to accept a pluralisation of international norm- and law-making processes,²⁵ or perhaps even a retreat from formal law-ascertainment?²⁶ Or, does some of the ‘non-traditional normative output’ actually fit within existing sources of international law or is it at least part of the process of law creation (including custom and treaty interpretation), given the absence of formal criteria for an agreement to constitute a treaty or legally binding commitment, as well as the accessible nature of customary law (broadly defined in Article 38 of the ICJ Statute as “evidence of a general practice accepted as law”)?²⁷

This paper will further highlight this dimension and point to the choice of states to move from formal to informal international decision-making as well as to some consequences of this choice. Section 2 will first of all revisit the debate on the changing role of international organizations and the notion of ‘international decisions’. Section 3 will further explain what is meant by a turn to ‘informality’ by pointing to changing actors, processes and output. The reasons for states and other international actors to start using different fora and allowing for a new type of ‘international decisions’ will be investigated in Section 4. This will be followed by a short assessment of the new questions that are or should be raised by international legal scholarship (Section 5).

2. An Emerging Global Institutional Layer

While many international organizations were set-up as frameworks to allow states to institutionalise cooperation in a specific field, decisions of international organizations are increasingly considered a source of international law.²⁸ Yet, not each and every decision taken by an international organization contributes to law-making. Indeed,

²³ Jan Klabbers, ‘Law-making and Constitutionalism’ in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009, pp. 81-125, at 97.

²⁴ The possible demise of international law is described in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, *European Journal of International Law*, 2014 (forthcoming; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271862).

²⁵ Cf. N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford: Oxford University Press, 2010.

²⁶ As eloquently argued by Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of legal Rules*, Oxford: Oxford University Press, 2011. D’Aspremont even claims that there is a “growing acceptance of the idea of a penumbra between law and non-law [which] has provoked a move away from questions of law-ascertainment, [which are] increasingly perceived as irrelevant.” *Ibid.*, at 1.

²⁷ This latter argument is made in J. Pauwelyn, R.A. Wessel and J. Wouters, ‘Informal International Law as Presumptive Law: Exploring New Modes of Law-Making’, in R. Lijjova and J. Petman (Eds.), *International Law-Making: Essays in Honour of Jan Klabbers*, London/New York: Routledge, 2014, pp. 75-102.

²⁸ J. Alvarez, *International Organizations as Law-Makers*, Oxford: Oxford University Press, 2005. But see already I. Detter, *Law-Making by International Organizations*, Stockholm: Norstedt & Söners Förlag, 1965. Also J. E. Alvarez, ‘International Organizations: Then and Now’ 100 *American Journal of International Law* (2006) p. 324, at pp. 326-336.

traditionally, law-making is not seen as a key-function of international organizations.²⁹ The reason is that most international organizations have not been granted the power to issue binding decisions as states were believed not to have transferred any sovereignty. Nevertheless, these days it is undisputed that many organizations do ‘exercise sovereign powers’³⁰ in the sense that they not only contribute to law-making by providing a framework for negotiation, but also take decisions that bind their member states. Indeed, the current debates on international law-making to a certain extent mirror the ‘governance’ debates in other academic disciplines. In that respect Koppell pointed to the fact that we can indeed use the term governance for the different normative activities as many of the international bodies are “actively engaged in attempts to order the behaviour of other actors on a global scale”. Even without a global government we see “normative, rule-creating, and rule supervisory activities” as indications of global governance.³¹ For lawyers, ‘governance’ becomes interesting the moment it involves legal rules or at least normative utterances with an effect on the legal order.

It is this element in particular that may point to a developing ‘vertical’ dimension in international law as it highlights the existence of a dimension that cannot be explained by a focus on contractual relations between states. Elsewhere I referred to this dimension as an ‘institutionalised global normative web’ that seems to reveal the ‘public’ nature of international law.³² This web not only contains formal international organizations, but also transnational/regulatory bodies. Most bodies in one way or another contribute not only to traditional law-making in the form of international decisions, but also form part of a process of informal international law-making.³³ Indeed, a mere focus on traditional organizations would leave us with a too limited picture of the international normative output.³⁴ Although international networks and informal bodies have existed for a long time,³⁵ their proliferation and (legal) impact through harmonization methods (standardisation, certification) has made it impossible for lawyers to disregard them in their analysis of international law-making. In many cases –

²⁹ Not even of the United Nations. See O. Schachter, ‘The UN Legal Order: An Overview’, in C. Joyner (Ed.), *The United Nations and International Law*, Cambridge: Cambridge University Press, 1997, p. 3: “Neither the United Nations nor any of its specialised agencies was conceived as a legislative body”.

³⁰ D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, Oxford: Oxford University Press, 2005.

³¹ J.G.S. Koppell, *World Rule. Accountability, Legitimacy, and the Design of Global Governance*, Chicago/London: The University of Chicago Press, 2010, at 77-78.

³² R.A. Wessel, ‘Institutional Law-Making’, *op.cit.*. See also R.A. Wessel, ‘What’s Wrong with *International Law*? Revealing the Publicness of International Law’, in E.J. Molenaar, P.A. Nollkaemper, S. Nouwen and C. Ryngaert (Eds.), *What’s Wrong With International Law? What’s Wrong With International Law?*, Leiden/Boston: Martinus Nijhoff Publishers, 2014 (forthcoming); and Trachtman (2013), *op.cit.*

³³ J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), *Informal International Lawmaking*, *op.cit.*; and A. Berman, S. Duquet J. Pauwelyn, R.A. Wessel, and J. Wouters (Eds.), *Informal International Lawmaking: Case Studies*, Oslo: TOAEP, 2013.

³⁴ In their book *The Making of International Law*, Boyle and Chinkin (Oxford: Oxford University Press, 2007) accept and describe the role of numerous state and non-state actors in international law-making. It is striking that ‘treaties as law-making instruments’ is only dealt with marginally (section 5.4).

³⁵ Cf. S. Baldwin, ‘The International Congresses and Conferences of the Last Century as Forces Working towards the Solidarity of the World’, *AJIL*, 1907, p. 565; as well as H. Laski, *The Limitations of the Expert*, The Fabian Society, 1931 (criticizing the influence of experts in the making of international public norms).

and increasingly as ‘autonomous’ actors³⁶ – these bodies exercise a public authority which goes beyond a mere cooperation between public as well as private actors.³⁷ The distinction between formal and informal institutions and networks may have been helpful for lawyers to define their object of study, but no longer does justice to the interconnectedness of the norms they produce. Indeed, as has been observed, the institutions involved in global governance “interact, formally and informally on a regular basis. In recent years, their programs are more tied together, creating linkages that begin to weave a web of transnational rules and regulations.”³⁸

The emerging picture is one of a broad range of international normative fora, from intergovernmental organisations with a broad mandate (e.g. the UN and its related institutions), treaty-based conferences that do not amount to an international organisation (e.g. Conferences of the Parties under the main multilateral environmental agreements, such as the Framework Convention on Climate Change and the Kyoto Protocol), informal intergovernmental co-operative structures (e.g. the G20, the Financial Action Task Force on Money Laundering, the Basel Committee on Banking Supervision), and even private organisations that are active in the public domain (e.g. the International Organisation for Standardisation (ISO), or private regulation of the internet by the Internet Corporation for Assigned Names and Numbers (ICANN), The Internet Engineering Task Force (IETF) or the Internet Society (ISOC).³⁹ In addition, normative activities can also be discovered in international bodies that are neither based on a treaty nor on a bottom-up cooperation between national regulators, but on a decision by an international organization. By delegating or outsourcing some of their tasks, these ‘international agencies’ as we may perhaps call them,⁴⁰ may obtain a role in norm-setting that can be distinguished from the ‘parent organization’.

3. A Changing Nature of International Fora and Decisions?

The case for international organization is well-debated in both political science and institutional economics.⁴¹ Conventional arguments are said to rests on three pillars: “1.

³⁶ N.D. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, Routledge, 2011. See also R.A. Wessel, ‘International Governmental Organizations as Non-State Actors’, in M. Noortmann, A. Reinisch and C. Ryngaert (Eds.), *Non-State Actors in International Law*, Oxford: Hart Publishing, 2014 (forthcoming).

³⁷ Cf. Von Bogdandy, et al., *The Exercise of Public Authority by International Institutions*, *op.cit.*

³⁸ Koppell, *op.cit.* at 12.

³⁹ More extensively on the normative activities of these bodies: R.A. Wessel, ‘Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors’, in M.A. Heldeweg and E. Kica (Eds.), *Regulating Technological Innovation: A Multidisciplinary Approach*, Basingstoke: Palgrave MacMillan, 2011, pp. 77-94.

⁴⁰ See more extensively E. Chiti and R.A. Wessel, ‘The Emergence of International Agencies in the Global Administrative Space: Autonomous Actors or State Servants?’, in White and Collins, *op.cit.*, pp. 142-159; as well as A. Berman and R.A. Wessel, ‘The International Legal Status of Informal International Law-making Bodies: Consequences for Accountability’, in Pauwelyn, Wessel and Wouters (Eds.), *op.cit.*, pp. 35-62.

⁴¹ See for an overview of approaches A. Thompson and D. Snidal, ‘International Organization’, B. Bouckaert and G. de Gees (Eds.), *Encyclopedia of Law and Economics*, 2000, pp. 692-722.

Without international organization, international externalities would result in underproduction of international public goods and in overexploitation of common resources; 2. Without international organization, international economies of scale in the production of national public goods could not be exploited; 3. Game theory is used to show that non-cooperative national decision-making can produce a suboptimal outcome (for instance, a ‘prisoners dilemma’) and that cooperative behaviour can improve the outcome”.⁴² In addition, rational choice approaches have been used to point to the side-effects of international organization,⁴³ and ‘rational design’ approaches aimed at explaining the variety in international institutions.⁴⁴ In the end, most non-legal perspectives on international organization conclude that legally binding norms are helpful to enhance (legal, economic, social) certainty and stability, reduce transaction costs, merit greater respect, and are more legitimate (as they would normally have been created through democratic procedures).⁴⁵

In relation to ‘informality’, the debate largely concentrated on the pros and cons of the use of soft law. As indicated by, for instance, Guzman and Meyer, soft law would work well for mere *coordination*, but will be less easy to use to establish *cooperation*.⁴⁶ However, the legal scholarly debates have clearly moved beyond the soft law debate. Drawing on a two-year research project involving over forty scholars and thirty case studies⁴⁷, the current paper aims to highlight a ‘turn to informality’ and argues that the international legal order has radically transformed in the past, on all three axes of actors, processes and outputs. Recently, we noted that there even seems to be a stagnation of formal international law-making, in favour of more informal international law-making.⁴⁸ We use the term ‘informal’ international law-making in contrast and opposition to ‘traditional’ international law-making. Informal law is ‘informal’ in the sense that it dispenses with certain formalities traditionally linked to international law. These formalities may have to do with *output*, *process* or the *actors involved*.⁴⁹ It is exactly this ‘circumvention’ of formalities under international and/or domestic procedures that generated the claim that informal law is not sufficiently accountable (see further below).⁵⁰

⁴² See for instance R. Vaubel, ‘A Public Choice Approach to International Organization’, *Rational Choice*, 1986, pp. 39-57 at p. 39-40.

⁴³ *Ibid.*

⁴⁴ B. Koremenos, C. Lipson and D. Snidel, ‘The Rational Design of International Institutions’, in N. Koremenos, C. Lipson and D. Snidel (Eds.), *The Rational Design of International Institutions*, Cambridge: Cambridge University Press, 2001, pp. 1-39.

⁴⁵ Cf. Trachtman (2013), Chapter 2.

⁴⁶ See for instance A. Guzman and T. Meyer, ‘International Soft Law’, *Legal Analysis*, 2011, p. 2.

⁴⁷ The project was funded by the Hague Institute for the Internationalization of Law (HiiL). See the project website at www.informallaw.org, and the two books referred to above,

⁴⁸ J. Pauwelyn, R.A. Wessel and J. Wouters, ‘When Structures Become Shackles’, *op.cit.*

⁴⁹ Informal law was extensively defined in J. Pauwelyn, ‘Informal International Law-making: Framing the Concept and Research Questions’, in Pauwelyn, Wessel and Wouters (eds), *Informal International Lawmaking*, *supra*, pp. 13-33.

⁵⁰ See, for example, Eyal Benvenisti, ‘Coalitions of the Willing’ and the Evolution of Informal International Law’ in C. Calliess, G. Nolte and P.-T. Stoll (eds), *Coalitions of the Willing: Avantgarde or Threat?*, Carl Heymanns Verlag, 2007; B. Kingsbury and R. Stewart, ‘Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative

There is evidence of the slowdown in formal international law-making.⁵¹ Abbott, Green and Keohane calculate that “during the first few years of the 21st century, growth rates in IGO [formal international organizations] formation have decreased by 20% compared to the previous decade”.⁵² These authors also point out that growth rates in both treaties and formal IGOs decreased “despite continuing increases in the sensitivity of societies to one another, reflected in such phenomena as increasing trade, particularly services, and outsourcing”.⁵³ Whereas formal international law-making has slowed down, a rich tapestry of novel forms of cooperation, ostensibly outside international law, is thriving. It has been argued that cross-border agreement takes different forms and involves a different constellation of actors and processes, outside the traditional confines of international law. Thus, we have witnessed the creation of the International Conference on Harmonization (ICH, in respect of registration of pharmaceuticals), the Wassenaar Arrangement on export controls of conventional arms, the Kimberley Scheme on conflict diamonds, the Proliferation Security Initiative, the International Competition Network, the Copenhagen Accord on climate change, the Group of 20 (G-20), the Financial Stability Board, the Ruggie Guiding Principles on Business and Human Rights, the Internet Engineering Task Force, the Global Strategy on Diet, and the list goes on.⁵⁴ Although the International Organization for Standardization (ISO) was founded in 1947, the number of ISO standards has grown from under 10,000 in 2000 to more than 19,000 today.⁵⁵ Relatively recent topics such as the internet, competition or finance have been regulated from the start through informal norms and networks and in most of these areas creating legally binding treaties or traditional IGOs is not even a topic of discussion.

The shift from formal to informal international law-making can partly be explained by saturation with the existing treaties and changed policy preferences of States. However, at a more fundamental level multiple case studies⁵⁶ converge around deep societal changes that are not unique to international law but affect both

Tribunals of International Organizations’, in S. Flogaitis (ed.), *International Administrative Tribunals in a Changing World* (Esperia, 2008) 1-20, at 5, framed this critique as follows: ‘Even in the case of treaty-based international organizations, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies – including networks of domestic officials and private and hybrid bodies – operate wholly outside the traditional international law conception and are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree’.

⁵¹ J. Pauwelyn, R.A. Wessel and J. Wouters, ‘When Structures Become Shackles’, *op.cit.*. This section is partly based on that publication.

⁵² K. Abbott, J. Green and R. Keohane, ‘Organizational Ecology in World Politics: Institutional Density and Organizational Strategies’, prepared for the 2013 Annual Convention of the ISAA, available at <http://files.isanet.org/ConferenceArchive/fe41c477167d4b43aa441856cbff573a.pdf>, at 2 and footnotes 2-4.

⁵³ Abbott et al., *supra* note 52 at 2.

⁵⁴ See the many cases discussed in the OUP and TOAEP books *supra* notes 4 and 5.

⁵⁵ Herman, ‘The New Multilateralism: The Shift to Private Global Regulation’, *Commentary No. 360, C.D. Howe Institute* (2012), at 5. Cf. also E. Kica and R.A. Wessel, ‘Transnational Arrangements in the Governance of Emerging Technologies: The Case of Nanotechnology’, in E. Stokes, D. Bowman and A. Rip (Eds.), *Embedding and Governing New Technologies: A Regulatory, Ethical & Societal Perspective*, Singapore: Pan Stanford Publishing, 2014 (forthcoming).

⁵⁶ See the Informal International Lawmaking books, *op.cit.*

international *and* national legal systems, in particular: the transition towards an increasingly diverse network society and an increasingly complex knowledge society.

In sum, these societal undercurrents – essentially, the emergence of an increasingly diverse and complex network/knowledge society – seem to transform the actors, processes and outputs at work or required to deliver international cooperation. The actors (central state authorities), processes (formal law-making in IOs) and outputs (rigid treaties or IO decisions) recognized in traditional international law are not adapted. In this sense – as we argued – the traditional structures have become shackles. This goes well beyond the phenomenon of soft law⁵⁷ as it addresses not only informal output but also new and informal actors and processes. Moreover, even in terms of output, there is nothing ‘soft’, i.e. vague, aspirational or deeply contested about most of the internet, medical devices or financial norms developed in recent years. If anything, the process of their development is highly regulated and strict, based on consensus, and the expectation as to compliance with these norms is extremely high (higher than in respect of many traditional treaties). What characterizes these finance, medical devices or internet norms is not so much that they are non-binding under international law (the hallmark of ‘soft law’) but rather that they are outside traditional international law altogether. Similarly, the shift toward informal law-making described here goes beyond ‘global administrative law’.⁵⁸ There is nothing ‘administrative’ about the G-20, after all, a meeting of heads of state at the highest political level. Yet, the G-20 and its *communiqués* epitomize the new trend. Nor do we consider that the solution to this turn to informality is ‘administrative’. It goes beyond managerialism and requires both politics and courts.

4. Explaining the Informality Turn

4.1 Escaping Legal Commitments?

‘Informal’ is not the same as ‘non-legal’. As stated above, the term ‘informal international law-making’ already indicates that we are still talking about ‘law’. This comes close to the different types of ‘legalization’ used in political science literature. Thus, Abbott et al. define ‘legalization’ on the basis of three dimensions: *obligation* (states and other actors are bound by a rule or commitment or by a set of rules or commitments), *precision* (rules unambiguously define the conduct they require, authorize or prescribe) and *delegation* (third parties have been granted authority to implement, interpret, and apply

⁵⁷ See Basdevant, ‘La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités’ 15 *Recueil des Cours V* (1926) 539; Simma, ‘Völkerrecht in der Krise’, 20 *Oesterreichische Zeitschrift für Aussenpolitik* (1980) 280; Aust, ‘The Theory and Practice of Informal International Instruments’, 35 *ICLQ* (1986) 787; Lipson, ‘Why Are Some International Agreements Informal?’, *op.cit.*

⁵⁸ Kingsbury, Krisch and Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law & Contemporary Problems* (2005) 15; Ladeur, ‘The Emergence of Global Administrative Law and Transnational Regulation’, *IILJ-NYU Working Paper 2011/1* (2011).

the rules).⁵⁹ They argue that “Each of the dimensions is a matter of degree and graduation, not a rigid dichotomy, and each can vary independently. Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the ‘ideal type’ of legalization, where all three properties are maximized; to ‘hard’ legalization, where all three (or at least obligation and delegation) are high; through multiple forms of partial or ‘soft’ legalization involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type.”⁶⁰

While this variety is also recognized in international legal scholarship, the question is whether informal settings or output do allow actors to escape legal commitments. Obviously, this in turn raises questions about the legal nature of the informal output. Could these decisions be a source of international law? Elsewhere, we have tentatively argued that consensus within an international professional community on the best available knowledge and expertise can offer a foundation for legal powers to issue exhortations enjoying validity under international law.⁶¹ It is well accepted that not all law or legal norms impose or proscribe specific behaviour or legally binding rights and obligations. Normativity must not be confused with imperativity.⁶² Indeed, the debate between those who argue in favour of a bright line between law and non-law,⁶³ and those arguing for the existence of a grey zone⁶⁴ is well-known. In practice the divide may not always be clearly visible: “for the bright line school something may be law; for the grey zone school it may not be law (or fall in the grey zone between law and non-law) but still have legal effects, with little practical difference between the two approaches”.⁶⁵ Yet, large parts of the debate have been devoted to the establishment of one or more criteria to decide what makes an instrument law (be it sanctions, formalities, intent, effect, substance, or belief). Thus, depending on how one distinguishes between law and non-law, informal output may or may not be part of international law. If formalities or intent matter, a lot of the informal output would not be law. If, in contrast, effect or substantive factors decide, a lot would be law.

Yet, the question is whether it is not possible (or perhaps even more logical) to view these *prima facie* non-legal phenomena as law, in which case it should be a less decisive factor for international actors. After all, one stream of literature has

⁵⁹ K.W. Abbott, R.O. Keohane, A. Moravcsik, A.-M. Slaughter, and D. Snidal, ‘The Concept of Legalization’, in J.L. Goldstein, M. Kahler, R.O. Keohane and A.-M. Slaughter (Eds.), *Legalization and World Politics*, Cambridge, MA/London: MIT Press, 2001, pp. 17-35 at 17.

⁶⁰ *Ibid*, at 17-18.

⁶¹ D.W.P. Ruiter and R.A. Wessel, ‘The Legal Nature of Informal International Law: A Legal Theoretical Exercise’, in J. Pauwelyn, R.A. Wessel and J. Wouters, *op.cit.*, pp. 162-184.

⁶² A. Lalande, *Vocabulaire technique et critique de la philosophie*, Presses Universitaires de France, 1993, *sub verbo* ‘Normatif’.

⁶³ E.g. P. Weil, ‘Towards Relative Normativity in International Law?’, 77 *American Journal of International Law* (1983) 413-442, at 417-8; J. Klabbers, ‘The Redundancy of Soft Law’, 65 *Nordic Journal of International Law* (1996) 167-182, at 181; and J. Klabbers ‘The Undesirability of Soft Law’, 67 *Nordic Journal of International Law* (1998) 381-391.

⁶⁴ E.g. R.R. Baxter, ‘International Law in “Her Infinite Variety”’, 29 *International & Comparative Law Quarterly* (1980) 549-566; and O. Schachter ‘The Twilight Existence of Nonbinding International Agreements’, 71 *American Journal of International Law* (1997) 296-304.

⁶⁵ J. Pauwelyn, ‘Informal International Lawmaking: Framing the Concept and Research Questions’, in Pauwelyn, Wessel, Wouters, *op.cit.* pp. 13-34.

consistently stressed that one would need good reasons not to consider international commitments as law, or at least as legally relevant.⁶⁶ A key element here may be the notion of 'presumptive law'.⁶⁷ This notion was developed by Klabbers, who proposes to focus on how the norms are received by their possible addressees:⁶⁸ "One possible approach might be to propose what can be labelled 'presumptive law': normative utterances should be presumed to give rise to law, unless and until the opposite can somehow be proven".⁶⁹ Obviously, this presumption could be rebutted, but the idea is to reverse the burden of proof. A confrontation with the informal output reveals that – perhaps despite the expectations of the actors themselves – it is not so easy to completely ignore the international legal structure in which most cooperation takes place.

We may indeed have to focus more on the actual effects and the acceptance of the norms as playing a role in legal orders, but we feel that acceptance cannot be decoupled from the origin of the norms both in terms of the authority (or authorities) they emanate from and their procedural pedigree. Many of the case studies in the informal international law-making project indicate that the acceptance of the norms – and perhaps their legitimacy – is based on the fact that they are created by people who know what they are talking about and in such a way that takes account of many (if not always all) affected stakeholders. 'Expertise-based legitimacy' or 'executive authority' are not new phenomena but may very well form a key to a more inclusive understanding of international legal norms. Again, this is not ground breaking. As argued by Paul Craig, in national politics also, law-making is legitimated in three ways: "through legislative oversight/imprimatur from the top; through participation from the bottom by input from those affected by the rules; or through executive authority combined with technocratic expertise".⁷⁰ While the second way (participation) is relevant for informal international law-making as well, the fact that only a limited number of stakeholders may be involved renders the third possibility (executive authority) equally relevant.

⁶⁶ J. Klabbers, *The Concept of Treaty in International Law*, Kluwer Law International, 1996 at 247: "Although several normative orders may govern international relations, none of them is capable of serving as a viable alternative to the international legal order, for they cannot be utilized intentionally. Courtesy and morality develop over time, through the aggregate conduct of actors; and neither can be created intentionally (except, perhaps, by legal instrument). It follows, that an agreement cannot be concluded with the intention of becoming courteously bound, or morally bound. Politics moreover, perhaps the most popular alternative to law, is really no alternative. Rather, law is the normative order governing politics, and in that sense at least, law and politics are one and the same. Again, it follows that one cannot intend to become politically bound without at the same time also becoming legally bound."

⁶⁷ See J. Pauwelyn, R.A. Wessel and J. Wouters, 'Informal International Law as Presumptive Law', *op.cit.*

⁶⁸ J. Klabbers, 'Law-making and Constitutionalism', *op.cit.* See also Jan Klabbers, 'International Courts and Informal International Law', in Pauwelyn, Wessel and Wouters, pp. 217-240. While not referring to it, this approach comes close to the debate on 'output legitimacy', initiated by Fritz Scharpf. See further Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

⁶⁹ Klabbers, 'Law-making and Constitutionalism', *op.cit.* at 115.

⁷⁰ P. Craig, 'Postnational Rulemaking: Conceptions of Legitimacy', paper presented at the conference *Postnational Rulemaking between Authority and Autonomy*, University of Amsterdam, 20-21 September 2012.

However, ‘executive authority’ is usually used to describe (or promote) the role of ‘the executive’ in situations of secondary rulemaking in (domestic) constitutional systems.⁷¹

In the case of informal international law-making, however, it is not about authority to make secondary norms on the basis of primary legislation, it is in fact about primary norms. This may make it difficult to apply the ‘executive authority’ argument in our case. In addition, the technocratic (rather than the bureaucratic) version of executive authority seems to suffer from a changing societal attitude towards technocratic expertise.⁷² This, obviously, may have consequences for the extent to which the norm-setters can actually be seen as representing the final addressees of the norms,⁷³ and whether ‘expertise’ can form an additional source for legal norms.⁷⁴

Accepting informal law as contributing to a process of law-making does not to ignore that actors may perceive informal rules differently and may in fact opt for informality to evade legal obligations. As indicated by Klabbers, the presumption that we are dealing with law could be rebutted by the fact that “no one ever thought of making law”.⁷⁵ Admittedly, this is a tricky factor. After all, this is usually the reason not to consider any informal norm-setting as law.⁷⁶ To give one example: the Global Harmonization Task Force (GHTF) on medical devices,⁷⁷ list very concrete standards that are to be met before a product can be marketed.⁷⁸ Its 2005 Essential Principles of Safety and Performance of Medical Devices itself state that “[t]he document is intended to provide non-binding guidance to regulatory authorities for use in the regulation of

⁷¹ Cf. P. Craig and A. Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective*, Oxford: Oxford University Press, 2005; and, with regard to the EU, D.M. Curtin, *Executive Power of the European Union: Law, Practices and the Living Constitution*, Oxford: Oxford University Press, 2009.

⁷² Craig, ‘Postnational Rulemaking’, *op.cit.*, at 25: “There is less trust in technocracy than there was a generation ago. The idea that we should trust in those who know best, and that those with technical expertise should be regarded as *primus inter pares* in this respect, is now viewed with greater scepticism. The related idea that science provides ‘objective’ answers to certain problems that have to be dealt with in the political arena, has likewise come under strain. It has been recognized that the ‘answer’ may be contentious in scientific terms, and that any one version of the scientific solution may embody value judgments of a social, moral or political nature, even if such factors are not immediately apparent on the face of the decision.”

⁷³ W. Wallace and J. Smith, ‘Democracy or Technocracy? European Integration and the Problem of Popular Consent’, in J. Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995) 137-157, at 140.

⁷⁴ See for recent contributions in various policy fields: A. Alemanno, ‘Science and EU Risk Regulation: The Role of Experts in Decision-Making and Judicial Review’ in E. Vos, *European Risk Governance: Its Science, its Inclusiveness and its Effectiveness* (Connex Report Series, 2008); M. Ambrus, K. Arts, H. Raulus and E. Hey (eds), *Irrelevant, Advisors or Decision-Makers? The Role of ‘Experts’ in International Decision-Making* (Cambridge, 2013).

⁷⁵ J. Klabbers, ‘Law-making and Constitutionalism’, *op.cit.*

⁷⁶ For possible reasons for actors to opt for informal rather than formal law, see Pauwelyn, ‘Is It International Law or Not and Does it Even Matter?’ in Pauwelyn, Wessel, Wouters, *op.cit.* pp. 125-161.

⁷⁷ A. Berman, ‘Informal International Law-Making in Medical Products Regulation’, in A. Berman, et al., *op.cit.*, pp. 353-394.

⁷⁸ Essential Principles of Safety and Performance of Medical Devices, Doc. GHTF/SG1/N41R9:2005, 20 May 2005, section 5.12.3: ‘Devices where the safety of the patients depends on an external power supply should include an alarm system to signal any power failure.’ With many thanks to Dick W. P. Ruiter for finding and analyzing these examples. See further Ruiter and Wessel, ‘The Legal Nature of Informal International Law’ *op.cit.*

medical devices”.⁷⁹ While ‘non-binding’ by itself may indeed not form a reason to list it under ‘non-legal’, one may safely assume that the drafters indeed had the intention to prevent going to have to go to court in case of a violation of the norms. Moreover, in most cases ‘should’ rather than ‘shall’ is used in the description of what is expected of the addressees. This is in line with many other areas that have been researched. Yet, there are as many differences as there are cases. Some informal norms merely aim to be a source of subsequent domestic legislation. In that sense they would contribute to law-making, rather than being law themselves (although one may argue that the law-making process did already start at the international/transnational regulatory body/network, in particular when the only thing domestic law does is refer to an established norm or standard). In many other cases, however, the norms themselves aim to “determine individuals, private associations, enterprises, states, or other public institutions” (see above) from the outset. In these many cases, the norms are to be followed directly, without interference by a domestic legislator.

In fact, there are reasons to argue that the ‘informal’ norms are perceived by the addressees as *committing* them in their activities.⁸⁰ This then, according to Klabbers, could do the trick: the fact that people may actually perceive the norms as committing could be decisive. And, there may obviously also be cases where people don’t recognize law as law, in which case it still may be applied, as “in the end ... it is eventually the law which determines which consequences to attach to which acts.”⁸¹ So, even when ‘no one thought of making law’, it may be perceived as law by its addressees and the effects may be similar. The reason for that may be that expertise or stakeholder consensus as the source of the norms reflects material evidence of authority. If we accept the committing nature of both formal and informal norms, what then would be reasons for actors to opt for either route?

4.2 *Reasons to Opt for Informal Law*

A lot has been written on the question why states cooperate and are willing to create and expand international institutions. The most common approach to this question seems to be functionalist.⁸² Functionalist starting points are also used to explain the choice for formal or informal settings as they theorise about “the respective advantages and disadvantages of formal and informal approaches in responding to problems of collective action, incomplete contracting, and uncertainty, and making predictions about the conditions under which States might choose formal or informal approaches to

⁷⁹ Essential Principles of Safety and Performance of Medical Devices, *supra* note 78, at Preface (italics added).

⁸⁰ See: Ruiter and Wessel, *op.cit.* at 165; A. Flückiger, ‘Keeping Domestic Soft Law Accountable: Towards a Gradual Formalization’, in Pauwelyn, Wessel and Wouters, *Informal International Lawmaking*, *op.cit.*, pp. 409-436, at 415.

⁸¹ Klabbers, ‘Law-making and Constitutionalism’, *op.cit.* at 118-119.

⁸² Cf. recently also Trachman, *op.cit.* at 13-18, who at the same time links functionalism to new institutional economics.

lawmaking”.⁸³ Indeed, this type of arguments have generally formed the basis for the debate on soft-law in international relations. Thus, Abbott and Snidel argue that “international actors choose softer forms of legalized governance when those forms offer superior institutional solutions. [...] By using hard law to order their relations, international actors reduce transaction costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting. Doing so, however, also entails significant costs: hard law restricts actors’ behaviour and even their sovereignty.”⁸⁴ The hard- or softness of the legalization is then measured against the extent of obligation, precision and delegation (see above).

At the same time, Pollack and Shaffer, recently made a case for a ‘distributive approach’, to “help explain why and under what conditions formal and informal procedures can interact as antagonist as well as complements”.⁸⁵ They point to the fact that “[i]n a setting of distributive conflict, IN-LAW [informal law-making] procedures can provide alternative fora within which coalitions of States – and of non-State actors frozen out of participation in formal treaty-making – can advocate for their preferred international norms or counter-norms that would otherwise be out of reach”.⁸⁶ It is this combination (and above all the interconnectedness) of different fora that seems to be supported by our analysis of an ‘institutionalised global normative web’ (above). Actors operate in different fora at the same time and even in case of different (state and non-state) actors, we see a clear relation when norms adopted in one body affect norms in other bodies (a phenomenon we referred to earlier as ‘multilevel regulation’⁸⁷).

As stated above, formalities have to do with *output*, *process* or the *actors involved*. At the same time, escaping these same formalities is also what is said to make informal law more desirable and effective. Lipson, for example, explains that “informality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels”.⁸⁸ Indeed, in today’s increasingly complex and fast-paced world, informality may not only be the less costly option – with new technologies cutting down communication costs, the participation of diverse stakeholders through novel processes has become less costly – it may also be the more effective option, in that a treaty or formal international organization can be too rigid and states may not be able to do it alone (due to limited resources, knowledge or implementation capacity).

⁸³ M.A. Pollack and G.C. Shaffer, ‘The Interaction of Formal and Informal Lawmaking’, in Pauwelyn et al., *op.cit.*, pp. 241-270 at 244.

⁸⁴ K.W. Abbott and D. Snidel, ‘Hard and Soft Law in International Governance’, in Goldstein, et al. *op.cit.*, pp. 37-72, at 37-38.

⁸⁵ Pollack and Shaffer, *op.cit.*, at 244.

⁸⁶ *Ibid.* at 269.

⁸⁷ 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; and 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.

⁸⁸ C. Lipson, ‘Why Are Some International Agreements Informal?’, 45 *International Organization* (1991) 495-538, at 500.

Yet, the informal international law-making project, drew our attention to the fact that in making the choice for formal or informal settings or output, actors are aware of the fact that in practice this distinction may be less relevant and classic 'legalization' criteria may be less helpful. Informal rules can be committing, quite precise and authority to implement, interpret, and apply the rules may have been delegated to certain third parties. In one of his contributions to the project, Pauwelyn pointed to one of the ironies inherent in the choice for formal (or hard) international law:

"First, soft law (including [informal law-making]) seems to have equal and sometimes higher compliance rates than hard law and where there are courts in other fields they tend to refer to non-binding instruments anyhow. Second, the toolbox or secondary rules of international law to regulate the life-cycle of the instrument may not technically apply but they could be applied by analogy. Third, given its neutrality and value-free architecture, international law does not add substantive legitimacy over and above what non-binding instruments can offer. The opposite may even be true. Fourth, unlike traditional international law, instruments outside international law make no problem with involving new actors (be they agencies, the private sector, or NGOs)." ⁸⁹

The consequence of this line of reasoning may be far-reaching: "if making an instrument legally binding under international law may not make much of a difference anyhow, why should negotiators be so afraid of making something legally binding? Rather than a move away from law we should then perhaps see a move back to international law". ⁹⁰ This underlines that the question of why international actors opt for either formal or informal cooperation is much more complex and that political science and institutional economics have only been able to provide part of the answer. The turn to informality seems to be much more related to the involvement of non-state actors in norm-setting and the realisation by state actors that it is simply impossible (and indeed perhaps not at all necessary) to mould all their agreements into traditional formal legal instruments. International cooperation has moved from agreements on general larger issues, to detailed, often quite technical, issues. At the same time, classic explanations referring to the need for legal certainty and stability to reduce (transaction) costs seem to be confronted with a need for flexibility, to be able to take new and fast (technological) developments into account and prevent international law from being outdated the moment a consensus on a treaty provision has been reached.

5. (Constitutional) Consequences of International Decisions: New Questions for International Law

Renewed attention for the relationship between the law-making function of international organizations and individual citizens was triggered in particular by the

⁸⁹ J. Pauwelyn, 'Is it International Law or Not, and Does it Even Matter?', *op.cit.*, at 151.

⁹⁰ *Ibid.*

Kadi-judgments of the European Court of Justice and more in general by the acknowledgment that decisions of international organizations could directly impact the life of individual citizens.⁹¹ While the distance between international decisions and individuals has been noted by other academic disciplines (for instance by pointing to a principal-agent problem⁹²), this development raised new questions – for instance related to the constitutionalisation of the international legal order, the legitimacy of the decisions or the accountability of the actors.⁹³ While ‘constitutionalism’ is a more general theme in current international legal discourse⁹⁴ the increasing autonomy of international organizations (or at least the perception that this is the case) has triggered a new stream of literature, which basically aims to apply (variations of) constitutional and similar state-oriented notions related to the rule of law to international organizations.⁹⁵

The question is to which extent a ‘turn to informality’ raises additional constitutional questions.⁹⁶ While some studies have pointed to problems related to (democratic) legitimacy – in particular when experts rather than democratically elected politicians are in the driver’s seat⁹⁷ – others pointed to the fact that the possible negative side-effects of international/transnational regulation in relation to legitimacy should always be weight against alternatives at national or intergovernmental level, which are often less legitimate.⁹⁸ This is also general seen as an outcome of the research on Global

⁹¹ See of the many publications on the *Kadi*-case, for instance G. De Búrca, ‘The European Court of Justice and the International legal Order after *Kadi*’, Jean Monnet Working Paper 01/01.

⁹² R. Vaubel, ‘Principal-Agent Problems in International Organizations’, *Review of International Organizations*, 2006, pp. 125–138.

⁹³ See also J. Klabbers, ‘Law-Making and Constitutionalism’, *op.cit.*, at 12, arguing that non-state actors have “started to compete with states for the scarce resource of politico-legal authority (i.e. the power to set authoritative standards).” In general the book discusses international constitutionalism as a framework within which further normative debate on a legitimate and pluralist constitutional order can occur (Klabbers, at 4, 10).

⁹⁴ See for instance J. Klabbers, A. Peters and G. Ulfstein (Eds.), *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009; and A. Peters, ‘Are we Moving toward Constitutionalization of the World Community’, in A. Cassese (Ed.), *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press, 2012, pp. 118–135.

⁹⁵ A more specific stream focuses on the creation and application of administrative law in international institutions. Cf. also E. Benvensiti, ‘The Interplay between Actors as a Determinant of the Evolution of Administrative Law in International Institutions’, *Law and Contemporary Problems*, 2105, pp.319–340.

⁹⁶ Cf. also S. Duquet, J. Pauwelyn, R.A. Wessel and J. Wouters, ‘Upholding the Rule of Law in Informal International Lawmaking Processes’, *Hague Journal on the Rule of Law*, 2014, pp. 75–95.

⁹⁷ See for instance G.C.A. Junne, ‘International Organizations in a Period of Globalization: New (Problems of) Legitimacy’, in Coicaud and Heiskanen, *op.cit.*, pp. 189–220 at 219: “It is the rise of such alternative structures as a result of the globalization process that might prove to be a bigger challenge to the legitimacy of IOs that the direct impact of globalization on the demand for IO activity and on the effectiveness of their actions.” Cf. also M. Ambrus, K. Arts, E. Hey and H. Raulus (Eds.), *The Role of ‘Experts’ in International and European Decision-Making Processes: Advisors, Decision-Makers or Irrelevant Actors?*, Cambridge: Cambridge University Press, 2014.

⁹⁸ Cf. A. Pereira, ‘Why Would International Administrative Activity be Less Legitimate? – A Study of the Codex Alimentarius Commission’, in Von Bogdandy et al., *op.cit.*, pp. 541– 571. See also M. Poiars Muduro, ‘Europe and the Constitution – What if this is as Good as it gets?’, in J.H.H. Weiler and M. Wind (Eds.), *European Constitutionalism beyond the State*, 2003; and N.K. Komisar, *Imperfect Alternatives, Choosing Institutions in Law, Economics and Public Policy*, 1994.

Administrative Law.⁹⁹ In fact, as we have recently argued, given the legitimacy problems of traditional international law-making, ‘informal international law-making’ may have to prevail because it replaces a ‘thin state consent’ with a ‘thick stakeholder consensus’.¹⁰⁰ Indeed, the assumption that traditional international law is, by definition, legitimate and new forms must be presumed not to be may be challenged. This is not to say that a turn to informality is without problems. Constant vigilance is required especially to ensure sufficient domestic oversight and meaningful participation of all stakeholders, critiques to which informal law-making mechanisms have recently responded with surprising speed. Our claim is only that new *and* traditional can offer legitimate forms of cooperation and that the conventional dividing line between formal and informal international law-making – with only the former being effective, needing control or deserving legitimacy – no longer holds. In the long term, we may see a transformation of both formal and informal international law-making towards the ‘thick stakeholder consensus’ benchmark, emancipating (but also controlling) new actors, new processes and new types of normative outputs. New forms of cooperation can be given legal effect already today by international courts, in particular when they meet the ‘thick stakeholder consensus’ benchmark or triple barreled meta-norm of procedural integrity axed on (i) the source, respectability, and authority of the norm creating body, (ii) the transparency, openness, and neutrality in the norm’s procedural elaboration, and (iii) the substantive quality, consistency, and overall acceptance (consensus) and objectivity of the norm. If correct, this assessment has consequences for the entire discipline of international law, including law school teaching.

⁹⁹ A relevant GAL publication in this respect is N. Krisch, ‘The Pluralism of Global Administrative Law’, *EJIL*, 2006, pp. 262-274.

¹⁰⁰ J. Pauwelyn, R.A. Wessel and J. Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’, *op.cit.* This section is largely based on that publication.