
When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking

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Abstract

Formal international law is stagnating in terms both of quantity and quality. It is increasingly superseded by 'informal international lawmaking' involving new actors, new processes, and new outputs, in fields ranging from finance and health to internet regulation and the environment. On many occasions, the traditional structures of formal lawmaking have become shackles. Drawing on a two-year research project involving over 40 scholars and 30 case studies, this article offers evidence in support of the stagnation hypothesis, evaluates the likely reasons for it in relation to a 'turn to informality', and weighs possible options in response. But informal structures can also become shackles and limit freedom. From practice, we deduce procedural meta-norms against which informal cooperation is increasingly checked ('thick stakeholder consensus'). Intriguingly, this benchmark may be normatively superior (rather than inferior) to the validation requirements of traditional international law ('thin state consent').

1 Introduction

It is a mantra amongst international lawyers that the field of international law is expanding, exponentially.¹ This trend, also referred to as the legalization of world

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¹ See Alvarez, 'The New Treaty Makers', 25 *BC Int'l & Comp L Rev* (2002) 213, at 216 and Peters, 'The Growth of International Law between Globalization and the Great Power', 8 *Austrian Rev Int'l and European L* (2003) 109, at 109.

politics,² may have been true until a decade ago. It is highly questionable today. Formal international law is stagnating in terms both of quantity *and* quality. It is increasingly superseded by ‘informal international lawmaking’³ involving new actors, new processes, and new outputs. On many occasions, the traditional structures of formal lawmaking have become shackles. Drawing on a two-year research project involving over 40 scholars and 30 case studies,⁴ this article offers evidence in support of the stagnation hypothesis (section 2), evaluates the likely reasons for it in relation to a ‘turn to informality’ (section 3), and weighs possible options in response (section 4). The international legal order has radically transformed in the past, on all three axes of actors, processes, and outputs. The conceptual boundaries of how international law may look in the future are wide open. Crucially, however, also informal structures can become shackles and limit freedom. Informal lawmaking must therefore be kept accountable, through tailor-made accountability mechanisms, especially towards stakeholders not involved in the network but affected by it (section 5). Finally, focusing on the short to medium term, the article questions whether some of the new outputs of international cooperation could already be seen as part of traditional international law, and how traditional and new forms are interacting before international tribunals (section 6). In this respect, it proposes certain procedural meta-norms against which informal cooperation forms ought to be checked, which we refer to as ‘thick stakeholder consensus’ imposing limits in respect of actors (authority), process, and output. Intriguingly, this benchmark may be normatively superior (rather than inferior) to the validation requirements of traditional international law, coined here as ‘thin state consent’. In this sense, formal international law is stagnating not only in quantity but also quality.

2 Evidence of the Slowdown in Formal International Lawmaking

For each decade since the 1950s, the number of new multilateral treaties deposited with the UN Secretary General was around 35.⁵ In the 10 years between 2000 and 2010, this number dropped quite dramatically to 20. In the preceding five decades

² J. Goldstein *et al.* (eds), *Legalization and World Politics* (2001).

³ We define ‘informal international lawmaking’ as follows: ‘[c]ross-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 other traditional source of international law (*output informality*)’: J. Pauwelyn, R.A. Wessel, and J. Wouters (eds), *Informal International Lawmaking* (2012), at 22.

⁴ The project was funded by the Hague Institute for the Internationalization of Law (HiiL). See the project website at www.informallaw.org, Pauwelyn *et al.*, *supra* note 3, and A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (eds), *Informal International Lawmaking: Case Studies* (2012).

⁵ 36 in the 1950s; 35 in the 1960s; 36 in the 1970s; 34 in the 1980s and 37 in the 1990s: see UN Treaty Collection, Multilateral Treaties Deposited with the Secretary General (MTDSG, totalling 507 at the time of writing), available at: http://treaties.un.org/pages/DB.aspx?path=DB/MTDSG/page1_en.xml&menu=MTDSG (counting only new multilateral treaties and not including amendments, protocols, or annexes to existing multilateral agreements).

it had never been below 34. Between 2005 and 2010, only nine new multilateral treaties were deposited; in 2011, 2012, and 2013 not a single one.⁶ The broader UN Treaty Series database confirms this downward trend as of the 2000s, both for bilateral treaties (12,566 concluded in the 1990s; only 9,484 concluded in the 2000s) and multilateral treaties (406 entries in the 1990s; down to 262 in the 2000s).⁷ Looking at individual countries, in the 1990s, 210 treaties were transmitted to the US Senate. In the 2000s, this number was down to 136.⁸ Similarly, the number of international agreements reported to the US Congress under the Case Act⁹ has fallen significantly in the last years, from 313 in 2006 to 288 in 2007, 236 in 2008, 232 in 2009, 197 in 2010, 226 in 2011, and only 203 in 2012.¹⁰ In France as well we see a significant dip in the number of treaties reported, by date of signature, from 1,152 in the 1990s to 991 in the 2000s.¹¹ Most tellingly, the number of multilateral treaties (including such things as protocols, amendments, and annexes to existing multilateral treaties, but excluding European treaties) was down from 206 in the 1990s to only 90 in the 2000s.¹² The official treaty database of the Netherlands reports a similar decline: from 1,427 treaty entries in the 1990s to 1,197 in the 2000s. Amongst this treaty activity, the number of hits under multilateral treaties is down from 619 to 587.¹³ Belgium's treaty record displays a similar tendency (813 hits for the 1990s; 407 for the 2000s).¹⁴ Confirming this trend, Abbott, Green, and Keohane calculate that in the 1990s the total number of multilateral environmental agreements in force

⁶ Significantly, when looking at five year periods, the numbers are down from 20 (1990–1995) to 17 (1995–2000), 12 (2000–2005), and 9 (2005–2010). When counting not only new multilateral agreements deposited but all entries into the UN MTDSG database (including such things as amendments, protocols, and annexes) the downward trend as of 2000 is confirmed: 102 entries in the 1970s; 99 in the 1980s; 109 in the 1990s (the highest number since recording started); and a decline to 77 in the 2000s (the lowest number since the 1960s, when 57 entries were recorded).

⁷ See UN Treaty Series (UNTS), available at: <http://treaties.un.org/pages/UNTSOnline.aspx?id=1>. Multilateral treaties in this database include closed multilateral treaties, multilateral treaties deposited with the UN SG, multilateral not deposited with the UN SG, and open multilateral treaties.

⁸ Numbers are taken from The Library of Congress, available at: <http://thomas.loc.gov/home/treaties/treaties.html>.

⁹ By statute, 1 USC 112b(a), the US Secretary of State is required to transmit to the US Congress the text of any 'international agreement' other than a 'treaty' (in the sense of Art. II:2 of the US Constitution, that is a treaty to be submitted for approval by 2/3 of the US Senate). Such other 'international agreements' are not 'treaties' in the US constitutional sense but are legally binding under international law. They include so-called executive agreements and congressional-executive agreements (none of which are adopted by 2/3 of the US Senate).

¹⁰ Numbers are taken from the US Department of State website, available at: www.state.gov/s/l/treaty/caseact/. For an assessment of variation across issue areas see Voigt, 'The Economics of Informal International Law: An Empirical Assessment', in Pauwelyn *et al.*, *supra* note 3 at 81.

¹¹ Numbers are taken from the French government's *Base des traités et des accords*, available at: http://basedoc.diplomatie.gouv.fr/Traites/Accords_Traites.php.

¹² Since the 1930s, when the total number of multilateral treaties was 65, this number had never fallen below 135, the number in the 1940s, with a peak of 265 in the 1950s.

¹³ Numbers are taken from the official Dutch *Verdragenbank*, available at: www.minbuza.nl/producten-en-diensten/verdragen.

¹⁴ See www.ejustice.just.fgov.be/wet/wet.htm. The picture may be slightly affected by the slower pace of publication of approval laws due to the involvement of a high number of parliamentary assemblies for so-called 'mixed treaties' and the political crisis between 2008 and 2011.

grew by 146 per cent, whereas between 2002 and 2012 this increase was only 36 per cent. They add 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’.¹⁵ Even in today’s most dynamic and studied sub-branch of international law – international investment law – a marked slowdown has taken place in the number of investment treaties concluded since the late 2000s.¹⁶ Another indication of the tendency away from traditional international lawmaking is the follow-up given to draft texts prepared by the International Law Commission (ILC). Whereas the ILC’s work previously resulted often in new multilateral treaties (e.g., the 1969, 1978, 1983, and 1986 Vienna Conventions on treaty law) the most recent time this happened was the 2004 UN Convention on Jurisdictional Immunities of States and their Property, following the ILC’s 1991 draft articles on this matter.

Some may object that the picture outlined above fails to take into account other dynamics of international law, such as the continuing evolution of customary international law, the on-going activity of international organizations (IOs), and the steady production of case law by international courts and tribunals. As to customary law, although we agree that intensified international interaction may lead to a more rapid formation of customary rules in specific instances,¹⁷ today’s preference of states for informal arrangements obviously also impacts upon customary law, as the essence of the latter’s *opinio juris* component relates precisely to the legally binding character of an obligation.¹⁸ Moreover, with fewer multilateral conventions generated it becomes harder to find strong evidence of *opinio juris* confirmed by practice.¹⁹ As to the output of IOs, although they obviously continue to function and produce plenty of resolutions, statements, and decisions, many of the normative instruments they recently produced or endorsed are legally non-binding. A telling example is the World Health Organization (WHO). While as recently as 2003 it produced its very first multilateral treaty, the Framework Convention on Tobacco Control (FCTC),²⁰ this convention is

¹⁵ 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 notes 2–4.

¹⁶ See van Aaken, ‘The International Investment Protection Regime through the Lens of Economic Theory’, in M. Waibel, A. Kaushal, K.-H. Chung, and C. Balchin, *The Backlash Against Investment Arbitration* (2010), 537; Wouters, Duquet, and Hachez, ‘International Investment Law: The Perpetual Search for Consensus’, in O. De Schutter, J. Swinnen, and J. Wouters (eds), *Foreign Direct Investment and Human Development* (2013), at 25, 49–51.

¹⁷ See, e.g., with an emphasis on the significance of certain GA resolutions during times of fundamental change, Scharf, ‘Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change’, 43 *Cornell Int’l LJ* (2011) 439.

¹⁸ See *Case concerning military and paramilitary activities in and against Nicaragua – Merits* (Nicaragua/United States), judgment of 27 June 1986 [1096] ICJ Rep. 14, at para. 188. Cf. Brunnée, book review ‘Precautionary Legal Duties and Principles in Modern International Environmental Law’, by H. Hohmann’, 33 *Canadian Yrbk Int’l L* (1996) 484, at 487.

¹⁹ *Nicaragua Case*, *supra* note 18, at para. 183; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep. 13, at para. 27, as recently confirmed in *Jurisdictional Immunities of the State (Germany/Italy: Greece Intervening)* [2012] ICJ Rep. 99, at para. 55.

²⁰ Adopted by the World Health Assembly in 2003 and in force in 2005, available at: www.who.int/fctc/en/.

put into practice largely through legally non-binding 'Guidelines for Implementation'. Moreover, subsequent WHO efforts to tackle problems related to diet and alcohol were not enshrined in a formal treaty, but rather in non-binding guiding principles part of a Global Strategy on diet (2004²¹) and alcohol (2010²²).

Furthermore, a considerable number of classical multilateral institutions currently face serious challenges, from deep divisions at the UN Security Council²³ to immobilism at the WTO,²⁴ severe budget cuts or even membership dropout in a variety of organizations,²⁵ and difficult reform processes.²⁶ Unlike the post-cold war enthusiasm of the 1990s – matched historically only by the post-World War I League of Nations 'frenzy of law-making'²⁷ – there is a rather broad acknowledgment that traditional forms of multilateralism are facing a deep crisis.²⁸ It is partly because of the dissatisfaction with the rigidities and inadequacies of classical international institutions that governments have turned to informal cooperative fora (*infra*, 3A). Although international courts and tribunals continue their steady output, they mainly contribute – as they should – to the interpretation and clarification of existing international law rather than to developing new legal norms and principles.²⁹ Moreover, most of these

²¹ Global Strategy on Diet, Physical Activity and Health, adopted by the World Health Assembly in 2004, available at: www.who.int/dietphysicalactivity/en/.

²² Global Strategy to Reduce the Harmful Use of Alcohol, adopted by the World Health Assembly in 2010, available at: www.who.int/substance_abuse/activities/globalstrategy/en/.

²³ Illustrative of those divisions are the three recent joint vetoes expressed by Russia and China on draft UN SC resolutions regarding Syria, respectively on 4 Oct. 2011, 4 Feb. 2012, and 19 July 2012. Interestingly, this has led to a remarkable resolution of the UN GA adopted on 3 Aug. 2012, A/RES/66/253, overtly criticizing the SC for its failure to take action on the Syria crisis.

²⁴ See Pauwelyn, 'The WTO in Crisis: Five Fundamentals Reconsidered, WTO Public Forum', Sept. 2012, available at: www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/article_e.htm?art=9.

²⁵ The financial crisis since 2007 has led to severe cuts in membership contributions to a variety of organizations. See, e.g., the 2012–2013 budget of the Council of Europe (available at: www.coe.int/aboutcoe/index.asp?page=budget), UN Res. A/RES/66/248 of 24 Dec. 2011, and the agreement reached on 8 Feb. 2013 on the EU 2014–2020 budget, the first large budget cut in the EU's history. It spurred governments critically to review work and budgets of multilateral organizations, especially in the development field: see *inter alia* Australian Government/Australian AID, *Australian Multilateral Assessment* (Mar. 2012); DFID, *Multilateral Aid Review. Taking Forward the Findings of the UK Multilateral Aid Review* (Mar. 2011); Ministerie van Buitenlandse Zaken, *Samenwerken aan mondiale uitdagingen. Nederland en multilaterale ontwikkelingssamenwerking* (Apr. 2009); *Guide de gestion des organisations internationales*, French Ministry of Foreign Affairs, 13 Sep. 2012. Meanwhile, the UK and France have withdrawn from the UN Industrial Development Organization (UNIDO).

²⁶ E.g., the ever-ongoing talks on the reform of the UN SC: see, *inter alia*, Blum, 'Proposals for UN Security Council Reform', 99 *AJIL* (2005) 632; Wouters and Ruys, 'Security Council Reform: a New Veto for a New Century?', 44 *Revue de droit militaire et de droit de la guerre* (2005) 139; or the slow implementation of the reform of the IMF decided by the G20 in 2010 in order to accommodate the BRIC countries: G20, 'Communiqué Meeting of Finance Ministers and Central Bank Governors', Gyeongju, Republic of Korea, 23 Oct. 2010, at para. 5, available at: www.g20.utoronto.ca/2010/g20finance101023.html.

²⁷ W.G. Grewe, *The Epochs of International Law* (trans. and revised by M. Byers, 2000), at 603.

²⁸ See C. Brummer, *Minilateralism, How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft* (2014).

²⁹ See, however, as to the impact of the case law of international criminal tribunals on customary international law and on domestic legal systems Baker, 'Customary International Law in the 21st Century: Old Challenges and New Debates', 21 *EJIL* (2010) 173.

(quasi-)judicial bodies were set up in the late 20th century. No new international court with broad jurisdiction has been conceived in the 21st century.³⁰

3 Explaining this Slowdown, and the Rise of Informal Lawmaking

What could explain this slowdown in formal international lawmaking during the last decade? It is not that cross-border activity has become any less intense. As Abbott *et al.* point out, 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’.³¹ Whereas formal international lawmaking has slowed down, a rich tapestry of novel forms of cooperation, ostensibly outside international law, is thriving. Cross-border agreement takes different forms and involves a different constellation of actors and processes, outside the traditional confines of international law. The nomenclature used is increasingly diverse and creative: everything but the formal terms treaty, agreement, or IO. Instead, 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.³² 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.³³ 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.

Multiple factors, many issue- and/or country-specific, may explain this trend, and it is methodologically difficult to prove that one or the other is more pervasive. The shift from formal to informal international lawmaking can partly be explained by saturation with the existing treaties and changed policy preferences of states (A). However, at a more fundamental level the multiple case studies we conducted³⁴ converge around deep societal changes that are not unique to international law but affect both international

³⁰ Admittedly, the UN SC set up an *ad hoc* international criminal tribunal with very circumscribed jurisdiction to handle the killing of Lebanon’s former prime minister Rafiq Hariri by UN SC Res. 1757 of 30 May 2007.

³¹ Abbott *et al.*, *supra* note 15, at 2.

³² See the many cases discussed in Pauwelyn *et al.*, *supra* note 3, and Berman *et al.*, *supra* note 4.

³³ Herman, ‘The New Multilateralism: The Shift to Private Global Regulation’, *Commentary* No. 360, C.D. Howe Institute (2012), at 5.

³⁴ See Pauwelyn *et al.*, *supra* note 3, and Berman *et al.*, *supra* note 4.

and national legal systems,³⁵ in particular: the transition towards an increasingly diverse network society (B) and an increasingly complex knowledge society (C).

A Saturation and Changed Policy Preferences of States

Some of the slowdown, especially in multilateral treaty-making, can be explained by the fact that multilateral treaties now exist on most major policy issues. Where the area is covered by existing conventions, new treaty-making appears to be very difficult (e.g., negotiating a successor to the Kyoto Protocol, or concluding the WTO's Doha Round), because of the diversity of interests involved, lack of leadership, or simply because of the burdensome procedures that apply.³⁶ Only in areas where no treaty framework existed as of yet, some recent breakthroughs have occurred: e.g., the adoption of the Arms Trade Treaty in the spring of 2013.³⁷ A certain saturation, or treaty fatigue, seems to have descended on states, at least for the time being.³⁸ Obviously, this is not explicitly acknowledged in public statements. Still, policy preferences expressed by a number of states confirm the stagnation hypothesis and are likely further to strengthen it in the future. In Germany, for example, federal ministries are instructed, 'before international law treaties ... are elaborated on and concluded', to 'check whether a binding contract under international law is irrefutable or whether the same goal may also be attained through other means, especially through understandings which are below the threshold of an international agreement'.³⁹ Similarly, Canada's policy is that 'if a matter is of a routine or technical nature, or appears to fall entirely within the existing mandate and responsibility of a department or agency, and if it does not contain substantive matter which should be legally binding in public international law, it is often preferable to deal with the matter through the use of a non-legally binding instrument'.⁴⁰ The 2010 US National Security Strategy, in turn, refers to the 'shortcomings of international institutions that were developed to deal with the challenges of an earlier time' and calls on US authorities 'to spur and harness a new diversity of instruments, alliances, and institutions'.⁴¹

³⁵ On the emergence of new actors and forms in domestic legal systems see E. Bohne, *Der informale Rechtsstaat* (1981).

³⁶ Some organizations have drawn lessons from this. The International Maritime Organization (IMO), for instance, has learned from the difficulty of amending its conventions and has introduced a so-called 'tacit acceptance' procedure, notably for the Annexes to its SOLAS convention (International Convention for the Safety of Life at Sea). See www.imo.org/About/Conventions/Pages/Home.aspx.

³⁷ Arms Trade Treaty, done at New York, 2 Apr. 2013. The UN GA adopted the treaty with 154 votes in favour, 3 votes against, and 23 abstentions. Meanwhile 85 states have signed the treaty and 4 have ratified it: www.un.org/disarmament/ATT/.

³⁸ See, e.g., Anton, "'Treaty Congestion" in International Environmental Law, in S. Alam, J.H. Bhuiyan, T.M.R. Chowdhury, and E.J. Techera (eds), *Routledge Handbook of International Environmental Law* (2012), at 651.

³⁹ Bundesregierung, *Gemeinsame Geschäftsordnung der Bundesministerien* (2009), available at: www.bmi.bund.de/cae/servlet/contentblob/139852/publicationFile/55730/ggo.pdf (authors' translation).

⁴⁰ Canada Treaty Information, 'Policy on Tabling of Treaties in Parliament' (2011), Annex C, available at: www.treaty-accord.gc.ca/procedure.asp.

⁴¹ US National Security Strategy, 27 May 2010, available at: www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

The treaty stagnation *viz.* saturation thesis can be further underpinned with the following findings. First of all, many multilateral treaties have created their own governance regimes in the context of which non-binding rulemaking takes place through Conferences of the Parties (CoPs), Meetings of the Parties (MoPs), and/or other committees or working groups.⁴² The example of the WHO's FCTC was already cited above: no fewer than seven sets of (legally non-binding) 'guidelines for implementation' have been adopted by its CoPs and work on additional guidelines is in progress through working groups.⁴³ Especially within the area of multilateral environmental agreements, such bodies are very active in developing non-binding rules. Telling examples are, apart from the well-known cases of the Biodiversity Convention and the UN Framework Convention on Climate Change (UNFCCC) whose respective CoPs have literally produced hundreds of decisions and recommendations:⁴⁴ the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, within which a large body of technical guidelines has been developed by government expert groups and approved by the CoPs;⁴⁵ the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, whose MoPs have taken hundreds of decisions on policy, legal, non-compliance, science, technology, and technical issues (incorporated in a 'Handbook' by UNDP);⁴⁶ and, at more regional level, UNICE's 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP), its eight protocols and the extensive guidance documents adopted by LRTAP's Executive Body.⁴⁷ The enormous level of detail and technicality of the norms concerned and the constant need for adjusting, expanding, and updating them, make formal international lawmaking *de facto* a less preferred option.⁴⁸

Secondly, one notices a certain backlash after the wave of international treaty-making in the 1990s. Many states have become increasingly reluctant in the face of what they consider an 'invasion' of their domestic legal systems by international norms which, in some cases, take precedence over national legislation and even deeply held constitutional values. In addition, a democratic concern is at play: thus, the rejection by the US Senate of the UN Convention on the Rights of Persons with Disabilities in December 2012 was triggered by the question 'whether U.S. laws should be made by

⁴² For an analysis of the lawmaking activity of CoPs as a continuous interactional process see Bruneau, 'COPing with Consent: Law Making under Multilateral Environmental Agreements', 15 *Leiden J Int'l L* (2002) 1. Regarding the need to inform such institutional arrangements based on scientific knowledge see Bowman, 'Beyond the "Keystone" CoPs: the Ecology of Institutional Governance in Conservation Treaty Regimes', 15 *Int'l Community L Rev* (2013) 5. CoPs obviously do not fill the governance gaps if an area is not regulated by multilateral agreement, such as water governance: see Cullet, 'Governing the Environment without CoPs: the Case of Water', 15 *Int'l Community L Rev* (2013) 123.

⁴³ See www.who.int/fctc/guidelines/en/.

⁴⁴ See respectively, for the Biodiversity Convention: www.cbd.int/decisions/ and for the UNFCCC: <http://unfccc.int/documentation/documents/items/3595.php> (with a search database of 7,112 documents).

⁴⁵ See www.basel.int/TheConvention/Overview/Milestones/tabid/2270/Default.aspx.

⁴⁶ See http://ozone.unep.org/new_site/en/index.php and, for the Handbook, http://ozone.unep.org/Publications/MP_Handbook/MP-Handbook-2012.pdf.

⁴⁷ See www.unece.org/env/lrtap/.

⁴⁸ About the economics of the choice of regulatory instruments in international environmental law see, e.g., Wiener, 'Global Environmental Regulation: Instrument Choice in legal Context', 108 *Yale LJ* (1999) 677.

politicians held accountable to Americans through the ballot box or by unaccountable officials in multinational organizations'.⁴⁹ Apart from this, emerging powers, in particular China, have generally shown reluctance *vis-à-vis* binding international obligations which could hamper their growth potential.⁵⁰

Last but not least, the financial crisis since 2007 and the preoccupation with domestic problems have not only affected US and European leadership in international lawmaking and international affairs generally,⁵¹ they have also made them more cautious about entering into (costly) new international legal obligations and structures.

B An Increasingly Diverse Network Society: New Actors, New Processes

Besides a degree of saturation, we are also witnessing a move from societies of individuals (at the national level) and a society of territorial states (at the international level) to an increasingly transnational and diverse society of networks.⁵² These networks both *disaggregate* the state and *transcend* the state, thereby multiplying the types of actors and processes involved in cross-border cooperation. Within states, new internationally active actors have emerged which cooperate with their counterparts across borders, be they industry- or sector-specific regulators, competition authorities, central banks, regions, provinces or cities, judges, or parliaments. Beyond states, new actors have converged not on national, let alone sub-national, interests of the nation state, but on economic or societal interests that span across territories, be it transnational corporations, global NGOs (think of Amnesty International or *Médecins sans frontières*), or international coalitions of consumers, farmers, workers, or other special interests or citizens' groups.⁵³ As Abbott *et al.* note, whereas the

⁴⁹ See Kyl, Feith and Fonte, 'The War of Law. How New International Law Undermines Democratic Sovereignty', *Foreign Affairs* (July/Aug. 2013) 115. Similar questions pertaining to the political (un) accountability of the prosecutor of the International Criminal Court were voiced from a US perspective: see Bolton, 'The United States and the International Criminal Court', Remarks to the Federalist Society, 14 Nov. 2002, available at: <http://2001-2009.state.gov/t/us/rm/15158.htm>.

⁵⁰ See, for instance, regarding climate change: Belis and Schunz, 'Global Climate Change Governance and the Energy Challenge: European and Chinese Perspectives', in J. Defraigne, P. Defraigne, T. de Wilde, and J. Wouters (eds), *China, the EU and the Restructuring of Global Governance* (2012), at 201, 209. For the possible impact of the rise of the BRICS on the evolution of international law and international organizations see, *inter alia*, P.B. Casella, *BRIC – Brésil, Russie, Inde, Chine et Afrique du Sud: à l'heure d'un nouvel ordre juridique international* (2011).

⁵¹ See also, with special emphasis on China, James, 'International Order after the Financial Crisis', 1 *Pennsylvania State J L & Int'l Affairs* (2013) 275.

⁵² A.-M. Slaughter, *A New World Order* (2004); Abbott and Snidal, 'Strengthening International Regulation Through Transnational New Governance', 42 *Vanderbilt J Transnat'l L* (2009); Tietje, 'History of Transnational Administrative Networks', in O. Dilling, M. Herberb, and G. Winter (eds), *Transnational Administrative Rule-Making, Performance, Legal Effects, and Legitimacy* (2011), at 23.

⁵³ See Krisch and Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', 17 *EJIL* (2006) 1; A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann, and M. Goldmann (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010).

number of IGOs has grown at an average annual rate of only 3 per cent since 1990, NGOs – which are just one type of private transnational organization – have grown at a rate of nearly 10 per cent.⁵⁴

On top of that also the number of states themselves has increased and, as importantly, the power differences between some of them have flattened. Whereas the cold war period pitted two blocks against each other (with a Third World rising in the background), the spectre of sole US hegemony did not outlive the 1990s for long. Most characteristic of the 2000s is the emergence of new powers such as China, Brazil, India, and South Africa and the relative decline of European powers. As indicated above, this diversity has given rise to new clashes and divisions and has not made consent-based solutions easier.⁵⁵ At the same time, it has also created and enabled new alliances and networks such as the BRICS and G-20.

This diverse network society has given rise to new actors and new forms or processes of cooperation, other than those traditionally recognized by international law.⁵⁶ The state remains a pivotal entity of interest aggregation, legitimation, and control. Yet, it is supplemented, assisted, corrected, and continuously challenged by a variety of other actors, be they regulators, national and international agencies, city mayors, businesses, or NGOs who – out of technical necessity,⁵⁷ e.g., because they cannot legally conclude a treaty or join an IO – are pushing international lawmaking from the formal to the informal arena.

C An Increasingly Complex Knowledge Society: New Outputs

Besides treaty fatigue and the rise of new actors and processes, also the output or type of cooperation emerging has changed and diversified. It used to be carefully negotiated but subsequently relatively stable treaties consented to by states – or resolutions issued by IOs set up by those same states – on the assumption that state representatives most legitimately represent the people. In an increasingly complex society – complexity at all levels: political, technological, scientific, regulatory, etc. – authority flows from other sources too, both public *and* private,⁵⁸ in particular, expertise, knowledge, or acceptance by affected stakeholders.⁵⁹ In addition, complexity and the resulting uncertainty and rapid change that come with it, require more flexible norms or guidelines, grounded in practical experience and expertise and continuously corrected to

⁵⁴ Abbott *et al.*, *supra* note 15, at 3 and note 12.

⁵⁵ See Pauwelyn, 'The End of Differential Treatment for Developing Countries? Lessons from the Trade and Climate Change Regimes', 22 *RECIEL* (2012) 29.

⁵⁶ The argument has been made that some of these new powers (e.g., China) have an inherent preference for more informal modes of cooperation. To the extent that this is correct, the stagnation of international law may go hand in hand with the rise of these new powers. See Kahler, 'Legalisation as Strategy: The Asia-Pacific Case', in J.L. Goldstein, M.O. Kahler, R. Keohane, and A.-M. Slaughter (eds), *Legalisation and World Politics*, (2001), at 165–167.

⁵⁷ See Hartwich, 'ICANN – Governance by Technical Necessity', in Bogdandy *et al.*, *supra* note 52, at 575.

⁵⁸ See, *inter alia*, A. Marx, J. Swinnen, M. Maertens, and J. Wouters (eds), *Private Standards and Global Governance* (2012); H. Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (2005).

⁵⁹ H. Willke, *Smart Governance, Governing the Global Knowledge Society* (2007).

take account of new developments and learning.⁶⁰ As Scott observes, in the context of financial norms emanating from the Basel Committee, '[i]t appears that Basel II may be more like Basel 2.0 (in software language) to be continuously updated by later "releases"'.⁶¹ Abbott *et al.* argue that although formal IOs are more powerful (as they receive resources and authority from states), private transnational organizations are more flexible and nimble and can, in an increasingly dense institutional landscape, more easily adapt, find their niche, and make quick and decisive strategic decisions. On this basis, they 'expect the ecology of international institutions to continue to change, toward relatively greater activity by private organizations, clubs, networks and partnerships compared to formal public institutions'.⁶²

In sum, the societal undercurrents described above – essentially, the emergence of an increasingly diverse and complex network/knowledge society – is transforming the actors, processes, and outputs at work or required to deliver international cooperation. The actors (central state authorities), processes (formal lawmaking in IOs), and outputs (rigid treaties or IO decisions) recognized in traditional international law are not adapted. In this sense, the traditional structures have become shackles. This goes well beyond the phenomenon of soft law⁶³ 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 (in the sense of UN GA resolutions of the 1970s) 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. If the core challenge of soft law is whether it 'works', the most pressing problems of informal lawmaking, accountability and legitimacy, arise as a consequence of its effectiveness.⁶⁴ Similarly, the shift towards informal lawmaking described here goes beyond 'global administrative law'.⁶⁵ 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

⁶⁰ As H. Willke, *Governance in a Disenchanted World, the End of Moral Society* (2009), at 33 puts it, 'knowledge and expertise are provisional by necessity. They exist to be revised. Even worse, transitions and revisions are not steps in the approximation to a final truth but remain provisional steps in a never-ending story.'

⁶¹ H.S. Scott, *International Finance: Transactions, Policy, and Regulation* (15th edn, 2008), at 347.

⁶² Abbott *et al.*, *supra* note 15, at 32.

⁶³ 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 *Österreichische 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?', 45 *Int'l Org* (1991) 495.

⁶⁴ Brummer, *supra* note 28, at 20.

⁶⁵ Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law', 68 *L & Contemporary Probs* (2005) 15; Ladeur, 'The Emergence of Global Administrative Law and Transnational Regulation', *ILLJ-NYU Working Paper 2011/1* (2011).

informality is ‘administrative’. As discussed below, it goes beyond managerialism and requires both politics and courts.

4 Options in Response: Merger and Acquisition or Entrenchment?

How should international law respond to these developments? Logically speaking, two options present themselves. Firstly, international law can adapt and incorporate (at least part of) the new activity described above, thereby increasing its societal relevance (merger and acquisition).⁶⁶ Secondly, international law can entrench itself and stick to its traditional typologies, acknowledging that it is increasingly just one form of international cooperation (mainly for states) within a broader ‘legal universe’ or ‘normative menu’ of options from which actors can choose.⁶⁷ The first option (merger and acquisition) would require a radical transformation of international law, both procedurally and substantively.⁶⁸ Sudden and deliberate change is unlikely. Since the system is largely controlled by states, it is unlikely that these same states will formally agree to end their quasi-monopoly and accept sources of international law that are completely outside their sphere of influence.⁶⁹ At the same time, traditional international law is anything but formalistic and does allow for organic change to reflect new social realities.⁷⁰ Over the centuries, the subjects and lawmaking process and outputs in the international legal order have dramatically evolved. In the Middle Ages, for example, the main actors were not states, but the spiritual and temporal regime of the two universal powers, the Holy Roman Emperor and the Pope,⁷¹ with, under them, kings and princes, the clergy, and independent cities, tied up in complex feudal relationships. In the 17th century, states emerged but also the semi-state, semi-private trading companies operating on the basis of concessions and privileges granted to them by states including trade monopolies and sovereign rights. As the ICJ opined in the *Reparations* case, ‘throughout its history, the development of international law has been influenced by the requirements of international life’. This had led to new ‘instances of action upon the international plane by certain entities which are not States’ and may,

⁶⁶ See Schiff Berman, ‘A Pluralist Approach to International Law’, 32 *Yale J Int’l L* (2007) 301 (referring to ‘multiple normative communities, some of which impose their norms through officially sanctioned coercive force and formal legal processes, but many of which do not’, and adding that ‘it has become clear that ignoring such normative assertions altogether as somehow not “law” is not a useful strategy’).

⁶⁷ For an early realization of this see Virally, ‘La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique (à l’exception des textes émanant des organisations internationales)’, 60 *Annuaire de l’Institut de Droit International* (1983) 166.

⁶⁸ See, e.g., ASIL Proceedings, ‘New Voices: Rethinking the Sources of International Law’, 103 *AJIL* (2009) 71.

⁶⁹ For a legal philosophical discussion of statehood and its relation with international law see Jodoin, ‘International Law and Alterity: The State and the Other’, 21 *Leiden J Int’l L* (2008) 1, at 26.

⁷⁰ For evidence of change and creativity at international organizations see Marceau, ‘IGOs in Crisis? Or New Opportunities to Demonstrate Responsibility?’, 8 *Int’l Orgs L Rev* (2011) 1.

⁷¹ Grewe, *supra* note 27, at 11.

in turn, lead to 'new subjects of international law' that are 'not necessarily ... States or possess the rights and obligations of statehood'.⁷²

In terms of actors, although states are currently the principal subjects and creators of international law, there is no fixed list of subjects of international law that is set in stone.⁷³ Based on practice and recognition new subjects and creators of law may and have emerged or disappeared. In terms of output, there is general agreement that Article 38 of the ICJ Statute does *not* offer an exhaustive list of the sources of international law,⁷⁴ nor does international law require that a particular process be followed to create international norms or that international law can only emerge out of particular fora or IOs. As a result, new sources and processes (such as unilateral acts and decisions by IOs) can and have emerged. Even explicitly provided for sources and their law-ascertainment criteria remain vague⁷⁵ and can be adapted to new developments.⁷⁶ The constituent elements of custom and general principles are notoriously vague. Even the definition of what is a convention or treaty is contested and open to interpretation.⁷⁷ Hence, even though it is hard to imagine, for example, that the states parties to the ICJ Statute would amend Article 38 to expand the sources of international law, or that the UN Charter be re-written to allow explicitly for new actors, no such formal decisions are required for international law to evolve. After all, whether new modes of cooperation will have an impact or persist will play out not so much at the UN or WTO, or before courts or tribunals, but in foreign ministries, national parliaments and regulatory bodies, standard-setting and procurement organizations, corporate board rooms and rating agencies, NGO or trade union strategy meetings, the media, and individual citizens'/consumer decisions. The conceptual boundaries of how international law may look in the future are wide open.

5 Keeping the New *and* the Old Accountable

Should we be worried about the legitimacy or democratic accountability of these new types of cooperation? Our normative threshold is that any exercise of public authority⁷⁸

⁷² *Reparations for Injuries Case* [1949] ICJ Rep 174, at para. 174.

⁷³ See J. d'Aspremont, *Formalism and the Sources of International Law* (2011), at 14.

⁷⁴ See O. Spierman, *International Legal Argument in the Permanent Court of International Justice* (2005), at 207 (with references to authors and negotiation documents). Furthermore, Art. 38 (1) of the ICJ Statute is primarily defined through case law, where it has been used to guide the Court in determining the applicable law before the ICJ. Yet, the role of a *lex arbitri* cannot be confused with that of a meta-source for all international law. See: Kammerhofer, 'The Pure Theory of Law and Its "Modern" Positivism: International Legal Uses for Scholarship', 106 *ASIL Proceedings* (2012) 3.

⁷⁵ See d'Aspremont, *supra* note 73, at 151 (the 'sources of international legal rules do not rest on any formal law-ascertainment mechanisms, for these rules are not identified on the basis of formal criteria').

⁷⁶ See, e.g., Cohen, 'Finding International Law: Rethinking the Doctrine of Sources', 93 *Iowa L Rev* (2007–2008) 65, at 108.

⁷⁷ See J. Klabbers, *The Concept of Treaty in International Law* (1996).

⁷⁸ Von Bogdandy, Dann, and Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German LJ* (2008) 1375, at 1376 (defining 'exercise of public authority' as 'any kind of governance activity . . . [which] determines individuals, private associations, enterprises, states, or other public institutions').

must be kept accountable.⁷⁹ '[C]oercion whether it emanates from governments or international institutions, is coercion nonetheless and all forms of coercion ought to be subject to the same requirement of legal justification.'⁸⁰ Also informal structures can become shackles. With this in mind, a number of conventional views must be challenged.

A All Cooperation that Affects Freedom – Binding or Not – Must be Justified

First, it is not because something is not legally binding under international law that it does not affect public policy-making or individual freedom. Non-binding instruments or informal modes of cooperation with new actors and/or pursuant to novel processes may be as constraining – if not more so – than traditional treaties.⁸¹ In this sense as well, structures, even informal ones, can become shackles. The Recommendations on money laundering of the Financial Action Task Force (FATF), for example, are non-binding. However, for a state to become an FATF member, these Recommendations must be implemented domestically as binding law.⁸² In case of non-cooperation, the FATF blacklists and sanctions not just FATF members but also non-members, an enforcement mechanism that, for example, the legally-binding UN Convention against Corruption lacks. Especially at the international level where centralized enforcement is absent, actors comply for reasons other than or beyond legal constraint (e.g., reputation, reciprocity, retaliation, prior consent to or perceived legitimacy of the norm in the first place⁸³). These reasons may be activated as much for binding, traditional international law as they can be triggered by new forms of cooperation.⁸⁴ Hence, for the Case Act in the US to require only notification to the US Congress of agreements

⁷⁹ Our working definition of accountability is: 'a relationship (at the domestic or international level) between an actor (exercising public authority) and a forum (internal to the rulemaking process or an external stakeholder) in which the actor has an obligation (in particular, but not exclusively, expressed in legal rules or procedures) to explain and to justify his or her conduct (ex ante leading up to a decision or ex post in the implementation of a decision) the forum can pose questions and pass judgment, and the actor may face consequences (in particular, but not exclusively, so as to enhance the democratic legitimacy of the rulemaking process).' See Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', at 13, 28 and Corthaut, Demeyere, Hachez, and Wouters, 'Operationalizing Accountability in Respect of Informal International Lawmaking', at 310, both in Pauwelyn *et al.*, *supra* note 3.

⁸⁰ Pauwelyn and Pavlakos, 'Principled Monism and The Normative Conception of Coercion under International Law', in M. Evans and P. Koutrakos (eds), *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World* (2011), at 317.

⁸¹ In respect of ICH standards see Berman, 'Informal International Lawmaking in Medical Products Regulation', in Berman *et al.*, *supra* note 4, at 359. See as early as Schachter, 'Towards a Theory of International Obligation', 8 *Virginia J Int'l L* (1968) 300, at 311 ('some "laws", though enacted properly, have so low a degree of probable compliance that they are treated as "dead letters" and ... some treaties, while properly concluded, are considered "scraps of paper"').

⁸² See FATF Reference Document: AML/CFT Evaluations and Assessments: Handbook for Countries and Assessors, Apr. 2009, at paras 39–40.

⁸³ See Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010) 127, and Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705, at 706.

⁸⁴ See Guzman and Meyer, 'International Soft Law', 2 *J Legal Analysis* (2010) 171; Brummer, *supra* note 28.

concluded by the US that are 'legally binding' does not make sense.⁸⁵ Assuming that the objective of the Case Act is to keep the US Congress informed about international cooperation that matters, i.e., that may constrain the US or impact on US agencies or citizens, the US Congress – and other parliaments for that matter⁸⁶ – ought to be informed and be given a minimum of oversight (albeit indirectly through administrative agencies) in respect of all international cooperation that affects public policy-making and individual freedom.⁸⁷ Whether an instrument is 'legally binding' under international law is simply no longer the right criterion or proxy.⁸⁸

B Cooperation Outside State Consent Can Be Accountable

Secondly, as traditional international law is based on state consent, we might presume that it is legitimate and democratically accountable to the extent that state representatives speak for, and are controlled by, the people. Yet, it is widely recognized that legitimacy can come from other sources too, in particular, expertise, an inclusive and open process of deliberation, or the implementation of effective outcomes.⁸⁹ Experts and private bodies can create legitimate norms. In the US, for example, for reasons of cost, expertise and effectiveness, it is a long-standing policy that standard-setting be done in private bodies, not government agencies.⁹⁰ At the same time, the participation of federal agencies in standard-setting activities outside the government is encouraged. Traditional international law, based as it is on state consent, does not have a monopoly on legitimate cooperation.⁹¹ New types of cooperation require

⁸⁵ Similarly, in the US, Circular 175 and its coordinating role for the US State Department and obligation of publication and transmittal to Congress, 'does not apply to documents that are not binding under international law'. See US State Department website, Circular 175 Procedure, available at: www.state.gov/s/l/treaty/c175/. Hence, if a document is not legally binding (i.e., not an international agreement under the specific criteria of Circular 175), the obligations in Circular 175 do not apply.

⁸⁶ In the UK, e.g., the formalities which surround treaty-making do not apply to so-called Memoranda of Understanding (MOUs) – which the UK defines as international commitments that are not legally binding. As a result, MOUs are not usually published in the UK. See Treaty Section, Foreign & Commonwealth Office, *Treaties and MOUs, Guidance on Practice and Procedures* (2004), at 1. Note, however, that the UN Treaty Handbook (at 61) does consider MOUs legally binding: '[t]he term memorandum of understanding (MOU) is often used to denote a less formal international instrument than a typical treaty or international agreement ... The United Nations considers MOUs to be binding and registers them if submitted by a party or if the United Nations is a party.'

⁸⁷ See Flückiger, 'Keeping Domestic Soft Law Accountable: Towards a Gradual Formalization', in Pauwelyn *et al.*, *supra* note 3, at 409 ('the validity of restrictions [imposed through informal or soft law] to these fundamental rights [of individuals] must be judged based on the same criteria as those applied to legal [hard law] restrictions, which means that they are subject to the requirements of legal basis, public interest and proportionality').

⁸⁸ Note, indeed, that certain IOs already require that even non-binding recommendations be submitted to domestic parliaments for adoption. See Art. 19:6 ILO Constitution; Art. IV:B(4) UNESCO Constitution; Art. XI FAO; Ch. XIV, Art. 62 WHO.

⁸⁹ M. Barnett and M. Finnemore, *Rules for the World: International Organizations in Global Politics* (2004), at 24; Sharpf, *Governing in Europe: Effective and Democratic?* (1999), at ch. 1.

⁹⁰ See OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, available at: <http://standards.gov/a119.cfm> (directing agencies to use 'voluntary consensus standards' in lieu of 'government-unique standards').

⁹¹ N. Krisch, *Beyond Constitutionalism, The Pluralist Structure of Postnational Law* (2010), at 188 and 271.

new types of accountability, and special attention. We propose a calibrated approach to accountability depending on the subject matter and impact of the norm (not on whether it is formal or informal), drawing on different sources of legitimacy and types of control (*ex ante*, ongoing, and *ex post*), at both the domestic and international levels, towards both internal and external stakeholders.⁹² Conceptually, there is no reason why only traditional international law could qualify as legitimate or democratically accountable.⁹³

C State Consent is Not (Any Longer) a Sufficient Condition for Legitimate Cooperation

Thirdly, the idea (referred to earlier) that traditional international law is necessarily legitimate and democratically accountable, because it is based on state consent, can no longer be accepted blindly (if ever it could).⁹⁴ At the international level, the formal legitimacy that comes with a treaty or being part of international law is rather thin. For treaties, all that is required is *an agreement consented to by states*. International law is agnostic on how this agreement was reached (process), who participated in its establishment (actors), what form it takes (instrument), and what is actually agreed on (substance⁹⁵). The stop-clause of state consent – hereafter referred to as ‘thin state consent’ – is all that is required to justify international law. A norm is part of international law not because it is right or reasonable but because states agreed to it (*authoritas, non veritas facit legem*⁹⁶). An agreement between two unelected heads of state recorded in informal but mutually accepted minutes, concluded after a five minute discussion in some secret, smoke-filled backroom, is as much a ‘treaty’ binding under international law as a formal convention between two states concluded after five years of multi-stakeholder dialogues under the auspices of the UN that was formally consented upon by the democratically elected parliaments of both states parties.

The rigidity of treaties once adopted – amendment often requires unanimity and a new, formal round of parliamentary approvals – makes them less (rather than more)

⁹² Pauwelyn, Wessel, and Wouters, ‘Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable’, in Pauwelyn *et al.*, *supra* note 3, at, 500, 516 ff; Corthaut, Demeyere, Hachez, and Wouters, *supra* note 79. See also Amtenbrink, ‘Towards an Index of Accountability for Informal International Lawmakers’, in Pauwelyn *et al.*, *supra* note 3, at 337. We distinguish between (i) ‘accountability mechanisms strictly defined’, that is, *ex post* and institutionalized mechanisms holding an actor to account for its activities (e.g., electoral, hierarchical, supervisory, fiscal, and legal), (ii) ‘preconditions’ required to enable such accountability mechanisms to work (such as transparency, the setting of a clear mandate or benchmark against which an actor can be held accountable), and (iii) ‘other accountability promoting measures’ (ensuring the responsiveness of actors, such as *ex ante* appointments, peer pressure or market-based sanctions).

⁹³ See Teubner, ‘Breaking Frames: The Global Interplay of Legal and Social Systems’, 45 *Am J Comp L* (1997) 149, at 159; Schepel, *supra* note 58, at 413–414; Willke, *supra* note 60, at 7; R. G. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (2003), at 1.

⁹⁴ See S. Wheatley, *The Democratic Legitimacy of International Law* (2010); Besson, ‘Theorizing the Sources of International Law’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010), at 166 and 175 (consent is insufficient to ensure the authority and legitimacy of international legal rules).

⁹⁵ With the exception of rules of *jus cogens*.

⁹⁶ T. Hobbes, *Leviathan*, Vol. 2, ch. 26 (‘authority not truth makes law’).

democratic. As Krisch points out, 'Revisability is commonly seen as a key element of democratic orders ... Ensuring the revisability of norms and decisions then becomes a key democratic demand.'⁹⁷ The requirement of state consent is both too lenient and too strict. *Too lenient or easy*, because the validation rules of international law do not care about transparency, inclusiveness, or impartiality of the process or actors involved, nor about the effectiveness, coherence, or substantive quality of what is agreed on. *Too strict or difficult*, because concluding rules on, for example, climate change or the WTO's Doha Round requires the individual consent of each state involved and thereby gives blocking power to even the smallest minority interest.

D Do New Forms of Cooperation Circumvent International Law Formalities?

In the context of these thin validation requirements of traditional international law, the charge that new forms of cooperation circumvent the formal structures of *international law* or are 'devoid of the guarantees that come with law'⁹⁸ rings rather hollow. Other than state consent, there are no structures or guarantees. One of our main claims is that in contrast to this thin consent, the emerging code of good practice for the development of standards or new forms of cooperation outside international law is normatively thicker.⁹⁹ In many of the case studies we examined the process is more inclusive, transparent, and predictable. The actors involved are more diverse and expert. The output, finally, is elaborated more carefully and coherently, supported by a broader consensus, both *ex ante*, when the norm is developed, and *ex post*, when the norm is accepted because it works. One area that illustrates this is the internet sector.¹⁰⁰ Thick stakeholder consensus is visible, for example, in the so-called Internet Governance Forum, established with a view to better understanding issues related to internet governance and to promoting dialogue among stakeholders in an open and inclusive manner. The IGF allows for many groups to participate in meetings: governments, the private sector, civil society, intergovernmental and other international organizations. In the 2010 meeting (in Vilnius), 1,451 people participated (a total of around 2,000 people were present). The breakdown of participants shows that all the major stakeholder groups were represented almost equally, with 21 per cent of participants coming from civil society, 23 per cent from the private sector, 24 per cent comprising government representatives, and 22 per cent made up of technical and academic communities. Institutionalization took place on the basis of the creation of a *de facto* secretariat, the Multi-stakeholder Advisory Group (MAG). This MAG has 56 members which are nominated by the different stakeholder groups, taking into account geographical and gender balance. Apart from the Chairman's

⁹⁷ Krisch, *supra* note 91, at 273.

⁹⁸ Klabbers, 'The Idea(s) of International Law', in S. Muller, S. Zouridis, M. Frishman, and L. Kistemaker (eds), *The Law of the Future and the Future of Law* (2011), at 69, 79.

⁹⁹ See ISEAL Code of Good Practice for Setting Standards, available at: www.isealalliance.org/code.

¹⁰⁰ See 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* (2011), at 77 (on the basis of case studies by Ana Berdajs).

Submissions that are issued at the end of every meeting, IGF meetings have no formal binding output. Nevertheless, the IGF is believed to prepare and affect decisions that are finally taken elsewhere. Indeed, together with other informal groups such as the Internet Engineering Task Force (IETF), the Internet Society (ISOC), and the Global Cybersecurity Agenda (GCA) of the International Telecommunications Union (ITU), the internet sector forms an example of a complex normative web in which extensive numbers of governmental and non-governmental stakeholders participate, and where norms established or agreed upon in one body influence normative actions of other bodies. While the case studies underlying our thesis are much more diverse (relating to finance, health, and many other fields), they do underline our main claim that the turn to informality is not *per se* negative from the perspective of accountability and legitimacy of the decision-takers. At the same time, informality increases flexibility and adaptiveness. Thus, case studies on, for instance, financial market regulation or food safety standards point to the fact that the expertise of a large pool of regulators and other actors can lead to more dynamic regulation, sensitive to global and regional changes and evolution.¹⁰¹ Informal bodies generally are well-equipped to grasp certain complex global trends and the resulting uncertainty and rapid changes that come with them. In financial market regulation, for instance, as well as standard-setting in health, food safety, and human security, the bodies provide flexible norms and guidelines that are grounded in practical experience, consensus-building, and expertise, the so-called ‘rough consensus and running code’,¹⁰² without veto or opting-out power for any given actor, contrary to traditional international law. An important overall feature is the possibility continuously to correct the rules, taking into account new developments and learning. Since 1990, FATF Recommendations, for example, have been revised three times.

The importance of accountability obviously depends on the type of body or regulation. Thus, for disaster risk reduction practices, for example, accountability has not been considered a major issue,¹⁰³ whereas other case studies (e.g., on the ICH or Basel Accords¹⁰⁴), when assessing the same issue, remain critical and formulate ways to improve responsiveness and inclusiveness, in order for the informal bodies to become more accountable.

Whereas traditional international law is driven by thin (state) consent, new forms of cooperation are increasingly based on thick (stakeholder) consensus. No inherent or automatic benefits come with being part of international law. Yet, to conclude a treaty, in particular a multilateral one within a formal IO requires huge transaction costs, and once concluded is hard to adapt to changing circumstances. In the end,

¹⁰¹ See Donnelly, ‘Informal International Lawmaking: Global Financial Market Regulation’, at 179 and Duquet and Geraets, ‘Food Safety Standards and Informal International Lawmaking’, at 395, both in Berman *et al.*, *supra* note 4.

¹⁰² G.P. Callies and P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010).

¹⁰³ See Corredig, ‘Effectiveness and Accountability of Disaster Risk Reduction Practices: An Analysis through the Lens of IN-LAW’, in Berman *et al.*, *supra* note 4, at 471.

¹⁰⁴ See Berman, *supra* note 81 and Verdier, ‘US Implementation of Basel II: Lessons for Informal International Lawmaking’, in Pauwelyn *et al.*, *supra* note 3, at 437.

new forms of cooperation can be more (rather than less) accountable or responsive to a broader audience and better (rather than worse) adapted to the needs of modern society. To that extent, traditional international law is no longer the first-best option to which soft or informal law can only aspire.

E Do New Forms of Cooperation Circumvent Domestic Law Formalities?

The circumvention of *domestic* formalities linked to lawmaking must be taken more seriously. Domestic accountability mechanisms are at the core of keeping new models of international cooperation in check. In most countries, for a treaty to become binding it must receive the consent of Parliament or Congress. Certain new forms of cooperation may avoid this legitimizing step.¹⁰⁵ For example, few, if any, national parliaments have explicitly consented to the Wassenaar Arrangement, although for EU Member States its substance was implemented in a Regulation adopted jointly by the European Parliament and the Council.¹⁰⁶ In Latin America, a debate is raging as to whether stand-by arrangements concluded between the IMF and countries seeking financial assistance from the IMF – generally regarded as *not* being international agreements – should nonetheless satisfy the legal domestic approval requirements for the conclusion of a treaty.¹⁰⁷ The conditionalities set out in such IMF arrangements can have enormous consequences. Yet, in most cases, they have been adopted without parliamentary approval. In Canada, Basel II was implemented through guidelines rather than a regulation, partly to avoid the procedural requirements associated with adopting regulations. In the US some have criticized as unconstitutional the trend of concluding so-called ‘congressional-executive agreements’ (adopted by simple majority in both houses of the US Congress) rather than treaties which, under Article II:2 of the US Constitution, require the advice and consent of two-thirds of the US Senate.¹⁰⁸

Of course, the domestic approval of treaties is often a mere rubber-stamping of a *fait accompli* anyhow.¹⁰⁹ Yet, to secure domestic democratic legitimacy, a minimum degree

¹⁰⁵ French practice, e.g., distinguishes between ‘*accords en forme solennelle*’ (Art. 52 of the Constitution), concluded by the French President and subject to ‘ratification’, and ‘*accords en forme simplifiée*’, concluded at the level of the government by the Minister of Foreign Affairs and subject to ‘approbation’: *Circulaire du 30 mai 1997 relative à l’élaboration et à la conclusion des accords internationaux*. See also, for Belgium, P.F. Smets, *La conclusion des accords en forme simplifiée: étude de droit international et de droit constitutionnel belge et comparé* (1969).

¹⁰⁶ EP and Council Reg. 388/2012 amending Council Reg. (EC) No 428/2009, OJ (2012) L129/12.

¹⁰⁷ See Garcia, ‘Understanding IMF Stand-By Arrangements from the Perspective of International and Domestic Law: The Experience of Venezuela in the 1990s’, *Society of International Economic Law* (2012), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091204.

¹⁰⁸ Tribe, ‘Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation’, 108 *Harvard L Rev* (1995) 1221, at 1252; Yoo, ‘Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements’, 99 *Michigan L Rev* (2001) 757. Yet, as Oona Hathaway has argued, a strong case can be made that congressional-executive agreements ‘enjoy increased legitimacy and stronger democratic credentials’ as compared to ‘treaties’: Hathaway, ‘Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States’, 117 *Yale LJ* (2008) 1237, at 1307. Notably, ‘treaties’ are adopted without any involvement of the US House of Representatives.

¹⁰⁹ See Livshiz, ‘Updating American Administrative Law: WTO, International Standards, Domestic Implementation and Public Participation’, 24 *Wisconsin Int’l LJ* (2007) 961; Mulgan, *supra* note 93, at 12.

of parliamentary or congressional oversight (not necessarily formal consent) of all international cooperation that affects public policy-making or individual freedom – treaty or not, formal or informal – must be available. To the extent that lawmaking powers are delegated to administrative agencies, transparency, reason-giving, and notice and comment procedures should apply to both the domestic *and* international activities and norm-making of these agencies, whether norms are binding under international law or not. A general guideline along these lines is already in place in Canada.¹¹⁰ A recent Recommendation of the Administrative Conference of the US similarly calls on US agencies engaging in international regulatory cooperation to ‘seek input and participation from interested parties’ and to ‘promote to foreign authorities the principles that undergird the United States administrative and regulatory process’, including transparency, consensus-based standard setting, and accountability under the law.¹¹¹ When it comes to private standards or norms, competition law may play a controlling role.¹¹² Finally, judicial review must be available before domestic courts to protect fundamental rights of individuals and to ensure checks and balances between the legislature, executive, and administrative agencies. Examples of such court control can already be found in the EU, The Netherlands, US, Canada, and Brazil.¹¹³ Also international courts and tribunals can play a controlling role (see section 7). It is not that traditional international law is legitimate and new forms of cooperation are not, or vice versa. Both require close scrutiny and vigilance.¹¹⁴ Both can be more, or less, democratically legitimate depending on the circumstances.

F *Keeping Cooperation Accountable Toward All Affected Parties*

Based on our case studies,¹¹⁵ the core challenge for new forms of cooperation is their taking into account of *external* stakeholder interests.¹¹⁶ Coalitions of the willing may be created. Yet, these may also affect (directly or indirectly) outsider state or private actors (think of the ICH, Basel, or the FATF). Such coalitions may more efficiently address collective action problems, e.g., harmonized certification requirements for the approval of pharmaceuticals at the ICH, involving only the USA, EU, and Japan as the

¹¹⁰ Berman, ‘The Role of Domestic Administrative Law in the Accountability of Informal International Lawmaking: The Case of the ICH’, in Pauwelyn *et al.*, *supra* note 3, at 468.

¹¹¹ Administrative Conference of the US, Recommendation 2011–6, International Regulatory Cooperation. Adopted 8 Dec. 2011. See also Executive Order 13609, Promoting International Regulatory Cooperation 77 FR 26413 (1 May 2012), Section 2, calling for ‘the promotion of good regulatory practices internationally, as well as the promotion of U.S. regulatory approaches, as appropriate’.

¹¹² See Schepel, ‘Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test’, 39 *CML Rev* (2002) 31.

¹¹³ Examples are discussed in Besselink, ‘Informal International Lawmaking: Elaboration and Implementation in the Netherlands’, in Berman *et al.*, *supra* note 4, at 97; Nasser and Machado, ‘Informal International Lawmaking and Accountability in Brazil’ in *ibid.*, at 141, and Pauwelyn, Wessel, and Wouters, *supra* note 96, at 500.

¹¹⁴ See J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (1995), at 441–442.

¹¹⁵ See Berman *et al.*, *supra* note 4.

¹¹⁶ See Benvenisti, ‘Coalitions of the Willing and the Evolution of Informal International Law’, in C. Calliess, C. Nolte, and G. Stoll (eds), *Coalitions of the Willing – Avantgarde or Threat?* (2008), at 1.

leading market players. Yet, the impact of these coalitions often extends, *de jure* or *de facto*, positively or negatively¹¹⁷, beyond their membership. In the case of the ICH, for example, countries like Brazil or China are pressed *de facto* to adopt ICH standards although these standards have been written without their input.¹¹⁸ In the context of Basel financial standards, it has been argued that Basel II was shaped by banks and regulators from industrialized countries and is not responsive to the needs and circumstances of developing countries.¹¹⁹ The ICH has been criticized for including the pharmaceutical industry as an equal participant with regulators but excluding patients' or consumers' organizations. Basel has been blamed for being responsive to large banks, but not or less so to smaller financial institutions or users. The Forest Stewardship Council, which for 20 years has provided a unique system of transnational private regulation for the preservation of forests, has been facing a North–South divide both in terms of formal representation/participation as well as in relation to certificate adoption.¹²⁰ GLOBALG.A.P., the world's most extensive system of private food safety standards, faces a similar challenge of inclusion of consumers and small food producers.¹²¹

On the one hand, this type of transnational cooperation is a step forward as compared to, say, the US or a US agency unilaterally setting standards and imposing them on the rest of the world (in the ICH, at least EU and Japanese interests are taken on board).¹²² On the other hand, the legitimacy of certain transnational cooperation still leaves much to be desired as its accountability mechanisms are not commensurate with its real life impact. ICH guidance on good clinical practices (GCPs), for example, allows the pharmaceutical industry to run clinical trials in which the patients in the control group can be treated with placebos instead of the existing proven therapy. Often such clinical trials are conducted in developing countries, to lower costs. Using placebos there, instead of existing treatments, has led to patients dying who could have been saved by using existing proven therapy.¹²³ Had developing countries been involved in the establishment of these GCPs such adverse consequences might have been avoided.¹²⁴ Although the Kimberley Scheme on conflict diamonds involves

¹¹⁷ Indeed, the fact that a club of rich, developed countries invests time and resources to establish state-of-the-art standards, without any support from other countries, could also be seen as free-riding by these other countries on public goods produced by the countries which are members of the club.

¹¹⁸ Regarding the ICH see Berman, *supra* note 81. Regarding the FATF see Donnelly, 'Informal International Lawmaking: Global Financial Market Regulation', in Berman *et al.*, *supra* note 4, at 179.

¹¹⁹ Claessens *et al.*, 'The Political Economy of Basel II: The Costs for Poor Countries', 31 *The World Economy* (2008) 313.

¹²⁰ See Marx, Bécault, and Wouters, 'Private Standards in Forestry: Assessing the Legitimacy and Effectiveness of the Forest Stewardship Council', in Maertens and Wouters (eds), *supra* note 57, at 60, 83–86.

¹²¹ See Hachez and Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards. Assessing the Public Accountability of GlobalG.A.P.', 14 *J Int'l Econ L* (2011) 677, at 708.

¹²² See Braithwaite, 'Prospects for Win-Win International Rapprochement of Regulation', in S. Jacobs, *Regulatory Cooperation for an Interdependent World* (1994).

¹²³ Lurie and Wolfe, 'Unethical Trials of Interventions to Reduce Perinatal Transmission of the Human Immunodeficiency Virus in Developing Countries', 337 *New England J Medicine* (1997) 853.

¹²⁴ See also Berman, *supra* note 108.

both the diamond industry and NGOs, critics have pointed out that the interests of small, artisanal diamond miners (who may have a much harder time complying with Kimberley rules than big mining corporations such as De Beers) were not represented.¹²⁵ Similar critiques have been raised in respect of internet standards, arguing that recent changes in the internet's architecture deviate from the internet's original design principles and benefit network providers at the expense of internet users, application developers, and content providers.¹²⁶

Increased participation of external stakeholders is, however, a hallmark of recent reforms, from the Basel Committee¹²⁷ to the ICH and the FATF.¹²⁸ In the process, a fine line must be walked between effectiveness (which may require decisions by a smaller club of core players¹²⁹) and inclusiveness (necessitating input from all parties affected for major policy turns). This demonstrates the adaptability of new cooperation methods in response to criticism. In June 2012, for example, the ICH adopted a major overhaul of its principles of governance (*inter alia*, to ensure 'regulatory oversight as well as integrity of the entire process'), removing the veto power and equal participation rights of the pharmaceutical industry, increasing transparency through publication of technical documents, and improving global outreach by involving new countries and regional harmonization initiatives.¹³⁰ Examining Brazil in the context of a number of transnational cooperation schemes including the Basel Committee and the ICH, Nasser and Machado conclude that '[w]here Brazil had until recently no voice in the outputs of the networks, it begins to be heard. Where it had already one, it is now more audible.'¹³¹

The informal nature and flexibility of new forms of cooperation (be it the ICH or the G-20) allows for this adaptation to take account of new interests much more so than, for example, in the UN or WTO, where institutional reforms are excruciatingly difficult because of state consent. Where thin state 'consent' implies a veto or opt-out power for each individual state, 'consensus', as it is defined in the standards world, provides for a procedurally inclusive and fair process but at the end of the day takes away each player's automatic veto power. The ISO/IEC Guide 2, for example, defines 'consensus' as follows:

[g]eneral agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves

¹²⁵ See Vidal, 'Informal International Lawmaking: The Kimberley Process' Mechanism of Accountability', in Berman *et al.*, *supra* note 4, at 505.

¹²⁶ See B. van Schewick, *Internet Architecture and Innovation* (2010).

¹²⁷ See Barr and Miller, 'Global Administrative Law: The View from Basel', 17 *EJIL* (2006) 15, who describe how the Basel Committee engaged in a very substantial international notice-and-comment process throughout the development of Basel II, in response to concerns about the lack of adequate rule-making and participatory procedures at the international level.

¹²⁸ See the creation of 8 FATF-Style Regional Bodies (FSRBs) through which non-FATF members can provide expertise and input in FATF policy-making: www.fatf-gafi.org/countries/.

¹²⁹ E.g., only 'strategically important' jurisdictions can become full members of the FATF (FATF Membership Policy, 29 Feb. 2008, Step 1); other countries can influence policy, however, through FSRBs, see note 125 above.

¹³⁰ ICH Press Release, Fukuoka, Japan, June 2012, *ICH Parties Agree on New Principles of Governance*, available at: www.ich.org/fileadmin/Public_Web_Site/News_room/B-Press_Releases/ICH_GCG_Press_Releases/Press_Release_Fukuoka_2012.pdf.

¹³¹ Nasser and Machado, *supra* note 110.

seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.

In other words, the views of all parties concerned must be taken into account and an attempt must be made to reconcile conflicting arguments. Yet, once 'general agreement' is reached, that is, there is no 'sustained opposition' to 'substantial' issues by an 'important' part of the interests concerned, the norm or standard can be adopted to address the problem identified. The process is inclusive and provides clear incentives for compromise and action in the shadow of being out-voted.

Although continuous vigilance is required – in particular, to ensure sufficient domestic oversight and meaningful participation of all stakeholders – the inclusiveness and adaptability of new forms of cooperation are able to offer the best of both worlds:¹³² norms that are adapted and tested to domestic needs, while at the same time avoiding imposing externalities on outsiders;¹³³ normatively superior cooperation (thick consensus involving all stakeholders as opposed to thin consent by essentially one branch of government only), while at the same time addressing (at least some of) the collective action problems that a system based on state consent (and individual vetoes) cannot tackle. This is a far cry from, even the anti-thesis of, conventional critiques against new types of international cooperation.¹³⁴

7 The Threshold of Traditional International Law versus the Emergence of Procedural Meta-norms for Any Restriction on Freedom

A *The Threshold for a Norm to be Part of Traditional International Law*

In the short to medium term, do any of the new types of cooperation described above amount to international law, traditionally defined?¹³⁵ As discussed earlier, traditional international law is anything but formalistic. Informal instruments (such as oral agreements or custom) can bind; non-binding instruments (such as ISO standards)

¹³² Verdier, *supra* note 104, refers, in the context of Basel II, to 'emerging forms of interactive international policy-making, where standards are implemented over several years and continually revised in light of new information and feedback from regulators, the industry, and markets'.

¹³³ See Willke, *supra* note 60, at 72, arguing that transnational law may be normatively superior to domestic law as it 'carries the chance for greater heterogeneity and an influx of distributed intelligence provided by many actors, organizations and institutions'; Schepel, *supra* note 58, at 408.

¹³⁴ See, e.g., Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 8 *EJIL* (1997) 435 (writing that new cooperation forms imply 'the marginalization of governments as such and their replacement by special interest groups' suggesting 'a move away from arenas of relative transparency into the back rooms').

¹³⁵ See Pauwelyn, 'Is It International Law or Not, and Does It Even Matter?', at 125 and Ruiter and Wessel, 'The Legal Nature of Informal International Law: A Legal Theoretical Exercise', at 162, in Pauwelyn *et al.*, *supra* note 3; Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23.

can be very formal. For there to be a treaty in the sense of the Vienna Convention all that is required is an agreement consented to by states.¹³⁶ International courts and tribunals have commonly referred to and applied as part of international law press communiqués and informal agreements or guidelines.¹³⁷ What matters is the intent of the parties and whether they can be said to have agreed to something under international law. Klabbers convincingly coins the idea of ‘presumptive law’, arguing that ‘in international affairs, emanations that are of normative significance and that are based on some form of consent by the relevant actor, must be presumed to be legally binding’. To rebut this presumption parties must then provide clear language or other contextual elements that demonstrate that the instrument is *not* binding or *not* part of international law.¹³⁸

That said, a lot of the new transnational activity described above does not fall under the traditional sources of international law set out in Article 38 of the ICJ Statute, e.g., because there is sufficient evidence that the state parties did *not* intend to agree under international law¹³⁹ or because the actors involved (be it public agencies or private actors) do not have the capacity to create international law in the first place.¹⁴⁰ However, the mere fact that a process falls on the *non-law* side does not preclude the fact that it is regulated *by law* or needs justification *under law*. Especially where a non-law instrument still has legal effects (and may thereby restrict freedom) such justification or regulation *by law* becomes crucial. As a result, even where an informal law instrument is not as such ‘international law’, it could still (i) have legal effects, and/or (ii) be subject to legal constraints (or be *regulated by law*), be it under

¹³⁶ See Art. 2.1(a) VCLT: “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’. The definition includes those agreements drafted in a less formal manner (‘in simplified form’) but excludes Memoranda of understanding where the latter do not intend to create obligations in international law. See A. Aust, *Modern Treaty Law and Practice* (2007), at 17. But see above note 84.

¹³⁷ Klabbers, ‘International Courts and Informal International Law’, in Pauwelyn *et al.*, *supra* note 3, at 219. See, e.g., the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep. 112, at para. 25, and *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment), 20 Apr. 2010 [2010] ICJ Rep. 128.

¹³⁸ Klabbers, *supra* note 137; d’Aspremont, *supra* note 73, goes a step further and suggests dropping ‘intent’ as the law-ascertainment criterion altogether and replacing it with a more formal criterion focused on the *instrumentum* or form used to memorialize agreement (the so-called ‘container’) rather than on what parties intended or agreed on (the *negotium* or so-called ‘content’), more specifically ‘by a systemic use of *written linguistic indicators*’. See also Pauwelyn, Wessel, and 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* (2014), at 75.

¹³⁹ See, e.g., the International Forum of Sovereign Wealth Funds: ‘the Forum shall not be a formal supra-national authority and its work shall not carry any legal force’; Kuwait Declaration: Establishment of the International Forum of Sovereign Wealth Funds, 6 Apr. 2009, available at: www.iwg-swf.org/mis/kuwaitdec.htm, discussed in Malathouni, ‘The Informality of the International Forum of Sovereign Wealth Funds and the Santiago Principles: A Conscious choice or a Necessity?’, in Berman *et al.*, *supra* note 4, at 251.

¹⁴⁰ As the ISO puts it, ‘the agency neither regulates, nor creates laws’ (quoted in Duquet and Geraets, ‘Food Safety Standards and Informal International Lawmaking’ in Berman *et al.*, *supra* note 4, at 395).

international law, domestic law, or the rules internal to the mechanism where the instrument was created.

B *The Emergence of Procedural Meta-norms for Any Normative Restriction on Freedom*

When an instrument does not meet the threshold of international law, serious thought must be given to what legal effects it may still have and how to control these effects. Checks and balances are needed which should involve an examination of (i) the source, respectability, and authority of the norm-creating body, (ii) transparency, openness, and neutrality in the norm's procedural elaboration, and (iii) the substantive quality, consistency, and overall acceptance (consensus) of the norm. Based on these criteria, tribunals may or may not then consider a norm and give it varying degrees of weight the way they evaluate, weigh, and refer to other 'legal facts'. Schepel refers to these criteria collectively as rules of 'procedural integrity' adding that such control by international tribunals (e.g., the WTO) over outside norms 'exercises an upward pull on the work of private standardizers'.¹⁴¹ Scott and Sturm have referred to this judicial control as 'courts as catalysts'.¹⁴² These three criteria – referring to authority, procedure, and substance – also link back to the very definition of 'informal international lawmaking' as we have defined it,¹⁴³ involving new actors, processes, and outputs as well as to the benchmark of 'thick consensus' described above, which is slowly emerging as a 'code of good practice' in the standard-setting world and beyond.¹⁴⁴

The legal techniques that can then be used by international tribunals to refer to these outside norms – e.g., Basel or ISO standards, ICH or IBA guidelines – could be reliance on them as facts or treaty interpretation, e.g., interpreting a treaty with reference to these outside norms as reflecting a 'good faith' interpretation, 'ordinary meaning' (if a general dictionary can provide ordinary meaning, why not a standard or guideline developed by experts in the specific field?), 'subsequent agreement' or 'subsequent practice' (both, however, focusing on 'agreement' or practice establishing 'the agreement' of *states* parties, not other actors¹⁴⁵), or other 'relevant rules of international law' (although such rules would pre-suppose that the outside norms are

¹⁴¹ See Schepel, 'Private Regulators in Law', in Pauwelyn *et al.*, *supra* note 3, at 356; Bernstein and Hannah, 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space', 11 *J Int'l Econ L* (2008) 575.

¹⁴² Scott and Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance', 13 *Columbia J European L* (2007) 565, at 567.

¹⁴³ See *supra* note 4.

¹⁴⁴ See the ISEAL Code of Good Practice for Setting Standards, available at: www.isealalliance.org/code. This Code of Good Practice is imposed on ISEAL's membership, including the Forest Stewardship Council, the Rainforest Alliance, the Marine Stewardship Council, the Fair Trade Labelling Organization, and others. As Schepel, *supra* note 140, notes: 'These procedures were not adopted spontaneously out of a collective civic awakening: they have evolved in response to demands by public authorities and courts.'

¹⁴⁵ See G. Nolte (ed.), *Treaties and Subsequent Practice* (2013).

actually part of international law).¹⁴⁶ Certain treaties may also directly or indirectly incorporate or make reference to such outside norms or standards (as the SPS and TBT agreements do within WTO law, referring, for example, to Codex and ISO standards).¹⁴⁷ This, of course, facilitates making a bridge to them.

When it comes to the checks and balances to be applied to these outside norms – the procedural meta-norms related to authority, procedure, and substance referred to earlier – on what legal basis could those be relied on? Checks and balances have been developing internally within each normative sub-system (be it the ISO, ICH, or Basel Committee). Reference has been made to reflexive governance,¹⁴⁸ the self-generated internal law of administration,¹⁴⁹ or a variety of system-specific deontologies which replace morals with professional standards.¹⁵⁰ Over time, convergence around certain procedural meta-norms that apply across the board may emerge. This will take time and we may not have reached that stage yet. More experimentation, trial, and error are needed. This is normal. Ladeur describes, for example, how domestic German administrative law developed not starting from general codes imposed by the legislator or courts.¹⁵¹ Rather, principles emerged from the practice within administrative agencies. The same process is occurring at the international level. A 2012 Executive Order by US President Obama, for example, calls for the examination of ‘best practices for international regulatory cooperation with respect to regulatory development, and, where appropriate, information exchange and other regulatory tools’.¹⁵² Time will tell whether procedural meta-norms will arise and on what legal basis they will then be enforced.¹⁵³ It may well be that they will be codified in a treaty or other standard or agreement. They could also develop through the case law of courts and tribunals,¹⁵⁴ or emerge as

¹⁴⁶ See Art. 31(1)–(3) VCLT. The term ‘agreement’ is broader than the notion of ‘treaty’, as defined in Art. 2(1): see Dörr and Schmalenbach, ‘Article 3’, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (2012), at 551. See also Art. 31(4): ‘A special meaning [which could draw on outside norms or standards] shall be given to a term if it is established that the parties so intended’. According to Villiger, such special meaning goes beyond the apparent ordinary meaning of the term and is often found in technical contexts: see M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 435.

¹⁴⁷ See also the UNESCO International Convention against Doping in Sport, which expressly refers to the World Anti-Doping Agency and its Code, and requires that states align their anti-doping legislation with the WADC principles, discussed in Cassini, ‘Domestic Public Authorities within Global Networks: International and Procedural Design, Accountability and Review’, in Pauwelyn *et al.*, *supra* note 3, at 385.

¹⁴⁸ See O. De Schutter and J. Lenoble (eds), *Redefining the Public Interest in a Pluralistic World* (2010).

¹⁴⁹ Ladeur, ‘The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law’, *Osgoode Hall Law School, Research Paper Series, Research Paper No. 16/2011*, (2011), at 17; Mashaw, ‘Federal Administration and Administrative Law in the Gilded Age’, 119 *Yale LJ* (2010) 1362, at 1461.

¹⁵⁰ N. Luhmann, *Die Moral der Gesellschaft*, Herausgegeben von Detlef Horster (2008), at 163ff.

¹⁵¹ Ladeur, *supra* note 149, at 38. For a similar view on US administrative law see Mashaw, *supra* note 149, at 1361–1362.

¹⁵² Executive Order 13609, Promoting International Regulatory Cooperation 77 FR 26413 (1 May 2012), Section 2.

¹⁵³ For a critical view, in the specific context of universal principles of administrative law, see Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *EJIL* (2006) 187, at 187.

¹⁵⁴ Art. 38(1)(d) refers to ‘judicial decisions’ and even to ‘the teachings of the most highly qualified publicists of the various nations’ as ‘subsidiary means for the determination of rules of law’. On the role of national courts see Benvenisti and Downs, ‘National Courts, Domestic Democracy, and the Evolution of International Law’, 20 *EJIL* (2009) 59; and Kingsbury, ‘Weighing Global Regulatory Decisions in National Courts’ in *Acta Juridica* (2009) 90.

general principles of law or even custom.¹⁵⁵ The attraction of such procedural meta-principles is that, as procedural rules, they may attract universal support. As Herbert Simon points out, in highly complex constellations, the only viable kind of rationality is 'procedural rationality', that is, a rational and agreed-upon way to organize a decision-making process.¹⁵⁶ That way, international law may continue to play its 'neutral' role.¹⁵⁷

Ultimately, however, this may lead to a paradox. For formal or traditional international law to arise 'thin' state consent suffices (as discussed above, the validation rules of international law are agnostic as to process, actors involved, instrument, or substance). In contrast, for other norms or standards merely to have *legal effects*, the above criteria of a 'thick consensus' must be met, examining both the source (authority) and the procedural and substantive quality of the norm. The test for 'mere' legal effects is thereby stricter than the test for actual 'law'. If one believes in the full, legitimizing effect of state consent, this may not be a paradox at all: whereas legal effects do not require consent by each state (and therefore need justification on other grounds), for something to be international law the stop-clause of state consent is, at least under current international law standards, both a sufficient and necessary condition. Another way to alleviate this tension is, of course, gradually to move to a test of 'thick consensus' not only for informal law or standards with merely legal effects, but also for traditional international law. Yet, for that to happen a fundamental reassessment of traditional international law would be called for: a shift from 'thin consent' to 'thick consensus'.¹⁵⁸

C A Few Examples

A good, recent example of how traditional international law is grappling with novel forms of governance and standard-setting can be found in the *US – Tuna II* dispute recently decided at the WTO.¹⁵⁹ A core question that arose in this dispute was whether

¹⁵⁵ For 'custom' and 'general principles' Art. 38 does not explicitly refer to 'states'. Custom is defined as 'evidence of a general practice *accepted as law*', without specifying who must have accepted this practice as 'law'. General principles of law, in turn, must be 'recognized by civilized *nations*', where the word 'nation' could be understood more broadly than central state actors alone. Both custom and general principles thereby leave the door open to new actors as well as new types of processes and outputs.

¹⁵⁶ Simon, 'Rationality as Process and as Product of Thought', 68 *Am Econ Association Rev* (1978) 1. See also N. Luhmann, *Legitimation durch Verfahren* (1969).

¹⁵⁷ As strongly advocated by, e.g., Weil, 'Toward Relative Normativity of International Law', 77 *AJIL* (1983) 413. For a different, value-laden account see E. Jouannet, *Le droit international libéral-providence: Une histoire du droit international* (2011).

¹⁵⁸ Yet, it could be argued that some weighing of actual international law along 'thick consensus' requirements may already be possible under, e.g., Art. 31.3(c) VCLT which reveals a certain flexibility as it calls upon a treaty interpreter to 'take into account', together with context, 'any relevant rules of international law applicable in the relations between the parties'. Whereas such reference is limited to 'rules of international law', the qualifiers that they must only be 'taken into account', be 'relevant', and 'applicable in the relations between the parties', leave flexibility for tribunals to consider informal norms and apply 'thick consensus' type checks and balances. Despite its 'under use' by courts, the provision is considered essential to avoid fragmentation in international law. See: Sorel and Boré Eveno, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), at 829, para. 47.

¹⁵⁹ Panel and Appellate Body Reports on *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R and AB/R, adopted 13 June 2012.

the tuna labelling requirements developed under the auspices of the International Dolphin Conservation Programme (AIDCP) could be regarded as an ‘international standard’ on which the US should base its national standard pursuant to Article 2.4 of the WTO Agreement on Technical Barriers to Trade (TBT). With reference to definitions found in the standardization world (ISO/IEC Guide 2:1991) and a non-binding decision adopted by the WTO’s TBT Committee,¹⁶⁰ the panel imposed the following requirements for something to be an ‘international standard’. The document must be (1) a ‘standard’ that was (2) ‘adopted by an international standardizing/standards organization’, and (3) ‘made available to the public’. For the document to be a standard, it must (i) ‘be established by consensus’, (ii) ‘be approved by a recognized body’, and (iii) ‘provide for common and repeated use, rules, guidelines or characteristics for activities or their results aimed at the achievement of the optimum degree of order in a given context’. An international standardizing organization, in turn, is (i) a ‘body that has recognized activities in standardization’ and (ii) ‘whose membership is open to the relevant national body from every country’, *in casu*, every WTO Member. Made available to the public, finally, includes respect for certain transparency procedures concerning elaboration, dissemination, and implementation.

Based on this definition, the WTO panel found that the AIDCP labelling requirements do constitute an ‘international standard’. The Appellate Body, in contrast, though not disagreeing with the panel’s definition, was not convinced that membership of the AIDCP was open to the relevant bodies of at least all WTO Members. It was, in particular, not persuaded that being invited to join the AIDCP is a mere ‘formality’, since to invite new members requires consensus of all AIDCP parties.¹⁶¹ The US pointed out, for example, that although all states whose vessels fished for tuna in the area were eligible, WTO Members with an interest other than fishing, such as consumer or conservation interests, were ineligible to become parties.¹⁶² The Appellate Body agreed that ‘an international standardizing body must not privilege any particular interests in the development of international standards’ and underscored ‘the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards’.¹⁶³

For something to be an ‘international standard’, relevant in WTO adjudication, both source (authority) and procedural and substantive requirements must therefore be met. These are crucial elements also of the ‘thick consensus’ benchmark discussed above. These requirements are fundamentally different from what is required for the establishment of international law, including the WTO Agreement itself (‘thin consent’). In particular, where the WTO requires ‘consent’ (as in veto power for each WTO

¹⁶⁰ *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement*, G/TBT/1/Rev. 9, at 37–39, pursuant to which (in para. 1) 6 ‘principles and procedures should be observed ... to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries’.

¹⁶¹ *Ibid.*, at para. 398.

¹⁶² *Ibid.*, at para. 383.

¹⁶³ *Ibid.*, at paras 379 and 384.

Member), ‘consensus’ in the TBT/international standards sense is defined (in ISO/IEC Guide 2) with reference not only to who ultimately must agree/has veto rights (more lenient than ‘thin consent’) but also with reference to process, who must be heard, and how disagreements must be weighed (stricter than ‘thin consent’).¹⁶⁴ In addition, if one were to apply the WTO’s test of what constitutes an ‘international body’ to the WTO itself, the WTO would fail as it is not ‘open’ to all countries but subject to rigorous accession requirements and veto by all existing WTO Members.

In the investment context as well, norms enacted by new actors and in new forms play an increasing role. Tribunals frequently refer to and apply, for example, rules developed by the privately run International Bar Association (IBA) (e.g., the Rules on the Taking of Evidence in International Commercial Arbitration and the Guidelines on Conflicts of Interest in International Arbitration).¹⁶⁵ These rules do not have the force of law, have never been consented to by states, and are normally not incorporated in the arbitration rules by the disputing parties. Instead, they were developed by experts and the epistemic community of global arbitration. Questions have been raised about their legitimacy and whether such instruments are ‘a tool by which the arbitration elite maintains its power and control over international arbitration’.¹⁶⁶ One solution is to subject these instruments to the source (authority), procedural, and substantive elements of the ‘thick consensus’ test discussed earlier. Along similar lines, Kaufmann-Kohler has suggested ‘integrat[ing] users in the process of soft law creation [“generally weaker parties that are not commercial or business players, but rather consumers, athletes, employees and the like”], thereby extending the consultation beyond the service providers (arbitral institutions, counsel, arbitrators) presently involved’.¹⁶⁷ In addition to such inclusiveness, ‘thick consensus’ would also test (i) the source and authority of the norm-creating body, (ii) transparency, openness, and neutrality in the norm’s procedural elaboration, and (iii) the substantive quality, consistency, and overall acceptance (consensus) of the norm.

Interestingly, however, a recent arbitration tribunal, acting not in the field of investment arbitration, but under the UN Convention on the Law of the Sea, refused to refer to the same IBA Guidelines on Conflicts of Interest. It did so explicitly relying on the ‘thin consent’ paradigm discussed earlier (rather than applying the idea of ‘thick consensus’ which the WTO panel on *US – Tuna II* opted for).¹⁶⁸ This arbitration tribunal

¹⁶⁴ Thereby disagreeing with an earlier Appellate Body decision in *EC – Sardines* finding that consensus adoption is *not* a requirement for an ‘international standard’ in the sense of TBT Art. 2(4). The Appellate Body in *US – Tuna II* left this issue open.

¹⁶⁵ See 2012 International Arbitration Survey, published by White & Case LLP, available at: www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf, at 2 (‘The IBA Rules on the Taking of Evidence in International Arbitration are used in 60% of arbitrations: in 53% as guidelines and in 7% as binding rules’).

¹⁶⁶ Di Robilant, ‘Genealogies of Soft Law’, 54 *Am J Comp L* (2006) 549.

¹⁶⁷ Kaufman-Kohler, ‘Soft Law in International Arbitration: Codification and Normativity’, 1 *J Int’l Dispute Settlement* (2010) 283, at 299.

¹⁶⁸ *The Republic of Mauritius v. The UK of Great Britain and Northern Ireland*, Reasoned Decision on Challenge, 30 Nov. 2011, available at: www.pca-cpa.org/upload/files/Reasoned%20Decision%20on%20Challenge.PDF (italics added), at 165 and 167.

was, of course, bound by the applicable law under the Law of the Sea Convention (whereas the WTO panel in *US – Tuna II* had an explicit mandate to refer to ‘international standards’ under the TBT Agreement). That said, as discussed earlier, this UNCLOS tribunal could also have derived some guidance from the IBA Guidelines if only as relevant facts or as normative guidance to interpret or shed light on the applicable UNCLOS provisions the state parties agreed on, at least to the extent that these Guidelines emanate from a respected authority, were elaborated in an open and fair process, and have over the years attracted support amounting to a consensus in the arbitral community (the ‘thick consensus’ benchmark).

9 Conclusion

There is strong evidence that traditional international lawmaking is in a process of stagnation, both quantitatively (number of treaties) and qualitatively (thin state consent followed by domestic rubber-stamping by parliament). New, alternative forms of cross-border cooperation have emerged and gained prominence, especially since the 2000s. Not surprisingly, as insiders looking at new players joining the scene, international lawyers have focused their attention on whether these new forms are legitimate or even law in the first place. What has been neglected is a critical reflection on what these new forms tell us about *traditional* international law. This article challenges the assumption that traditional international law is, by definition, legitimate and new forms must be presumed not to be. Instead, it points to ‘thin state consent’ as the increasingly flimsy basis of traditional international law and an emerging, normatively superior benchmark of ‘thick stakeholder consensus’ that underlies many of the new forms of cooperation. Our point is not that new forms are without problems. Constant vigilance is required especially to ensure sufficient domestic oversight and meaningful participation of all stakeholders, critiques to which informal lawmaking 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 lawmaking – 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 lawmaking towards the ‘thick stakeholder consensus’ benchmark, emancipating (but also controlling) new actors, new processes, and new types of normative outputs. History teaches us that international law is dynamic and has gone through equally dramatic changes. In the short to medium term, the core questions will be to define what is international law and how does or should it interact with new forms of cooperation. This article argues that 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-barrelled 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. Why is it, for example, that notwithstanding the stagnation described in this article, law schools continue to teach only traditional international law and leave new forms of cooperation to international relations scholars? If we want to keep both the field and its students sociologically relevant we will need to look beyond the four corners of traditional actors, processes, and outputs. Problem solving in an increasingly diverse and complex network/knowledge society requires action beyond what states can shoulder. It needs pragmatic deliberation involving multiple sources of knowledge, experience, and control. The absence of centralized lawmaking in international law has its problems and can make collective action more difficult. At the same time, the de-centralized, heterarchical nature of the international system, where new processes, actors, and forms of cooperation can emerge almost organically, also has advantages as compared to more monolithic, state-centred, national legal systems.¹⁶⁹ This decentralized activity and control with distributed problem solving and multiple actors and interactions at a diversity of levels can ultimately make the international legal system more (rather than less) adaptable to today's challenges. Formal international law may be stagnating; informal international lawmaking is the international legal system's dynamic face.

¹⁶⁹ See J. Pauwelyn, *Optimal Protection of International Law* (2008), at 198.