The Exercise of Public Authority through Informal International Law-Making

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1. Introduction

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

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

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

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

Following the notion that ‘governance’ is about creating (public) order, the ‘public authority’ avenue may indeed lead us in the right direction. The notion was recently studied in the framework of a Max Planck project on the ‘Exercise of International Public Authority’. Large parts of international cooperation (including some of the forms mentioned above) could be considered as merely affecting the private legal relationships between actors. In particular when non-governmental actors are involved, we would argue that the ‘public’ dimension is essential whenever we wish to see international norm-setting as ‘law-making’. Von Bogdandy, Dann and Goldman define the ‘exercise of international public authority’ in the following terms: “any kind of governance activity by international institutions, be it administrative or intergovernmental, should be considered as an exercise of international

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6 A prime example being Alvarez, op.cit.
8 Alvarez, op.cit., at x.
public authority if it determines individuals, private associations, enterprises, states, or other public institutions”. Authority is defined as “the legal capacity to determine others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation”. Also important is the fact that the determination may or may not be legally obligating: “It is binding if an act modifies the legal situation of a different legal subject without its consent. A modification takes place if a subsequent action which contravenes that act is illegal.” The authors believe that this concept enables the identification of all those governance phenomena which public lawyers should study.

The ‘publicness’ of the international act indeed seems important and may be the most difficult element to establish. After all – as also noted by Von Bogdandy, Dann and Goldmann – it would be too easy to relate the ‘publicness’ of a legal act to an existing legal basis for the authority. In the present contribution we will assess whether (de facto) public authority is exercised through what we have coined ‘informal-international law-making’. Section 2 will first of all define the notion of informal law-making. Section 3 will present some findings based on case studies in the IN-LAW project related to the reasons to opt for informal law-making. In section 4 we will make a short excursion into rule-making in the internet sector with a purpose to investigate how we can discover the exercise of public authority. Section 5, finally, will be used to look at some consequences of informal international law-making.

2. Defining Informal International Law-Making

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

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12 Ibid. at 5.
13 Ibid., at 11-12.
14 See, for example, Eyal Benvenisti, ‘Coalitions of the Willing’ and the Evolution of Informal International Law in Coalitions of the Willing - Avantgarde or Threat? 1 (C. Calliess, C. Nolte, G. Stoll, eds., 2008); B. Kingsbury and R. Stewart, Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations, in International Administrative Tribunals in a Changing World (Spyridon Flogaitis, ed., Esperia, 2008), at 5, framed this critique as follows: “Even in the case of treaty-based international organizations, much norm creation and implementation is carried out by subsidiary bodies of an administrative character that operate informally with a considerable degree of autonomy. Other global regulatory bodies - including networks of domestic officials and private and hybrid bodies - operate wholly outside the traditional international law conception and are either not subject to domestic political and legal accountability mechanisms at all, or only to a very limited degree”.

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“informality is best understood as a device for minimizing the impediments to cooperation, at both the domestic and international levels”.

2.1 Output informality

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

At the domestic level, output informality may, at least in some situations, lead to weaker forms of domestic oversight, e.g. little or no internal coordination, notice and comment procedures, parliamentary approval or obligation of publication. In the United States, for example, Circular 175 and its coordinating role for the U.S. State Department and obligation of publication and transmittal to Congress, “does not apply to documents that are not binding under international law”. Similarly, in the U.K, the formalities which surround treaty-making do not apply to so-called Memoranda of Understanding (MOUs) – which the U.K. defines as “international commitments” that are “not legally binding” – and are, moreover, not usually published. In Germany, an internal instruction directed at all federal ministries stipulates that ministries must always inquire whether an international agreement is really needed or whether “the same goal may also be attained through other means, especially through understandings which are below the threshold of an international agreement”.

At the international level, output informality raises the fundamental question of whether IN-LAW is even part of what we call ‘international law’ (be it traditionally defined or under some modern, evolutionary definition) and whether IN-LAW is, as a result, subject

16 That is, sources of international law as described in Article 38 of the Statute of the International Court of Justice (conventions, custom, general principles of law).
18 See U.S. State Department website, Circular 175 Procedure, at http://www.state.gov/s/l/treaty/c175/. Similarly, the U.S. constitutional rule that “treaties” must be adopted in the Senate by 2/3 majority does not apply to what in U.S. law are known as “international agreements” (distinguished from “treaties”). This explains why today the large majority of U.S. international cooperation takes the form of “executive agreements” rather than “treaties” (to avoid the hurdle of 2/3 majority in the Senate). Such “international agreements” are, however, subject to Circular 175. That said, if a document is not legally binding (i.e., not an “international agreement” under the specific criteria of Circular 175), even the limited obligations in Circular 175 do not apply.
19 Treaties and MOUs, Guidance on Practice and Procedures, 2004, Treaty Section, Foreign & Commonwealth Office, p. 1. Note, however, that the UN Treaty Handbook (p. 61) does consider MOUs as legally binding: “The term memorandum of understanding (M.O.U.) is often used to denote a less formal international instrument than a typical treaty or international agreement … The United Nations considers M.O.U.s to be binding and registers them if submitted by a party or if the United Nations is a party”.
to the normative strictures and consequences that normally come hand in hand with being part of international law. Such strictures and consequences include the basic rule that no state can be bound without its consent, applicability before international courts or tribunals, hierarchy and systemic relation to other rules of international law including basic human rights and *jus cogens*, registration with the UN Secretariat\(^{21}\) etc. We leave the matter of whether IN-LAW and/or its output is regulated under, part of, or even (partly) binding under, international law open for further scrutiny. The reason to use the term ‘law-making’ is exactly meant to find out whether the normative processes under review can somehow lead to ‘law’. At the same time it forces lawyers to reassess the foundations of their discipline in view of emerging forms of global governance.

### 2.2 Process informality

Secondly, in terms of *process*, international cooperation may be ‘informal’ in the sense that it occurs in a loosely organized network or forum rather than a traditional international organization (IO). Think of the G-20, Basel Committee on Banking Supervision or the Financial Action Task Force, versus the UN or the WTO. Such process or forum informality does, however, not prevent the existence of detailed procedural rules (as exist, for example, in the Internet Engineering Task Force), permanent staff or a physical headquarter. Nor does process informality exclude IN-LAW in the context or under the broader auspices of a more formal organization (a lot of IN-LAW occurs, for example, under the auspices of the OECD).

What we do not include under informal international law-making, however, is what some could consider as the ‘informal’ negotiation or conclusion of treaties, such as oral agreements or negotiations conducted, or consent expressed, by means of modern technology (internet, fax etc.). Similarly, we do not want to include under the notion of IN-LAW all international negotiations or contacts that happen behind closed doors such as ‘informal’ or ‘green room’ meetings in preparation of formal agreements (even if quite a bit of IN-LAW also happens behind closed doors).

Process informality, on top of output informality, may, in certain situations, further limit normative strictures or control under both domestic and international law. As Slaughter phrased it, “[t]he essence of a network is a *process* rather than an *entity*; thus it cannot be captured or controlled in the ways that typically structure formal legitimacy in a democratic polity”.\(^{22}\) For example, regulators may face less domestic constraints when operating in a loose network abroad with foreign partners as compared to when they act purely domestically or in contrast to formal delegates to an IO. Moreover, meetings and decisions in a traditional IO are normally more tightly regulated and structured than informal gatherings. As a result,

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\(^{21}\) Article 102 of the UN Charter provides: “1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it. 2. No party to any such treaty or international agreement, which has not been registered in accordance with the provisions of paragraph 1 of this Article, may invoke that treaty or agreement before any organ of the United Nations”.

process informality raises additional questions and trade-offs between effectiveness and accountability both at the domestic and at the international level.

As we did above in respect of IN-LAW output and the question of whether such output is part of international law, we do not want to prejudge the matter of whether an IN-LAW grouping or network can be a subject of international law or have legal personality of its own. We leave this question open for further scrutiny. A possible advantage of being a subject or having legal personality may be that some IN-LAW groupings or networks can be held accountable as separate entities and may fall under the control (albeit partly) of international law. A possible drawback of such independent status may, however, be that it enhances the power of the grouping or network and may, in turn, make it more difficult rather than easier to hold the IN-LAW body accountable (participating national actors may, for example, hide behind the IN-LAW as a legal person when it comes to responsibility; independent international status may enhance the power of the network and reduce the need for domestic implementation and the domestic control that comes with it).

Indeed, as much as process or forum informality may enhance fears of lack of accountability, as Anne-Marie Slaughter has argued, IN-LAW (or, in her words, “transgovernmental networks”) may also be more accountable to domestic constituencies than traditional IOs. Slaughter’s argument is that in transgovernmental networks input and output is channeled directly through domestic actors with a shorter accountability chain back to the people, and no independent international body exists to which authority has been delegated or which could impose its will on participants.23

That said, even where accountable to domestic constituencies and, in this sense, accountable to internal stakeholders, the question remains whether IN-LAW networks are sufficiently accountable to external actors including broader societal interests and countries outside the network (but where network output is de facto implemented, as is the case of ICH24 guidelines in many non-ICH member countries). As Richard Stewart pointed out, “the problem is often not lack of accountability, but disproportionate accountability to some interests and inadequate responsiveness to others”.25

2.3 Actor informality

Thirdly, in terms of actors involved international cooperation may be ‘informal’ in the sense that it does not engage traditional diplomatic actors (such as heads of state, foreign ministers or embassies) but rather other ministries, domestic regulators, independent or semi-independent agencies (such as food safety authorities or central banks), sub-federal entities

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

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(such as provinces or municipalities) or the legislative or judicial branch.\textsuperscript{26} Under Article 7 of
the Vienna Convention on the Law of Treaties, for example, only heads of state, heads of
government, foreign ministers, heads of diplomatic missions or specifically accredited
representatives are presumed to have so-called full powers to represent and bind a state.

The non-traditional nature of the actors involved in IN-LAW may be further
accentuated with the participation of private actors (besides public actors) and/or international
organizations. In some cases, IN-LAW may even consist exclusively of a network of IOs
(think of the UN System Chief Executive Board of Coordination). Purely private cooperation
(that is, with no public authority involvement), on the other hand, is not covered under IN-
LAW.

The fact that regulators or agencies – rather than diplomats – are involved further
complicates the question of whether IN-LAW is part of international law (e.g., can such
regulators or agencies bind their state; are they ‘subjects’ of international law?). Under U.S.
law, for example, ‘agency agreements’ do constitute international agreements.\textsuperscript{27} For France,
in contrast, ‘arrangements administratifs’ are not recognized under international law, are not
even registered by the French Ministry of Foreign Affairs and should, according to a 1997
Circular of the Prime Minister, only be resorted to in exceptional circumstances given, inter
alia, their uncertain effects.\textsuperscript{28}

Besides creating uncertainty under international law, actor informality may also reduce
domestic oversight and coordination (e.g. through the ministry of foreign affairs). At the
same time, non-traditional actors (such as regulators and agencies) do remain subject to
domestic administrative law, internal bureaucratic controls, ministerial responsibility and any
parliamentary-oversight or limited mandate that may be in place under domestic law. In this
respect, the question arises whether an ambassador or diplomat (traditionally engaged in
international cooperation) is more accountable, more legitimately exercising authority or
subject to a shorter delegation chain than, for example, a regulator or agency, or vice versa.

In summary, our working definition of ‘informal international law-making’ is

\textsuperscript{26} That the actors involved may make international law making (including its domestic angle) more or less
formal is confirmed in the distinction made under French practice between “accords en forme
solennelle” (Article 52 of the Constitution), concluded by the French President and subject to
“ratification”, and “accords en forme simplifié”, concluded at the level of the government by the
Minister of Foreign Affairs and subject to “approbation” (Circular du 30 mai 1997 relative à
l’élaboration et à la conclusion des accords internationaux).

\textsuperscript{27} Circular 175, 1 U.S.C. 112a, 112b, para. 181.2, 5(b): “Agency-level agreements. Agency-level
agreements are international agreements within the meaning of the Act and of 1 U.S.C. 112a if they
satisfy the criteria discussed in paragraph (a) of this section. The fact that an agreement is concluded by
and on behalf of a particular agency of the United States Government, rather than the United States
Government, does not mean that the agreement is not an international agreement. Determinations are
made on the basis of the substance of the agency-level agreement in question”.

\textsuperscript{28} Website of the French Ministry of Foreign Affairs, http://www.doc.diplomatie.gouv.fr/pacte/index.html:
« Les arrangements administratifs conclus par un ministre français avec son homologue étranger ne sont
pas répertoriés dans la base de données documentaire. En effet, il ne s’agit pas de traités ou d'accords
internationaux … Cette catégorie n’est pas reconnue par le droit international. La circulaire du 30 mai
1997 relative à l’élaboration et à la conclusion des accords internationaux recommande aux
négociateurs français de ne recourir à ce type d’arrangements qu’exceptionnellement et souligne que les
effets qu’ils produisent sont incertains »
Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or traditional source of international law (output informality).

3. Reasons for Informal International Law-Making

Some of the reasons for IN-LAW are novel or recently on the rise (e.g. multipolarity, the disaggregation of the state or new modes of governance by “technical necessity”\(^ {29} \), discussed below). This may explain the growing number of IN-LAW mechanisms especially in the last 10-15 years. Other reasons (such as the formalities linked to formal law-making or the uncertainty inherent in specific fields of cooperation) have been around for much longer.

Some of the reasons for IN-LAW are perfectly benign. They portray IN-LAW as a complement or alternative to formal law (e.g. in areas that would otherwise not be occupied by formal law) or even as the first-best option to deal with a cooperation problem, more appropriate or effective, or less costly than formal law. These reasons would not seem to raise concern or call for major reforms or changes.

Other reasons for IN-LAW are more worrisome. The goal of ‘circumventing’ formalities, for example, has raised questions of accountability and even legality. Those reasons for IN-LAW could lead to calls for reforming, regulating or limiting IN-LAW activity. Other reasons for IN-LAW, in contrast, relate to arguably outdated features of international law itself: who can make it, how can it be made, changed and implemented, and how does it score on the scales of legitimacy and effectiveness. This raises the question of not so much how to reform or adjust IN-LAW but how to reform or adjust traditional international law.\(^ {30} \)

There are, in any event, multiple reasons for actors to opt for IN-LAW, some of which may even be in tension or outright contradictory. Below we classify those reasons in two broad categories: First, those that, in one way or another, portray IN-LAW (rightly or wrongly) as a ‘second-best’ option that is likely problematic (not least in terms of accountability) as compared to the perceived ‘superior’ route of formal law-making (IN-LAW because formal law-making is ‘too burdensome’, ‘un-attainable’ or ‘technically impossible’; IN-LAW to ‘favour the powerful’ or to ‘counter formal law’). We refer to these reasons for IN-LAW as reasons that portray IN-LAW as ‘second-best’ only because those reasons put IN-LAW in a bad light or portray it as the ‘inferior’ mode of governance (e.g. in the sense that if only negotiators would have been able to conclude formal law, that is what they would have


\(^ {30} \) As J. Klabbers has noted, albeit in a different context, « Globalization seems to have bypassed the discipline of international law completely”. Contribution to the HiLi Law of the Future project, 2011 (http://www.lawofthefuture.org/)

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done). By doing so, we do not in any way make ourselves a normative judgment as to whether IN-LAW is, in the circumstances, first or second-best. Those pejoratively tainted reasons for IN-LAW are what we would call the more conventional explanations for the rise of IN-LAW.

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

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

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

1. **Formal law-making is ‘too burdensome’** both internationally and domestically: IN-LAW is resorted to in order to overcome impediments linked to ‘formal’ international law-making\(^{31}\), in particular, (i) formal state consent between all target countries at the international level\(^{32}\) and (ii) domestic ratification and related (super-)majorities in national parliaments or domestic regulatory processes such as internal consultation or administrative notice & comment procedures. Regarding process informality, informal processes too may be selected over formal intergovernmental organizations when the latter are perceived as too burdensome, that is too bureaucratic or too slow in getting things done.

2. **Formal law-making is ‘un-attainable’** due to high uncertainty related to the issue area and/or high diversity amongst negotiating parties. Especially IN-LAW on the output-informality axis (soft law) is more likely when ‘uncertainty’ as to the issues involved or ‘diversity’ of interests between actors is high (think, for both elements, of climate change). When interests are certain and sufficiently aligned amongst a critical mass of countries, “formal” law is more likely.\(^{33}\)

Similarly, IN-LAW is often resorted to when countries are not ready to bind themselves formally given that formal law-making adds costs in case of defection

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\(^{31}\) Lipson.

\(^{32}\) See J. Klabbers, IN-LAW/soft law is “devoid of the guarantees that come with law... it discards the function of law which, in all plausibility, is precisely to simplify those existing political configurations and turn them into workable mechanisms, where behavior is either legal or it is not, and one is either in breach of an obligation or one is not”. Reference

\(^{33}\) Trubek & Trubek, Hard and Soft law; Shaffer & Pollack, p. 721.
(such costs can be linked to sanctions or retaliation, reciprocity or loss of reputation). For realists, this means that IN-LAW is meaningless (since not binding). Others have argued that even IN-LAW or soft law can be effective due to reputational costs (Guzman) or socialisation of norms. Based on our studies, the latter view is more convincing: soft law both internationally and domestically has on many (though certainly not all) occasions proven to be effective or at least to substantively change behaviour: countries implement it (e.g. Basel II), actors comply with it (ISO, internet standards) and even courts, both international and domestic, refer to it (ICJ in Pulp Mills, WTO in SPS/TBT).

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

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

Under traditional international law, these new actors of the “disaggregated” national state cannot normally represent the state (unless they were specifically accredited). Therefore, instead of resorting to formal law-making, by necessity (no domestic mandate to bind the state; no international recognition as legal persons), these new actors use IN-LAW. Here IN-LAW is used by technical necessity and this even though the participants would have been able to tie their hands more strictly under formal law. From this perspective, IN-LAW is a ‘second-best’ choice in that ‘real’ law-making is simply not available. It is not so much the subject matter or diversity of interests between states that dictates the choice for formal or informal law-making, but rather the very nature of the participants.

34 Guzman.
35 Downs, Rocke and Barsoom 1996.
36 IR social constructivism: believe in agency autonomy, runaway, dysfunctional at times; Social-constructivists see these networks mainly as norm-setters and arenas of normdiffusion (Finnemore and Sikkink 1998). They attribute real agency to them. Governance networks will undergo various types of socialization processes. Checkel (2007).
37 IR institutionalists: Institutions and issue-specific international regimes have been viewed as important mechanisms overcoming cooperation problems by providing information, transparency, lowering transaction costs, and tackling compliance problems to allow and sustain cooperation (Krasner 1983; Keohane 1984).
38 That said, if the actors involved would consider it necessary or important, they could involve the higher, political level that has the capacity to conclude treaties on their behalf. However, there may be many
One solution is for traditional international law to adapt itself, e.g. by formally recognizing domestic agencies or regulators as legal persons that can bind states under international law (as Slaughter and Zaring have proposed\(^39\)). Another solution is to set-up cross-border agency cooperation as activity outside formal international law and governed by, for example, a new set of rules such as Global Administrative Law.\(^40\)

4. **IN-LAW to favour the powerful:**\(^41\) Informality can benefit powerful players who will find their way out in case of pressures for defection. Weaker actors, in contrast, may, in practice, be as constrained by informal law as they are by formal law. This *rationale* for IN-LAW (powerful actors want it) may be in tension with another reason above, arguing that high diversity or multi-polarity (rather than hegemony) lead to more IN-LAW. In addition, the question remains whether informal law reflects power more than formal law or whether all norm-making is (equally) influenced by power.

5. **IN-LAW to counter formal law-making:**\(^42\) IN-LAW is, in this situation, not a complement or alternative to formal law-making but rather resorted to as an antagonist, to undermine existing hard or formal law (IN-LAW to soften hard law). This making of IN-LAW can go hand in hand with forum-shopping: actors unhappy with an existing framework create a competing one in another forum. This competition may play out especially when powerful countries cannot agree and there are important distributional effects to cooperation (e.g. in case of standard-setting, the need for cooperation is acknowledged but precisely whose standard will be adopted as international standard has important distributional effects). IN-LAW as antagonist can also be resorted to by weaker, outside countries who disagree with a regime set up by powerful players so as to thwart the existing regime.

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41 J. Klabbers, “political configurations tend to be those in vogue among the power holders, not the powerless”; Klabbers (Law of the Future), “One thing that is bound to continue over the next few decades is, alas, the further instrumentalization and even commodification of international law. The tendency has been, since the 1950s, to no longer regard agreement between states as automatically giving rise to legal rights and obligations, but, instead, to posit law as an option among options. … This helps turn the law from the full menu into just an element on a smorgasbord of possibilities, to be utilized whenever it is deemed convenient, and to left aside when considered inconvenient. The obvious question is then: “convenient or inconvenient for whom?” And the equally obvious answer is: “for those in positions of power”. This is further stimulated by Slaughter’s worrying observation that much policy-making takes place in networks of civil servants, far from the public view, and far removed from any systems of political accountability – never mind legal accountability”; Benvenisti. IR realists: serves interests of leading powers (Drezner, 2007).

42 Shaffer & Pollack.
3.2 Positive Reasons for IN-LAW (IN-LAW Perceived as ‘First-Best’)

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

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

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

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

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

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

   IN-LAW is increasingly resorted to not because formal law was un-attainable as some ideal solution but because informal cooperation was simply seen as better and more appropriate both procedurally and substantively. The IN-LAW route can then be chosen not as part of some dark conspiracy to avoid the democratic strictures of formal law-making, but rather because IN-LAW is more (rather than less) accountable or responsive to a broader audience and better adapted to modern norm development. Here as well IN-LAW is perceived not as a second-best fall-back option but as the normatively superior track with which formal law has difficulties competing. This raises the question not so much of what is wrong or needs to be reformed on the side of IN-LAW, but what should be reconsidered on the side of formal, traditional international law (should, for example, the Vienna Convention on the Law of Treaties be revised to take account of modern standards of norm-making set out in, for example, the ISEAL Code of Good Practice for Setting Standards43?). Here, IN-LAW can often be more (rather than less) accountable, transparent and responsive as compared to formal law-making.

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

   43 Available at http://www.isealalliance.org/code.
• *decision by ‘rough consensus’*\(^{44}\) rather than individual state consent: Rough consensus rather than individual state consent with a veto or opt-out for each individual country (no matter how small or important) may not only be easier to obtain (more effective). The way ‘consensus’ is defined and operates can also be more representative or responsive to a broader group of stakeholders in accordance with their respective weight and importance (and therefore be more accountable or democratic).\(^{45}\)

• IN-LAW is not to be ratified and implemented in a one-off exercise: *domestic input is an ongoing process* and even after adoption of the standard the interplay continues (‘running code’ idea relates to ex post testing of a standard: if it works, is legitimate, the standard becomes effective; if not, it is put aside and adjusted). Traditional international law is not only difficult to ratify domestically (senate majorities; administrative law requirements). It is also a static, one-time process of all or nothing. IN-LAW methods, in contrast, allow for more continuous interaction and adjustments between the international and the domestic level (continuous review, ongoing monitoring, formal or informal complaints mechanism v. fixed nature of treaty making and implementation where amendments normally have to go through the same, long process of ratification thereby stifling adaptations to quickly changing environments).

• *The flexibility of IN-LAW also allows for the mechanism at the international level to adapt itself to new developments*, be it new players or new issues to be incorporated or reforms to be implemented (e.g. on transparency or openness).

• Domestic regulators, subject to domestic administrative law procedures (such as notice and comment), allow for greater citizen involvement in transgovernmental rule making process – more than would be possible in the traditional settings (in IOs or in treaty negotiations).

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

• emerging general principles for the elaboration of IN-LAW (initiation of new standard; notice & comment; several drafts sent back and forth between stakeholders, clarity of rules, etc.) is likely to lead to norms that are more transparent, inclusive, clear and effective as compared to how traditional international law is made. Here as well, IN-LAW is not the

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\(^{44}\) Callies & Zumbansen.

\(^{45}\) See, for example, definition of ‘consensus’ in the ISEAL standard (making reference also to ISO definition): “General agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests. NOTE – Consensus should be the result of a process seeking to take into account the views of interested parties, particularly those directly affected, and to reconcile any conflicting arguments. It need not imply unanimity - (based on ISO/IEC Guide 2:2004)”.

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little stepsister of formal law; it can be normatively superior. Put differently, it is not so much formal law that is to give ‘accountability lessons’ to informal law but the other way around. These emerging IN-LAW principles can lead not only to input legitimacy but also output legitimacy in that norms are enacted that ‘work’ and solve the problem that voters or constituencies wanted action on.

- Because the IN-LAW elaboration process allows input from all stakeholders, consistency of norms across regimes may be easier to achieve (as compared to formal law-making where WTO negotiators conclude treaty without knowing environmental or human rights treaties). Against that, however, is the argument that formal law-making passes through the State Department or other oversight ministry which is supposed to check cross-regime consistency (whereas IN-LAW may be made by narrowly-focused regulators with no idea what the state is committed to elsewhere).

3. **IN-LAW as a ‘cultural practice’ (the Asian Way)** 46 The East Asian region has frequently been characterized as a principal example of soft legalization. It is generally believed that countries in this region have preferred non-binding measures to binding measures.

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

4. **IN-LAW as a ‘technical necessity’**. In these cases the reason to opt for IN-LAW is related to the technical expertise needed to regulate a particular area. In such areas (e.g. the regulation of medical products, of nano-technology or of standards to fight cybercrime) regulation can only be drafted by experts and there may be hardly any room for political (governmental) considerations. As one observer held, this is “governance by technical necessity”. 47

### 3.3 Other reasons for IN-LAW

1. **IN-LAW (process and output): The Rise of Private Actors as International Political Players**
   
The rise in the international political power of private actors, and the desire of governments to include them in regulatory processes, has shifted cooperation away from intergovernmental organizations and/or formal treaties as these formal processes and output would not allow for their inclusion.

2. **IN-LAW (process): A diffusion of European practices to the international level**

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46 Randy Peerenboom, LoF; Soami paper; Confucius and quest for harmony, balance, tolerance, mutually acceptable solutions rather than strict rules or formally binding commitments.

47 Hartwich, *op.cit.*
In some cases, the origin of the regulatory network model can be traced back to the European regulatory network. For example, without any previous experience in international cooperation, the drug regulatory authorities, which joined forces in the ICH to harmonize their pharmaceuticals registration rules, copied the network model, which had been previously developed in the context of European pharmaceutical harmonization. This could be explained by historical institutional, or path dependency theory.

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

4. INLAW (process): Temporary projects
When states consider a project to be temporary they may prefer an informal setting over a formal, institutionalized one.

5. IN-LAW (actors): Transgovernmental regulatory cooperation in reaction to domestic political pressures
For example, in the case of the ICH, regulatory cooperation was a tool to deal with domestic political pressure on the FDA due to the “drug lag” (the amount of years it took to approve new drugs).

6. IN-LAW (output): Maintenance of national sovereignty
‘Non-binding’ rules allow each of the parties to maintain their sovereignty and to adapt the agreed upon rules to their local capacities and needs.

7. IN-LAW (process, output): IN-LAW life cycle
Parties that have started out cooperating in an informal process may decide over the life cycle of the process whether a binding agreement is necessary or not. If they see that the parties are complying with the non-binding agreement, a binding agreement (whose completion is always resource and time expensive) becomes unnecessary. In some IN-LAW mechanisms a certain re-formalization of the mechanism can also be observed, for example in order to give it a certain legitimacy under international law. This ‘lack of international legitimacy’ might be one of the reasons to choose formal over informal law-making. On the other hand, it is precisely the flexibility of IN-LAW mechanisms that makes it possible to adapt to needs of member states, even if this is an extended formalization of the mechanism itself.

8. INLAW (output): On scientific matters parties do not want to bind themselves as science is constantly changing, and by the time a binding rule is concluded, it would need to be amended.
4. An Example: Informal International Law-Making in the Internet Sector

As an example, in this section we will focus on bodies with activities that are directly relevant for technological sectors, more precisely the internet sector. This leaves out other bodies in the technical arena, such as ISO (the International Standardization Organization), as well as all bodies with powers to regulate technological innovation in areas such as the environment, food, health, or security. We will also leave out the formal activities of traditional international organizations as these are well described by others.\(^{48}\) The descriptions below merely serve as illustrations of regulation of technological innovation through informal international law. Obviously, a broader scope would reveal a larger number of involved bodies. The main purpose will be to find out when we can argue that ‘international public authority’ is exercised.

4.1. The International Corporation for Assigned Names and Numbers (ICANN)

ICANN is a non-profit corporation, with the mission of coordinating the global Internet's systems of unique identifiers. It coordinates the allocation and assignment of the three sets of unique identifiers for the Internet: domain names, internet protocol (‘IP’) addresses and autonomous system (‘AS’) numbers; and protocol port and parameter numbers. ICANN is a non-profit corporation under Californian law and therefore is a striking example of a body that despite not being an international organization seem to govern an entire technical sector on a global scale. ICANN thus defies the traditional foundations of international law-making: its main members are private corporations (with national governments in an advisory role only), it has no international legal status and it is not based on an international agreement in which its competences are laid down and restricted. Thus, formally ICANN does not exist in international law. Yet, as argued by one observer, “ICANN establishes rules which are of greater importance than most acts of international organizations and they are more widely and more strictly accepted and respected than binding decisions of most international organizations. One could make the argument that ICANN decisions are more authoritative than those of the UN Security Council in the sense that ICANN decisions are less frequently violated”.\(^{49}\) The reason is simple: ICANN’s rules are necessary for the operation of the Internet.

The private law origin of ICANN is reflected in the composition of its main decision-making body, the Governing Board, which draws its members from interest organizations and groups. Governments do have an influence through one of the advisory bodies only, the Governmental Advisory Committee (GAC). The GAC is composed of representatives of (102) state governments, public authorities and (14) representatives of international organizations (such as the ITU and the WIPO). Since 2002 (following the terrorist attacks of

\(^{48}\) Many examples are drawn from the case studies in the IN-LAW project. The case studies used here were done by Ana Berdajs at the Graduate Institute in Geneva.

2001), the GAC’s advises are duly taken into account by the Board of Governors (see Art. 1, sec. 2.11 Bylaws of 2002). The GAC has its own governance structure, secretariat and decision-making procedures and seems to have become an ‘intergovernmental organization within a non-governmental organization’.

Another element pointing to its ‘informal law’ status concerns the ‘output’. ICANN does not regulate on the basis of binding decisions. Rather, it concludes contracts with the registries in charge of the administration of internet ‘top level domains’ (TLDs). However, given the fact that internet access is dependent on having a TLD name (such as .eu), one may argue that this comes close to ‘de facto’ bindingness. Indeed ‘It seems quite logical that the uniformity of the rules is best guaranteed by a single ‘legislator’’.\textsuperscript{50} It is this argument that seems to form the source of many more examples of the regulation of technology. Despite its informal, non-governmental, nature, ICANN fulfils a public task. It administers a scarce common good and decides on its assignment. In that sense it indeed can be said to exercise public authority.\textsuperscript{51}

\subsection*{4.2 The Internet Governance Forum (IGF)}

The 2006 World Summit on the Information Society (WSIS) led to the establishment of the IGF, with a view to better understand the issues related to Internet governance and to promote dialogue among stakeholders in an open and inclusive manner. The mandate of the Forum is laid down in Paragraph 72 of the Tunis Agenda adopted by the WSIS, which was endorsed by the UN General Assembly in its Resolution 60/252.

Unlike ICANN, the IGF allows for more groups to participate in meetings: governments, the private sector, civil society, intergovernmental and other international organizations. In the 2010 meeting (in Vilnius), 1451 people participated (a total of around 2000 persons were present). The breakdown of participants shows that all the major stakeholder groups were represented almost equally, with 21\% of participants coming from civil society, 23\% from private sector and 24\% government representatives and 22\% technical and academic communities. Institutionalisation 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. The MAG prepares the IGF meetings and meets three times per year and is physically located within the UN Offices in Geneva.

Apart from the Chairman Submissions that are issued at the end of every meeting, IGF meetings have no formal binding output. Nevertheless, IGF is believed to affect decisions that are taken elsewhere. Thus, the work of the IGF has been reflected in Ministerial Declarations of the Council of Europe and the OECD.\textsuperscript{52}

\textsuperscript{50} \textit{Ibid}, at 591.
\textsuperscript{52} Based on the data retrieved in the INLAW project by Ana Berdajs. See also Note of the UN Secretary-General, Prepared by UN Department of Economic and Social Affairs (May 2010), available at http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan039074.pdf
While the IGF most certainly influences the political as well as technical governance of the internet, it would be hard to argue that it exercises public authority itself. It does play its role in the regulation of the internet and may in that sense have a public task. It does, however, seem to lack ‘the legal capacity to determine others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation’.

4.3 The Internet Engineering Task Force (IETF) and the Internet Society (ISOC)

ISOC is an organisation network for the groups responsible for Internet infrastructure standards, including the IETF. The latter is the principal body engaged in the development of new Internet standard specifications. Being a large open international community of network designers, operators, vendors, and researchers, IETF is responsible for the resolution of all short- and mid-range protocol and architectural issues required to make the Internet function effectively. IETF is a network, formally established by IAB (Internet Architecture Board). It is not a corporation and it lacks a definite legal status. It has no board of directors, no official members, and no dues. ISOC is an independent international non-profit organisation, established in 1992 with the purpose of providing institutional framework and financial support for IETF, but it later expanded its objectives. ISOC is a corporation, incorporated under District of Columbia Non-Profit Corporation Act. Its responsibilities are provided for in RFC 1602 (Revision 2 of The Internet Standards Process), a constitutive instrument that was adopted in 1992 and was later revised.

There is no membership in the IETF. Anyone can register for and attend any meeting. The closest thing there is to being an IETF member is being on the IETF or one of the Working Groups’ mailing lists. The usual participants are designers, operators, vendors, and researchers concerned with the evolution of the Internet. Governments’ representatives can participate in the process; however their participation is at the same level as the one of private individuals or experts. They are not accorded any special treatment; to the contrary, they only form a part of large Internet community. The membership of ISOC is more structured. It is open for individuals and organisations. Today, ISOC’s community has more than 26,000 individual Members. Groups of people who live in the same area or share an interest in specific issues can form an ISOC Chapter. ISOC’s Organisation Members include corporations; non-profit, trade, and professional organisations; foundations; educational institutions; government agencies; and other national and international organisations.

The Internet Standards Process starts at the IETF. A specification undergoes a period of development and several iterations of review by the Internet Community and revision based upon experience. The standards developed through the IETF are considered by the Internet Engineering Steering Group, with appeal to the Internet Architecture Board, and promulgated by the Internet Society as international standards. Typically, a standards action is initiated by a recommendation to the appropriate IETF Area Director by the individual or group that is responsible for the specification, usually an IETF Working Group. WGs cooperate through the mailing lists. An important fact is that there is no formal voting in the WG. The general rule on disputed topic is that the WG has to come to “rough consensus”, meaning that a very large majority of those who care must agree.
Output takes different forms: proposed standards, draft standards, Internet standards, best current practices documents, informational documents, experimental documents and historical documents. The Internet Standards Process deals with protocols, procedures, and conventions that are used in or by the Internet, whether or not they are part of the TCP/IP protocol suite. The effect of the Internet standards is not binding per se, but the purpose of the Internet standards making process is to get consent of the end-users and their affirmation of the standard. This will result in actual use of the standards and therefore, a more unified and open use of the Internet. In effect, the Internet Standards Process has a very concrete and formal output and its standards are widely used by the Internet community.

This feature reveals the public authoritative nature of the process. It is hardly possibly not to accept the standards, which leads to an effective international regulation of this area through different, informal, means.

4.4 The Global Cybersecurity Agenda (GCA) of the ITU

GCA is a framework for international cooperation aimed at enhancing confidence and security in the information society. It was launched in 2007 by ITU Secretary-General. Cybersecurity refers to the protection against unauthorized access, manipulation and destruction of critical resources. The main problem is the lack of international harmonisation regarding cybercrime legislation. ITU’s idea with GCA is that the strategy for a solution must identify those existing national and regional initiatives, in order to work effectively with all relevant players and to identify common priorities.

All Members of the ITU – 191 Member States and 700 Sector Members – can participate in a discussion and initiatives the GCA. The decision-making process depends on the decision taken. For example, recommendations are issued on the basis of a consensus of all participants. On the other hand, toolkits (‘model laws’) are prepared by lawyers and not by state representatives. Except from the formal establishment of the initiative there is no ‘output’ as such, the objective being to influence the practice worldwide. With its cybercrime legislation resources and material, the GCA under the ITU aims to assist countries in understanding the legal aspects of cybersecurity in order to move towards a harmonizing of legal frameworks. Apart from many key security Recommendations, ITU has developed overview security requirements, security guidelines for protocol authors, security specifications for IP-based systems, guidance on how to identify cyber threats and countermeasures to mitigate risks. One of the most important security standards in use today is X.509, an ITU-developed Recommendation for electronic authentication over public networks. Recently, ITU-T X.1205 ‘Overview of Cybersecurity’ was approved. It provides a definition of cybersecurity and taxonomy of security threats. It discusses the nature of cybersecurity environment and risks, possible network protection strategies, secure communications techniques and network survivability.

Irrespective of their influence, the decisions taken do not have a binding force for the Members of the GCA. Again, however, one may argue that once the adopted recommendations in effect regulate a particular area – for instance, by excluding other possibilities – the GCA is exercising international public authority. Given the subject matter,
however, this effect may only occur once market players or governments decide on a mandatory use of the adopted standards.

5. Consequences of Informal International Law-Making and Suggestions for Further Research

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

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

While the transfer of competences to formal international organizations is a careful process guided by strict rules and principles (such as the ‘principle of the attribution of powers’), in a parallel process competences seem to have been transferred to or created by more informal fora. Again, this is not new, but the extent to which large parts of society now seem to be regulated in ‘informal’ ways triggered a debate on the consequences (in terms of legitimacy and accountability, or more generally upholding the rule of law) and possible solutions (ranging from the introduction of constitutional principles at the global level, the development of Global Administrative Law, or the acceptance of the plurality of legal orders and the fragmentation of international law). These responses underline that we may indeed have to rethink certain traditional aspects of international law.

The regulation of technological innovation is a prime example of an area which is already largely outside the direct influence of the traditional law-makers, the states. At the same time, we have seen that in most cases we are not talking about small and select groups

53 See H.G. Schermers and N.M. Blokker, International Institutional Law: Unity in Diversity, Boston/Leiden: Martinus Nijhoff Publishers, 2003, p. 155: “A rule of thumb is that, while states are free to act as long as this is in accordance with international law […], international organizations are competent only as far as powers have been attributed to them by the member states. […] International organizations may not generate their own powers, They are not competent to determine their own competence.”


of actors. Many stakeholders are involved and the institutionalisation has shown a dynamic that is similar to traditional international organizations. Moreover, this is not about the private sphere of companies; in many cases international public authority is exercised. It is clear that there is no way back and that ‘global governance’ developed, either in the shadow of existing arrangements, or simply ‘bottom up’ through cooperation between national regulators. In this case we clearly see one of the reasons for informal law-making: it can only be done by experts; it is “governance by technical necessity”.

Legal science is only at the beginning of accepting the reality of this development. At the same time this offers an opportunity to reassess the traditional foundations of international law. The ‘informal international law’ project may assist in providing the necessary empirical data and conceptual notions to make sure that international lawyers remain connected to the ‘real world’.

56 Hartwich, op.cit.