Informal international lawmaking
A study into its accountability and effectiveness
These days, international norms are being set by technical experts, central bankers and drug regulatory authorities rather than heads of state or diplomats. Often, scientific experts or companies join. Negotiations take place in conference rooms but a restaurant might also do. Flags, a permanent (web) address or an official secretariat, are often lacking. Procedural rules and roles are not clearly defined and note taking and reporting are often organised on an ad hoc basis.

The core feature of Informal International Lawmaking (IN-LAW), is that the participants, the processes surrounding their meetings and the rules they set, are all informal. Although not legally binding, the outcomes of these processes – guidelines, standards or codes – amount to rules of the game that stakeholders have to follow if they want to do business.

How legitimate is informal lawmaking? Is there enough democratic oversight? Can citizens hold these networks or bodies accountable? How representative are they, or responsive towards elected officials and people? These are the key questions addressed in two volumes on Informal International Lawmaking, edited by Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, Ayelet Berman and Sanderijn Duquet. In thirty case studies on policy areas such as finance, health and trade, HiiL’s research team shows what goes on behind the closed doors of dining and conference rooms.

Project leaders
Joost Pauwelyn is Professor of International Law and Co-Director of the Centre for Trade and Economic Integration (CTEI) and Senior Advisor with law firm King & Spalding.
Ramses A. Wessel is Professor of the Law of the European Union and other International Organizations, and Co-Director of the Centre for European Studies at the University of Twente.
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About the project

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Publications
- Informal International Lawmaking (the conceptual book, published by Oxford University Press, more information available here)
- Informal International Lawmaking: Case Studies (the case studies book, published by TOAEP e-Publisher, full text available here)
- Further information and unpublished materials (a complete list of the INLAW-networks, questionnaires and additional case studies) can be found at www.hii.org.
Executive summary

International finance, conflict diamonds, medicines, employment, money laundering and climate change. These are just some of the areas in which international cooperation is thriving. Along with this comes a profound change to the way global rules are being made: a sharp rise in informal international lawmaking (IN-LAW). Although effective, informal lawmaking might also come with a lack of democratic accountability. An accountability checklist shows how we can benefit from this informality without jeopardising democratic accountability.

Many international norms that have emerged in recent years are no longer set in formal treaties, painstakingly negotiated by diplomats, but in less formal documents, such as guidelines or standards. They have not emerged via traditional, and universally acknowledged, international organisations such as the United Nations or the World Health Organisation, but through informal global networks or bodies. This trend is on the rise.

Examples of these informal networks are the Group of 20 (G20), the Financial Stability Board, the International Conference on Harmonization of pharmaceuticals (ICH) and the Kimberley Scheme on conflict diamonds. The HiiL research shows how their rulemaking is fundamentally different from classical treaty making: the participants, the process surrounding their meetings and the rules they set, are all informal.

HiiL’s research team on Informal International Lawmaking laid bare what happens behind the closed doors of dining and conference rooms and how this affects all of us. Although the ‘guidelines’, ‘standards’ or ‘declarations’ produced by informal networks are not legally binding, in real life, these amount to the rules of the game. Those who sit at the table, and those who do not, will have to follow them. The study shows that informal lawmaking is effective, but suffers from a number of accountability problems.

The main issues concern the lack of parliamentary control and a lack of participation by those that are affected by the rules, but are not engaged in setting them. An accountability checklist shows how to benefit from informality, without jeopardising democratic accountability.

Key findings

- There is a sharp rise in informal international lawmaking.
- The participants, the process surrounding their meetings and the rules they set, are all informal.
- Compliance with informal rules is often high.
- Informal rules, though non-binding, limit the freedom of choice of individuals, companies and countries.

Challenges

Informal networks may suffer from accountability problems. Challenges relate to a lack of:

- Democratic control by national parliaments.
- Transparency, e.g. no information on the agenda or the names of representatives, no negotiation minutes, no secretariat, no public debate, and no clear mandate of the network.
- Representativeness, e.g. low income countries, civil society or consumer organisations are often not represented or consulted; private companies and commercial interests are.
- Reason-giving, e.g. rules are developed without an explanation of the interests considered, options chosen and rejected, publicity or public interest oversight.
- Remedies, such as complaint mechanisms, are often lacking.
The rise of IN-LAW and accountability issues

The financial crisis, international terrorism, cyber security, food safety, climate change. Modern problems require global answers. According to a new Hiil study, the inability to reach agreement on urgent matters through international organisations or multilateral treaties explains the rise of informal ways of cooperation. The outcomes of informal lawmaking affect livelihoods and businesses. But accountability is an issue.

Which is the most recent multilateral treaty that you can remember? The treaty abolishing landmines back in 1997 maybe, or the treaty establishing the International Criminal Court, a year later? If anything, what reaches the headlines are the international agreements that fail to be concluded. Think of the WTO's Doha Round of trade negotiations (deadlocked for over ten years) or the United Nation's inability to negotiate a successor to the Kyoto Protocol on climate change.

In the past decade, the amount of signed treaties has declined. Binding agreements that are acceptable to all relevant parties have become rare. The end of the Cold War era, the creation of 34 new countries since the 1990s, and the emergence of new powers such as China, Brazil, India and South Africa, has led to states attempting to pursue their own economic, political and ideological interests.

Stagnation of international law
The result is diverging views on which problems constitute common concerns, the level of urgency in addressing them, and what measures should be taken. This has become a huge problem for international organisations and for multilateral treaty making. The authors of Informal International Lawmaking call this phenomenon a 'stagnation of international law'.

But power changes have also taken place within states themselves. Global problems have simply become too difficult to be dealt with within individual states or parliaments. So political, technological, scientific and regulatory authority flows from other sources. Policy-makers, heads of central banks, industry members, judges and experts cooperate with their counterparts across borders, as global problems need to be addressed.

The last few decades have produced a ‘rich tapestry of novel forms’ of international cooperation. As the authors write: “the nomenclature used is increasingly diverse and creative. We have witnessed the creation of the International Conference on Harmonization (for the registration of pharmaceuticals), the Kimberley Scheme on conflict diamonds, (...) the Copenhagen Accord on climate change, the ISO 26000 Standard on social responsibility, the Group of 20 (G20), or the Financial Stability Board.”

The new thing about these forms of cooperation is that the participants, the process surrounding their meetings and the rules they set, are all informal. This is what the authors call informal international lawmaking (IN-LAW). The study shows that global rulemaking increasingly happens in so-called informal networks, and this trend is on the rise. (see figure)

According to the authors, the rise of informal rules and networks is not part of “some dark conspiracy to avoid legal constraints or to create an end-run on democracy.” It often stems from technical necessity. Perhaps the parties involved simply cannot conclude
a treaty, or because a treaty would not be appropriate or convenient. In rapidly changing fields like finance, health, security and food safety, adaptable, practice-based, or harmonised norms are needed. That is, rules that can continuously be adjusted in response to new developments.

Effective
The study shows that informal lawmaking is effective. It tackles problems which other systems fail to address. Informal lawmaking bypasses the cumbersome process of treaty making that brings with it veto powers, lengthy ratification processes, huge costs and the inflexibility of a treaty set in stone. Moreover, compliance with the rules doesn’t have to be enforced by a central authority. Parties agree on conditions and compliance is ensured through monitoring systems, peer pressure, or market sanctions. Potential loss of reputation, reciprocity, retaliation, or the perceived legitimacy of the norm also play a considerable role.

As the authors stress: “There is nothing ‘soft’ (or) vague, aspirational or deeply contested (...) about most of the internet, medical devices or financial norms developed in recent years. If anything, the process of their development is highly regulated and strict, based on consensus, and the expectation as to compliance with these norms is extremely high (higher than in respect of many traditional treaties).”

Accountability problems
Coalitions of the willing may address or tackle collective problems, but the impact of their decisions is felt by others. The study shows how informality affects both those who sit at the table, and on those who aren’t there when the rules are being made. But all international cooperation that affects individual freedom must be justified, stresses the HiiL study. Within the networks different accountability deficits have been identified. National parliamentarians, civil society and the wider public of the states that participate in informal networks often lack information on what these networks do. Because the rules are non-binding in a legal sense, under many domestic constitutions there is no obligation to submit them to parliamentary approval or oversight. Thus, for example:

- There is little domestic democratic oversight within countries that adhere to the Basel II financial standards, shaped by banks and regulators, although there might be administrative control.
- The same goes for decisions made by the G20. The research shows that while the EU, and several European countries, are involved in the G20, neither the European Parliament nor national parliaments debate the agenda or the outcomes of G20 summits on a structural basis.
- While governments and pharmaceutical companies of the US, EU and Japan set global standards for medicines within the ICH network, patient and consumer organisations are not represented.

No longer welcome
Informality often benefits powerful players. As one of the authors of the IN-LAW project dryly notes about the G20: “There are concerns that the interests of the G173 are not adequately represented.” A case study on the G20, a forum where world leaders meet and discuss global issues, describes how the Netherlands, the 17th largest economy of the world, was no longer welcome at G20 meetings after it pulled out of the Afghanistan war. As a result it had no influence on decisions to reform the IMF, and subsequently lost its chair. The Dutch couldn’t do a thing about it. A G20 spokesperson was quoted saying: “It might be perplexing to the Netherlands. We feel a bit sorry for them.”
Managing stakeholders
Although a lack of domestic checks and balances and involvement is very serious, the core challenge for IN-LAW, according to the authors, is taking account of the external stakeholders; those that are affected by the norms but do not participate in setting them. Examples of these challenges are:

- The Financial Stability Board’s standards affect developing countries, smaller financial institutions, and consumers, who are not represented in the Board.
- Global medical standards, developed by the ICH network, put pressure on major countries such as Brazil or China to follow these standards, although they were written without their input. The same standards allow the pharmaceutical industry to run clinical trials in which patients in the control group are given placebos. Often such clinical trials are conducted in developing countries, at lower cost. Using placebos, instead of existing treatments, has led to patients dying. Had developing countries been involved in the establishment of these standards, this might have been avoided.
- Although the Kimberley Scheme on conflict diamonds involves both the diamond industry and NGOs, critics have pointed out that the interests of small, artisanal diamond miners (who have a much harder time complying with the Kimberley rules than big corporations) are not represented.

Bowing to pressure
Informal networks are gradually opening up, though, following pressure by NGOs, international organisations and governments. Outreach programmes are being installed, consultation procedures are being created, and more information is being shared. Occasionally membership is expanded. An example of inclusiveness in which US domestic accountability principles, such as transparency and participation, became leading, is the ICH-network on global medical standards. There the US pressed the network to adopt comment procedures on draft guidelines. The ICH countries also introduced public hearings and workshops at the domestic level. As US medicine regulators by US law have to adhere to domestic accountability principles, both in their domestic and foreign activities, the US simply refused to participate in the ICH, if these safeguards would not apply to ICH standard-setting. Further improvement in the ICH is needed, however. The process remains dominated by the pharma industry, with limited influence of non-commercial stakeholders and developing countries.

Strengthening accountability
The research suggests a number of ways to strengthen the accountability of informal networks:

- Accountability within a network can be increased through enhancing transparency. This can be achieved by informing parliament and the wider public of decisions made, for example, but also by making available the agendas, the names of network participants, etc. Motivating decisions, notifying stakeholders of draft rules and inviting them to comment, administrative reporting, public hearings, public debate and judicial review are other means of strengthening accountability.
- With regard to external stakeholders, the same transparency increasing measures should be considered. In addition, participation by external stakeholders can be achieved through open consultation procedures, the granting of an observer status, or full membership. For developing countries, capacity building, knowledge sharing and representation through international organisations can be effective.
- The authors emphasise that a constant effort must be made to balance effectiveness with accountability. Duplication of accountability mechanisms must be avoided, because this may lead to ‘Multiple Accountability Disorder – MAD’. As the authors stress: “We do not necessarily need more, but better accountability.”
- HiiL has compiled an IN-LAW Accountability Checklist (see following page), which shows how to benefit from informality, without jeopardising democratic accountability. It can be used by government and business leaders who seek broader support for their activities in the international arena, and by parliamentarians and civil society organisations that monitor international lawmaker.
All international cooperation that affects individual freedom must be justified and kept accountable. A one-size-fits-all model of cooperation accountability (such as parliamentary approval) no longer works. A calibrated system of accountability must be worked out case-by-case. Accountability is due both internally, to those involved in the cooperation network, and externally, to those affected by the network or the norms it is setting. Parliamentary oversight is required for accountability of public agencies at the domestic level. Transparency, notice and comment procedures and reason giving should apply both at home and abroad; judicial review must be in place to check the domestic implementation of international cooperation. A constant effort must be made to balance effectiveness of action with required needs of accountability. More accountability is not always better. Duplication of accountability mechanisms must be avoided (risk of accountability overload; multiple accountability disorder - MAD).

In-Law accountability checklist

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- A constant effort must be made to balance effectiveness of action with required needs of accountability.
- More accountability is not always better. Duplication of accountability mechanisms must be avoided (risk of accountability overload; multiple accountability disorder - MAD).

For the full list, see www.hill.org.

“Power entails accountability, that is, the duty to account for its exercise.”
HiiL is an independent research and advisory institute devoted to promoting a deeper understanding and more transparent and effective implementation of justice and the rule of law, worldwide. It pursues this mission in several ways. First, it conducts both fundamental research and empirical evidence-based research. Second, it serves as a knowledge and networking hub for organisations and individuals in both the public and the private sector. And third, it facilitates experimentation and the development of innovative solutions for improving legal systems and resolving conflicts at any level. HiiL aims to achieve solutions that all participants in the process perceive as just. In line with its evidence-based approach, HiiL is non-judgemental with regard to the legal systems it studies.

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