INTERNATIONAL GRIEVANCE MECHANISMS AND INTERNATIONAL LAW AND GOVERNANCE (IGMS)

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Shortened description

GENERAL CONTEXT

The paradigm and terms of global governance have raised considerable debates over the last twenty-years in all fields of social sciences. This multi-faceted notion intends to go beyond traditional governmental decision-making patterns in order to reflect the complexification of decision-making fora, actors and processes, "the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest" (The Commission on Global Governance, 2005). As far as international law is concerned, such an approach questions the very grounding of the discipline. To sum up, the development of modern international law is largely based on the horizontal so-called 'Westphalian legal order', characterized by absolute territorial sovereignty and the legal equality of States, which entails that there can be no supra-national authority (verticality being circumscribed to domestic legal orders) and that no obligation can be imposed on a State without its consent (consensualism). The techniques of the legal framing of inter-state relations have of course experienced considerable evolutions, from contract-based relations between sovereigns to multilateralism and the set up of intergovernmental organisations, and so have the matters and activities covered by international law. However, being primarily intended as the legal framework of inter-state relations, made by and for States, it has always been a changing discipline, quite susceptible to international politics and their prevailing paradigms. It probably accounts for the discipline's worries about moving away from its main anchors—traditional sources of binding international law, i.e. treaties and customary law, and international tribunals—, as specific sources and adjudication means are often considered to be the proof of its existence (Arnaud, 2003). A global governance approach requires breaking this formal mould to explore the role non-binding law ('soft law') and non-subjects of international law (epistemic communities, civil society, private sector *et cetera*, i.e. neither States nor intergovernmental organisations) actually play in decision and law-making, and the way some activities—particularly as regards the economic life—or claims for increased global regulation go past the screen of States. And the proliferation of global governance research shows that we currently know very little about the processes under way. In other words, because traditional tools and assumptions can prove inappropriate, thinking global governance in terms of international law still amounts to a large extent to venturing into unchartered territories where, as ancient maps used to warn, "[t]here [might] be dragons".

Since the end of World War II, international law has considerably developed in order to answer increasing calls for world-wide and regional legal frameworks in very diverse matters. Such legal developments gave birth to many sub-systems—peace-keeping and international security law, international trade law, human rights, international environmental law…—, and each one of them operates in its own context and institutions, following its own logic. Beside this substantive and institutional remarkable spread, international law witnessed deep transformations as regards its sources and actors. Henceforth, one cannot ignore that in addition to positive international law, which requires the States' consent, soft law—stemming from declarations, resolutions, guidelines, agendas…—plays an important role in the development, the interpretation, and the perception of what is applicable law, and that some legal consequences may result from non-binding instruments (Shelton, 2000). Furthermore, interdependence and the globalization of security, economic, environmental or else social problems may require global responses to issues which often defy 'classic' international law, at least partly, in particular because it would require the creation of a global regulatory regime related to the activities of entities which are not subjects of international law, or to give them the means to make themselves heard, or to comprehend activities which cannot be easily linked to the jurisdiction of a State. Some traditional dichotomies which used to structure the discipline—among which the public/private and international/national dichotomies, and the horizontal and vertical ways of thinking the relationships—are called into question. In addition, the well-established notions of enforcement, responsibility and liability remain difficult to implement in a consensualist system, and the mechanisms the sub-systems of international law set up to ensure compliance are varied, and are often inefficient or lacking. Faced with institutional and normative profusion and fragmentation, and systemic regulation and justiciability gaps, international law also shows a relative inability to create the mechanisms which would be necessary to ensure that legal rules effectively generate the expected behavioural changes, and to guarantee what is seen as an international 'justice' (whether economic, environmental, humanitarian, social…) in a broad sense. These legal gaps are particularly obvious in the context of (diagonal) transnational economic activities: on the one hand, some actors' activities do have an important impact on the social and environmental conditions in the foreign countries where they operate while, on the other hand, those directly affected by such activities often have no direct legal connection with the source-actor which could enable them to come through the screen of their State to ask directly a transnational actor to account for its behaviour (Ruggie, 2008). However, in spite of, or because of this context, the international scene has been witnessing for the last twenty years the emergence of mechanisms which escape from the traditional patterns of the international/domestic dichotomy and from the international settlement of disputes model by the instruments they are based on, the 'law' they are intended to 'control compliance' with, and the nature of the accountable entity and account-holders.

ISSUE & SCOPE

This research intends to explore these international regulation mutations and justiciability gaps revealed by a global governance approach through an in-depth study of the international grievance mechanisms which grew in the cracks, the *inter*-national being materialised here as an 'in-between' space or a 'legal no man's land' rather than an 'among'. **For the purpose of this project, international grievance mechanisms (IGMs) are defined as non-judicial grievance mechanisms set up on a permanent basis by non-binding international instruments or international organisations, which aim at calling an entity—either public or not—to account for its actions in situations where no responsibility/liability mechanism can be set in motion because of the nature of the actors involved, and the lack of direct legal connection between them, and the non-binding character of the instruments these mechanisms 'control compliance' with. They answer to a regulation and justiciability gap, they emerged along some diagonal**

relationships the global governance approach brings to light and they also reveal a search for values: all in all, they deal with those relations which are "disregarded" by the system (Stewart, 2008).

More precisely, these mechanisms are:

1. ***The internal grievance mechanisms set up within international organisations*****.** Such mechanisms do not record wrongful acts under international law attributable to these organisations and they are not intended as judicial procedures. Their role is to assess, upon request of the people affected by the organisation's activities, the compliance of the organisation with its own internal rules, that is to say with its policies and procedures for instance related to the disclosure of information, environmental and social assessment, indigenous people rights… If the organisation is found not compliant, it does not result in its legal implication but it is expected to adopt corrective measures. Currently, the only kind of international organisations which set up this type of mechanism are development banks, namely:

- the World Bank Group: The **Inspection Panel** deals with official development assistance provided by the International Bank for Reconstruction and Development ('IBRD') and the International Development Association ('IDA'), and was created in 1993. This independent body examines the complaints from people who allege they are or will be affected by a project financed by the BIRD or the IDA, and whose present or potential harm results from a breach by these agencies' staff of their policies and procedures. The independent **Compliance-Advisor/Ombudsman** ('CAO') created in 1999 deals with the activities of the International Finance Corporation ('IFC') and the Multilateral Investment Guarantee Agency ('MIGA') which promote private sector's investment in development. In its 'Ombudsman' role, it examines the complaints of actually or potentially project-affected people, whether the alleged harm stems from a breach of their internal rules or not.
- the Asian Development Bank. The Inspection Committee created in 1995-1996 was replaced by an **Accountability Mechanism** in 2003 and reviewed in 2012. It includes a Special Project Facilitator ('SPF') who acts as a mediation forum where project-affected people can file their complaints whether ADB's operational policies and procedures are breached or not, and; a Compliance Review Panel ('CPR'), who examines complaints based on an alleged breach of ADB's policies and procedures.
- the European Bank for Reconstruction and Development (EBRD). The Independent Recourse Mechanism ('IRM') created in 2003 was replaced in 2010 by the '**Project Complaint Mechanism**'. It has both a compliance review mission and a problem-solving function, depending on whether the complaint is assessed as eligible for a compliance review, or a problem-solving initiative, or both. Civil society organisations can only request compliance review.
- the Inter-American Development Bank. In 2010, the **Independent Consultation and Investigation Mechanism** ('MICI', its initials in Spanish) succeeded the Independent Inspection Mechanism created in 1994. It works on a two-stage basis, with a consultation phase which, if unsuccessful, can precede a compliance review phase.
- the African Development Bank: The **Independent Review Mechanism**, entrusted to a Compliance Review and Mediation Unit ('CRMU') was set up in 2004 and modified in 2010. It has a two-stage (problem-solving/compliance review) structure.

2. ***The specific grievance mechanism set up by the Organisation for Economic Cooperation and Development ('OECD') Guidelines for Multinational Enterprises***, a set of principles aiming at ensuring the multinational enterprises adopt a socially and environmentally responsible attitude, under which the adhering governments "jointly recommend to multinational enterprises operating in or from their territories the observance of the Guidelines" and establish National

Contact Points ('NCPs'). NCPs can examine "specific instances" relating to the implementation of the Guidelines raised by the "business community, employee organisations and other parties concerned" (and thus NGOs since the 2000 version of the Guidelines), and issue recommendations. The latest version of the Guidelines was issued in May 2011.

Admittedly, though these mechanisms operate in an international law environment, they are located outside of international law strictly speaking, which certainly explains why they attracted limited attention among the international law scholarly community. For example, a research query on the innovative "Compliance-Advisor-Ombudsman" (since its creation in 1999 to date, 75 claims have been submitted to the CAO) in the 'Combined World Journals & Law Reviews' section of the Westlaw database, with no source or date restriction, finds 49 results, among which 11 only mention the CAO in footnotes, 12 in the passing, 5 are mostly descriptive, 3 deal with the creation by the International Bar Association of a wiki-base on alternative business-and-society dispute resolution means, and 23 deal with the CAO from a quite specific angle—mostly about a specific case or as a means to achieve the protection of a series of rights (some search results were recorded in several categories). The analyses which get closer from this project's object are Bradlow's article which undertakes a comparative study of independent inspection mechanisms in international financial institutions (Bradlow, 2005) and van Putten's book on the accountability of banks for their transnational activities (van Putten, 2008). Generally speaking, preliminary research suggests that most of the existing legal literature and research on IGMs as defined in this project, when not essentially descriptive, follow two main teleological lines. They are either:
- dealt with according to a (human, environmental…) rights-based approach, in particular by the literature dealing with the accountability of the private sector;
- or used as mere illustrations in much wider projects. The latter encompass the notion of accountability in the broad sense (including, as regards *legal* accountability, the international responsibility/liability traditional mechanisms), accountability being considered to be one of the weaknesses of global governance institutions and processes; they mainly deal with public authorities' accountability, some of them in a 'constitutional' perspective, or mostly with the express intention of improving it (see *inter alia* the "International Rule of Law" project of the Amsterdam Center for International Law; the "New Modes of Governance" (NewGov) FP6 integrated project, mostly centred on the case of the European Union; the "Informal International Law-Making" (IN-LAW) project financed by the Hague Institute for the Internationalisation of Law; the "Global Governance" (GloGov) project, focused on global environmental change and governance…).

Besides, most of the legal literature which takes into account IGMs as defined here often remains strongly subjected to traditional public/private and legal/non-legal polarizations, with a few exceptions such as the Global Administrative Law project (GAL). Though these polarizations offer obvious advantages in terms of homogeneity of the research object, they might also mask some aspects of the heterogeneity and transverse nature of the relationships, and some impacts of global governance processes that the present research proposal precisely intends to put the emphasis on, resulting in a return to 'classic' horizontal and vertical ways of thinking the relationships.

HYPOTHESES, EXPECTED RESULTS AND POTENTIAL RISKS

This project makes the hypothesis that an in-depth study of these 'off the beaten track' mechanisms can contribute to the understanding of the mutations international law is experiencing in the context of global governance. The primary goals are then neither to use the study of these IGMs to consolidate a ready-made theory, nor in itself to offer some support to

decision-makers, though it will most probably result in highlighting the IGMs shortcomings and some potential leads as regards the exportation of this kind of mechanism. **It consists in considering the same object—these oft-neglected, peripheral-to-international-law mechanisms which seem symptomatic of international regulation mutations and justiciability gaps—from different angles, so as to throw light on their many facets and to listen to what the IGMs have to say about international law and governance. Reciprocally, the project makes the hypothesis that the questioning of international law-making and regulation, in a global governance context, through the prism of these IGMs which deal with the 'disregarded' is useful to discuss existing analyses of the current decisional and law-making systems and the various explanations and alternatives proposed, from the viewpoint of both structure and underlying paradigms.**

This hypothesis is based upon the following main (and interrelated) assumptions:

- These grievance mechanisms which are intended to be non-judicial fora and the non-binding international instruments they are based on / 'control compliance' with play a **more important role in the construction of international law than is usually acknowledged**. In addition to traditional sources and law-making procedures, '**reflexive' law' or 'adaptative' law appears to be a key-feature of contemporary international law-making**. Primary instruments experience further normative developments resulting from the very existence of monitoring & control procedures, which allow a process of continuing development and adjustment of applicable norms. The phenomena is obvious as regards non-judicial verification mechanisms created by a number of multilateral conventions, especially in the framework of international environmental treaties where the normative impact of the verification and observance procedures they set up is well documented and demonstrated (Maljean-Dubois, 2010; Richard, 2011a). The project makes the hypothesis that though less easily discernible, the same reflexive or adaptative quality can be highlighted in the case of the IGMs, and that the functioning of the phenomenon and its consequences should be subjected to legal analysis.

- Preliminary research and works suggest IGMs are a privileged standpoint to observe **normative syncretism at work**. The fact that IGMs primarily assess compliance with non-binding instruments does not mean these instruments are impervious to international binding norms (for examples, see Richard, 2011b) nor to pressures exerted in this direction by varied stakeholder groups in the set up /review of grievance mechanisms. Nor does it mean that IGMs do not take international binding norms into account even when their functioning terms do not explicitly provide for this. For instance regarding this latter aspect, in the Chad-Cameroon Pipeline project case, both the Inspection Panel and the Management of the World Bank mentioned human rights in their assessment of the situation (Oleschak-Pillai, 2010). The OECD Guidelines are the result of a unique blend of inspirations drawn from binding and non-binding international instruments as varied as international conventions, declarations, and even ISO standards (Richard, 2011b), and NCPs might be led to interpret the Guidelines' provisions in the light of binding international law. Beyond, it is our belief that interesting ramifications should be explored, including through empirical study, concerning the IGMs' role on the evolution of the perception of what is applicable law.

- Rather than only using IGMs as mere illustrations of the variety of existing international accountability mechanisms, the project assumes that they deserve being analyzed as a remarkable example of the **mutations of the way access to justice and justiciability are understood, sought after and guaranteed** (or not) in the global governance context. This aspect undoubtedly deserves legal analysis but also empirical exploration of the whole of the IGMs actors' perceptions—a kind of exploration which is too scarcely integrated in international legal studies—in order to highlight the numerous rationalities at work. Whether this type of mechanism usefully complement mechanisms rooted in international law—in particular having in mind the International Law

Commission's draft articles on the Responsibility of International Organizations, which are currently submitted to States' consideration within the 6th Commission of the United Nations General Assembly, but also the International Law Association's propositions as regards the Accountability of International Organisations (ILA, 2004)—or compensate for the lack of it (as regards multinational enterprises and having in mind the failure of the 2003 UN Human Rights Norms for Corporations) also deserves discussion. Besides, the reasoning of IGMs and the impacts of the outcome of these IGMs, which were intended to be non-judicial by their creators, can also be useful to question the notion of remedy both in the light of the judicial/non-judicial dichotomy (legal analysis of their features regarding the normativity of the standards they assess compliance with, its *competence de la competence*, *juridictio*, *res judicata* and *imperium…*) and beyond. For instance, the study of IGMs might show that the opening up of the systemic relationships revealed by the global governance approach may well contradict the maxim according to which "where there is a remedy, there is a right".

- Finally, the choice of the precisely-targeted basis offered by IGMs as defined in this project can **help disentangle multi-layered issues** addressed by 'international legal system' and 'global governance' legal and political science studies, by bringing them back to the concrete characteristics and practice of these mechanisms which, what is more, require taking into account two different kinds of actors (public, international organisations on the one hand, private enterprises with transnational activities on the other hand).

The research might result in apparently contradictory findings. For example, if one considers that these mechanisms are effective (whatever the rationality adopted to assess their effectiveness) and prefigure what international remedies will look like in the future, it doesn't necessarily mean they will enhance or reinforce international law as we know it. Paradoxically, the high global regulation demand in certain areas feeds the creation of specific, relative, fragmented mechanisms which could contribute to further destabilise the legal system which is called upon to offer solutions. Another example: if they are found to be little effective from the viewpoint of a strengthening of international law or (social, environmental etc.) rights, it does not mean that they are insignificant or meaningless seen from the angle of the mutations of international law. The research might also find that, contrary to the initial assumptions, far from offering the opportunity of a breakthrough in the research on the mutations of international law in a global governance context, the IGMs are bound to remain on the margins because they are found to exclusively be a closed system (isolated fora using too specific rules) and thus they integrate political, social, or legal unbalances and gaps without throwing any light on the handling of these issues by international law and global governance. However, the fact that the project is based on robust preliminary research and insights offered on the occasion of the PI's previous works, and on an open approach—which does not rely on a specific theoretical preconception and seeks to avoid being from the start too subjected to 'traditional' polarizations—guarantees that there is ground for a research which opens up new horizons for scholarship.

MAIN RESEARCH QUESTIONS & METHODOLOGY

The project is resting on an international law approach. However, in addition to an international legal perspective and the use of legal analysis tools which, as mentioned earlier, could prove inappropriate or incomplete in some respects, the individual team will have recourse to other areas of law—theory of law—and other disciplines, namely legal sociology and political science. The purpose is not to carry an interdisciplinary analysis out, but to draw from the tools and logics of other fields than international law in order to enrich the reflection. Though they are

actually intertwined and will be set back in the broader objectives of the proposal, the research can be broken down into the following research questions:

- ***The rationalities at work*:** What is the rationale for the set up of and resort to these IGMs? It requires exploring their various rationalities as seen by their creators, their practitioners (i.e. those who examine the complaints) and the plaintiffs. Besides, do they think they are, in some way, law-makers or justice-makers? For each one of these IGMs, the need to modify their functioning terms was felt at some point: why? Beyond, depending on the rationality adopted as a reference, are the IGMs effective (e.g. effectiveness as far as the rationale for the creation of/resort to is concerned?) and in practice do they, voluntarily or not, have a law-making power (following a 'reflexive law' logic, and as far as the instruments they 'control compliance' with and / or international law are concerned)?

- ***The existence of institutional/procedural and substantive bridges with other international mechanisms and binding instruments***: This research lead is strongly connected to the assumption that IGMs contribute to the development of adaptative law and participate in normative syncretism. From the substantial point of view, it requires exploring *inter alia* whether they use international instruments and law (of what kind, when and how), whether they borrow reasoning from one case to another, whether their findings are used by other bodies of the organisation they belong to and/or other international instruments or mechanisms. This latter question shows how substantial and institutional bridges intertwine. The exploration must therefore be extended to whether their design and techniques are inspired by other international mechanisms, whether design and techniques innovate in their design and combination, whether they collaborate with other international mechanisms.

- ***Their impact in terms of legitimacy of the institutions or instruments they depend on***: In the case of development banks, the strengthening of their legitimacy was one of the main reasons leading to the set up of IGMs (Richard, 2005). Besides, a number of studies especially in the fields of political sciences and sociology show that the perception of the legitimacy of legal norms—and, at least partly, consequently the perception of their binding character in a constructivist perspective—which used to be rooted in the nature and validity of their sources tends to relocate on the quality of the procedures associated with decision and law-making (Manin, 2002; Arnaud, 2003). With this in mind, can the legitimacy issue be compared or put in perspective with the legitimacy criteria or debates relating to other international mechanisms (Wolfrum & Röben, 2008) which are located inside international law strictly speaking? Beyond, do they contribute to the legitimization of prevailing paradigms of global governance and the international legal system or do they challenge them?

- ***Their participation in the 'judicialisation' or 'dejudicialisation' of the international legal system***: Where are the IGMs located on a 'judicialisation' scale which would put non-compulsory dispute settlement means, mediation and conciliation at one end and judicial, compulsory decisions adopted under strict procedural conditions on the other (Kennedy, 2002)? Do they complement or compensate for the lack of international dispute settlement mechanisms and existing or currently discussed legal responsibility regimes including from the angle of access to justice and justiciability? Does the study of IGMs show that the opening up of the systemic relationships revealed by the global governance approach may contradict the maxim according to which "where there is a remedy, there is a right"?

In order to be able to address these issues, a first step will consist in the **legal analytical study of the constitutive instruments of the IGMs and their evolution, the procedures they establish, the 'law' they assess 'compliance' with, the complaints brought before them (by who? on what grounds?), and their intermediary and final outcomes**. **As a result, the team should at the end of**

this stage be able to paint an up-to-date comprehensive picture of the activities of each one of the IGMs.

A second step innovates by carrying out an **empirical analysis** on the rationalities which lay behind the creation, the examination of the cases and the resort to IGMs. This requires to **interview** either by electronic means or by 'on the spot' visits, as will prove necessary and possible: some **creators** of the constitutive instruments and/or the people who were in charge of reforming them; **persons who 'sit'** in these mechanisms; some **claimants** (the research will endeavour to contact a representative sample of the different kinds of claimants: private associations, NGOs, private individuals, trade unions, tribal groups…); **entities which were implicated** (even indirectly). A post-doctoral researcher, preferably with a legal sociology background, should significantly contribute to the enrichment of the reflection and will besides be in charge of collecting part of the data at this stage. Again, intermediary results will contribute to complementing the picture of the IGMs as painted at the first step, well beyond the related state of the art.

In the third step, though it is actually a transverse step, analytical and empirical studies will be set back within the founding assumptions of the project, and feed the reflection on the transverse main questions mentioned.

CITED WORKS

André-Jean Arnaud (2003) Critique de la raison juridique. 2- Gouvernants sans frontières. Entre mondialisation et post-mondialisation, Paris: LGDJ.

Daniel D. Bradlow (2005) "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions", 36 Georgetown Journal of International Law 403.

The Commission on Global Governance (1995) Our Global Neighbourhood. The Report of the Commission on Global Governance, Oxford: Oxford University Press.

David Kennedy (2002) "The Twentieth-Century Discipline of International Law in the United States", in Austin Sarat et al. eds, Looking Back at Law's Century, Ithaca: Cornell University Press.

Sandrine Maljean-Dubois (2010) "Les organes de contrôle du respect des dispositions internationales", in B. Jadot ed., Acteurs et outils du droit de l'environnement : développements récents, développements (peut-être) à venir, Brussels: Anthémis.

Maartje van Putten (2008) Policing the Banks. Accountability Mechanisms for the Financial Sector, Montréal: McGill-Queen's University Press.

Vanessa Richard (2011a) "Learning by Doing. Les procédures de réaction au non-respect dans la Convention d'Espoo et son Protocole de Kiev", 3 Revue juridique de l'environnement 327.

Vanessa Richard (2011b) "L'accountability comme alternative à la responsabilité ? Réflexions en droit international de l'environnement", in E. Vergès ed., Droit, sciences et techniques, quelles responsabilités?, Paris: LexisNexis.

Vanessa Richard (2005) "La participation des acteurs non-étatiques dans le système institutionnel de la Banque mondiale. Le rôle du Panel d'inspection et du Conseiller-Médiateur en observance", in L. Boisson de Chazournes & R. Mehdi eds, Une société internationale en mutation : quels acteurs pour une nouvelle gouvernance ?, Brussels: Bruylant.

John G. Ruggie (2008) "Protect, Respect and Remedy: A Framework for Business and Human Rights", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Doc. A/HRC/8/5.

Dinah Shelton ed. (2000) Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, Oxford: Oxford University Press.

Richard B. Stewart (2008) "Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance", Draft Paper for the IILJ International Legal Theory Colloquium, available at <http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf>.