



DEMOCRACY AND DISSENT

The Challenge of
International Rule Making

Frank Vibert



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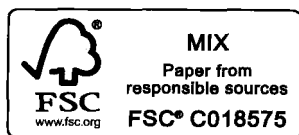
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List of acronyms

AMAN	Israeli Defence Forces' Directorate of Military Intelligence
ARM	Adjustable Rate Mortgage
ASEAN	Association of Southeast Asian Nations
BCBS	Basel Committee on Banking Supervision
BIS	Bank for International Settlements
CHMP	Committee for Medicinal Products for Human Use
CRU	Climatic Research Unit, University of East Anglia
EFSA	European Food Safety Authority
EMA	European Medicines Agency
EPA	US Environmental Protection Agency
EU	European Union
FAO	Food and Agriculture Organization
FATF	Financial Action Task Force on Money Laundering
FCTC	Framework Convention on Tobacco Control
FIU	Financial Intelligence Units
FSB	Financial Stability Board
FSF	Financial Stability Forum
GAAP	Generally Accepted Accounting Principles
GAO	US General Accounting Office
GATT	General Agreement on Tariffs and Trade
GMO	Genetically Modified Organism
GOARN	Global Outbreak and Alert Response Network, World Health Organization
IAEA	International Atomic Energy Agency
IAIS	International Association of Insurance Supervisors
IANA	Internet Assigned Numbers Authority
IASB	International Accounting Standards Board
IASC	International Accounting Standards Committee
IBRD	International Bank for Reconstruction and Development (World Bank)
ICANN	Internet Corporation for Assigned Names and Numbers
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICJ	International Court of Justice

IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFRS	International Financial Reporting Standards
IHR	International Health Regulations, World Health Organization
ILO	International Labour Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
IOSCO	International Organization of Securities Commissions
IPCC	Intergovernmental Panel on Climate Change
ISO	International Organization for Standardization
ITO	International Trade Organisation
ITU	International Telecommunication Union
MERCOSUR	Mercado Común del Sur [Common Market of South America]
MMoU	Multilateral Memorandum of Understanding
NGO	Non-Governmental Organisation
NRC	US National Research Council
NSG	Nuclear Suppliers Group
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OIE	World Organisation for Animal Health
OPEC	Organization of the Petroleum Exporting Countries
PICT	Project on International Courts and Tribunals
PRTR	Pollutant Release and Transfer Register
ROSC	Reports on the Observance of Standards and Codes (World Bank).
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNWTO	United Nations World Tourism Organization
UPU	Universal Postal Union
US	United States of America

WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
WTO	World Trade Organization

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Introduction

The institutions and procedures for making international rules and regulations are in need of renewal. The existing system is prone to failure. It is also undemocratic. This book is about the principles of design for the international order that could make it both less vulnerable to failure and more consistent with democratic norms.

The message of the book is that specific governing rules are needed to discipline the rule makers.¹ The current system relies on self-disciplining by expert elites when it comes to the formulation of the substance of new international rules. It relies on self-restraint by governments when it comes to implementing them. Neither self-discipline nor self-restraint is enough. Self-discipline is not good enough to guard against failures in systems of rule making. Self-restraint is not good enough to guard against undemocratic impositions of rules. Governing rules are therefore needed to enforce external disciplines and restraints on the rule makers.

The governing disciplines and restraints needed are those that allow for challenge and dissent. An organised system for challenge is the foundation for good regulation and rule making. The possibility of meaningful dissent is also a foundation of democratic legitimacy. Both have to be embedded within a system of governing rules. Only then will the current system of international rule making become less vulnerable to

¹ The term 'rules' can be used in two different senses. First, there are rules (sometimes referred to as 'meta-rules') that define the rules of the game and that comprise the constitutional rules that govern the behaviour of those with power in a system of government. Second, there are rules (or regulations) that are made by those with power (the rule makers) within the game or within a constitutional and political order. In order to reduce confusion and, since not all governing rules of a political order are put into constitutional form, 'meta' or 'constitutional' rules are referred to in the text as 'governing rules' unless a specific constitutional context is indicated. Unless governing rules are specified, the terms 'rules' and 'regulations' are used interchangeably to refer to policies endorsed at the international level, designed to shape behaviour and outcomes both at the level of national governments as well as at the level of the general public and usually transmitted through rule-making bodies in national or regional jurisdictions. Baldwin defines a 'rule' as 'A general norm mandating or guiding conduct or action in a given type of situation' (Baldwin 1995: 7). Black defines regulation as 'sustained and focussed attempts to change the behaviour of others in order to address a collective problem or attain an identified end or ends, usually through a combination of rules or norms and some means for their implementation and enforcement, which can be legal or non-legal' (Black 2008: 139).

failure. Only then will it be possible for international rule making to gain democratic legitimacy.²

THE REFORM OF INTERNATIONAL RULE MAKING

An increasing number of the rules and regulations that affect the lives of nations, individuals and communities are being made at the international level. There are compelling reasons why this should be so. Climate change, health pandemics, scientific innovations and closely inter-connected markets do not recognise national or regional boundaries. At the same time, despite the end of the Cold War, the world remains confrontational, divided by values, interests and identities. The further development of a rule-based international system of behaviour thus remains vital in order both to tackle global problems and to avert global confrontations. The way it develops will not only frame the general conditions that impact on individual lives (such as vulnerability to pandemics or nuclear proliferation) but also the detail of lives (such as the type of pension fund individuals may be able to invest in).

In recent years the making of new international rules has undergone a fundamental change.³ The architecture of international organisations with their universal membership set up at the end of the Second World War remains in place. But new venues are being used for rule making, new rule makers are involved, new types of rules are being made and they are being

² The traditional term 'international' is used in preference to a term such as 'global' in order to avoid unfruitful debate about what is global or not (for a discussion of definitional issues surrounding the terms global and globalisation see McGrew 2005: 207–11). It is also used in preference to the term 'transnational' that is used in order to suggest the connections that cross boundaries but that are not necessarily global and, in addition, that do not necessarily involve states (see for example, Djelic and Sahlin-Andersson 2006 and Slaughter 2003). However, the use of the more common term 'international' does not create a presupposition that nations or states are the only actors in rule making that crosses boundaries or that there is a bright line that divides the international from the domestic. The term international is also used to include intercontinental actors such as the EU, ASEAN and MERCOSUR that may be active in rule making. Rule making within such regional groupings is not however the focus of the discussion.

³ The term 'international rule making' can be defined narrowly to refer only to those rules that are formulated, agreed and promulgated at the international level (for example the rules agreed in Basel on the capital adequacy of banks) and more broadly to those rules that may originate within national jurisdictions but which reflect perceived international standards of behaviour (for example corporate governance standards). The discussion that follows applies to any rules that are derived in whole or in part from external sources, recognising that at the edges the distinction between what is of domestic origin and what is of international origin is blurred. The term 'international order' is used to denote the aggregate of international institutions and rules that are intended to affect public and private behaviour.

spread in new ways. Alongside the old architecture a new one has come into being. The new architecture for international rule making is largely the product of improvisation rather than the result of thinking about the principles of design. Thinking about the international order as an integrated whole has been put to one side in favour of a pragmatic approach to practical problems. The end result is a mix of old and new venues and old and new styles of rule making. It is a mix that is convenient for the rule makers. However, it disguises the failures, reduces the accountability, and undermines the legitimacy of international rule making.

The international financial crisis that unfolded in 2008 has exposed the vulnerabilities of the existing system. The crisis brought with it a massive destruction of wealth and a setback to an unprecedented period of global economic growth that had seen tens of millions of people lifted out of crushing poverty. It was however more than an economic and financial cataclysm. It was also a massive failure in the way that international rule making and international institutions have evolved in recent years. One of the most important functions of any system of financial regulation and rule making is to maintain public confidence in the financial system and to maintain the flow of credit. In this, the system failed across much of the world.

Financial regulators were not the only ones whose failure led to the 2008 financial crisis – governments and markets also failed. However the regulatory failure is particularly troubling because the new international architecture and instruments have been largely pioneered in the financial sector – so also have new approaches to rule making such as ‘risk-based’ regulation and ‘principles-based’ regulation. The pioneering is not coincidental. Finance is where a fully international market has first come into existence, where any strains are most quickly transmitted and where the need for new structures and techniques for international governance have been most acutely felt.

The lessons behind the failure extend well beyond the financial sector and present a challenge for all areas of international rule making. Other areas of international rule making, such as in environment and health, have also been changing in ways analogous to those in the financial sector. The mix of institutions and instruments involved in the financial sector is not unrepresentative of the current styles of working in other areas of international rule making. In 2008 it was international rule making in the financial area that failed. Unless the lessons are learnt, future years could bring failure in other equally important areas such as health or climate change or security. The failures may be failures of omission where rules that are needed are not made. Or they may be failures of commission where the rules that are made are fundamentally flawed. The 2008 financial crisis contained regulatory and rule-making failures of both types.

A TWIN CHALLENGE

The challenge to the current approach to international rule making is partly about why it failed in one of its most important practical tasks. The mix of venues and approaches to rule making has been justified as representing a pragmatic response to practical questions. This justification has been undermined.

The challenge is also about the connection, or lack of connection, of the current approach to international rule making to democratic values. What the rule makers have claimed to have gained in seeking pragmatic and flexible ways to solve problems through international cooperation, citizens have lost in an erosion of basic democratic protections.⁴

In the 2008 international financial crisis, national governments shifted the blame onto international forces 'beyond their control'. But the international arena that was meant to provide a means of weathering such challenges and failed to do so, itself offers no democratic means of accountability. On the contrary, the co-mingling of international venues, old and new, together with the co-mingling of old and new instruments for disseminating rules, creates an impenetrable jungle of acronyms. Citizens in democratic countries often do not know where salient rules have been made or who the rule makers are. Other procedural protections that are crucial for democracies have also been lost. Citizens are poorly informed about what procedures have been followed in making the rules, have little or no opportunity to influence the making of the rules, and lack the means to protest effectively if they disagree with them or to find remedies if they damage their own interests. In democratic theory the citizen is king and the rule makers are subjects. In today's world, the making of international rules sees the rule makers as kings and citizens as subjects. When rule making fails, there is no redress. For citizens, faith in the democratic protections offered by their own societies is shaken; so too is their faith in international rule making.

The twin challenges can be seen as twin deficits – a democratic deficit combined with an effectiveness deficit. They are not new but they have become more evident and are going to become more, not less, important in future. They need to be corrected. It is time therefore to think again about the principles of design in international rule making.

⁴ Dryzek comments 'Collective choice in the international sphere is at best only a thinly democratic affair, at worst thoroughly undemocratic' (Dryzek 1999: 30).

PRINCIPLES – FORM AND PROCESS

In thinking about the principles of design there is a long-standing debate between those who emphasise the importance of ‘form’ and those who stress the importance of ‘processes’.⁵ An emphasis on form means looking at the design and role of institutions, the scope and spheres of their authority, at the form of instruments they use to express authority, and at the relationship between forms of authority and forms of instrument. An emphasis on process means looking at the procedures institutions and authorities employ in order to formulate the rules and achieve their objectives. It also means looking at how different actors behave in the different settings in which rules are made and applied. It means examining the different ways in which the authority of the different actors in rule making is grounded. Both perspectives involve empirical analysis. Both also involve normative analysis.

In the context of post war international rule making it is a debate that started at the time that the post war architecture was originally established during the Second World War. Its salience continues. The two perspectives provide a unifying theme for much of the discussion that follows. They provide a common thread from the early post war history to current questions about the choice of venues and choice of instruments in international rule making. They link the discussion of the reasons for failures in rule making to the discussion of the reasons for the lack of respect for democratic norms.

THE ANALYTIC FRAMEWORK

The analysis undertaken in this book juxtaposes two different frameworks that refract the debate about form and process. The first framework is that provided by theories of multi-level governance. The second framework is drawn from what is known as diffusion theory.

The first framework, multi-level governance, focuses on forms and spheres of authority in the modern world. In particular it tries to combine newer, so-called ‘horizontal’ forms of authority, wielded by networks of

⁵ In later discussion, the start of the post Second World War debate is attributed to the functionalism of Mitrany. It is discussed from a different perspective by Easton (1990). The debate has a long historical background going back to late theories of kingship (where Bodin for example emphasised the importance of distinguishing between different forms of monarchical authority) and to early democratic theory that looked to processes embodied in notions such as ‘contract’ that were deemed necessary in order to establish legitimate authority.

officials, lawyers, experts from the natural and social sciences, and civil society actors, with traditional, more hierarchical forms of authority wielded by governments, their legislatures, courts and executive agencies. The term 'governance' is preferred to 'government' in order to recognise that governments are not the only sources of authority and to signal that the new forms of authority cohere as a system.⁶

Multi-level governance offers an approach both to the analysis of the effectiveness of rule making across different jurisdictions, including the international, and to the analysis of its democratic legitimacy.⁷ Unfortunately, the claims made on its behalf are greatly exaggerated. In making the rules for the international financial system, governments have had the use of an extensive range of different organisational forms with different spheres of authority. Nevertheless, the financial crisis has shown that the current system of international rule making is still prone to failure. In addition, far from helping to pinpoint democratic responsibility, multiple spheres of authority and multiple actors often help to conceal where the real power lies and who the real decision takers are. The analysis in this book therefore also utilises a second framework that focuses on processes rather than form.

The second framework chosen to explore the processes involved in international rule making is taken from what is known as 'diffusion theory', originally used by sociologists to explore the adoption of innovations in areas such as plant technology and medicine. In this application the adoption of a new international rule or regulation is treated as another kind of innovation.⁸

The diffusion framework involves a major distinction between three stages of international rule making, between the different actors playing the pivotal role at each stage and between the different types of reasoning deployed by the key actors at each stage.

⁶ Theories of multi-level governance draw on a number of different sources of inspiration including international relations theory, studies of federalism and studies of the European Union. For a description of the sources see Hooghe and Marks (2003).

⁷ The term 'effectiveness' is generally used in the discussion in preference to 'efficiency' as the term for characterising the performance of a rule or regulation. 'Efficiency' implies an economist's definition of achieving a given end at least cost and is appropriate in the limited context of a discussion of the economics of rule making. However, rules and regulations are particularly about changing behaviour and additional criteria are also apposite. See the discussion of 'effectiveness' in Young (1999b: 21–27).

⁸ Black defines innovation in the field of regulation as 'the use of new solutions to address old problems, or new solutions to address "new" (or newly constructed) problems' (Black 2005: 4). Walker (1969: 881) defines innovation in terms of 'a program or policy which is new to the states adopting it, no matter how old the program may be or how many other states have adopted it'. Either definition can be used.

The first stage is that of the formulation of rules where the substantive content of the rules is determined. It is a stage dominated by experts and bureaucratic elites and by reasoning that reflects their professional disciplines.⁹ Since experts often disagree, the venues and procedures used at this stage are those conducive to achieving consensus among peers. The experts form not only communities of knowledge but also communities of practice. The second stage is the adoption or endorsement of the proposed rules. It is a stage still dominated by governments and involves a different type of reasoning that reflects their own strategic calculations in deciding whether or not to endorse a proposed rule and, if so, in what form. The third stage is the acceptance of the rules. This is the stage where electorates and citizens are the central actors in democratic societies. In their own reasoning they may well be distrustful of what both governments and experts have to say.¹⁰

These distinctions are not absolute and are often blurred in practice. The experts focusing on the content of rules will keep an eye on what governments may be willing to endorse and adopt. Governments in their turn, in endorsing the proposed rules, may keep an eye on what their electorates may accept. Despite the simplifications, the distinctions nevertheless have hugely important advantages for both empirical and normative analysis.

The two perspectives are discussed in greater detail later in the book. They are not mutually exclusive. Each offers important insights into why international rule making may fail and why there is a lack of consistency with democratic norms. It is important that the analytic perspective provides for both. In addition, the use of the two frameworks provides for an interdisciplinary approach.¹¹ However, what is key is that the two approaches lead in different directions in diagnosing both the sources of failure in rule making and the origins of the democratic deficit. As a result they also lead to quite different prescriptions about the remedies for each.

⁹ An 'expert' can be defined as someone recognised in their field as competent or authoritative in providing advice on the design of a public policy.

¹⁰ These distinctions are based on Ryan and Gross (1943). In their pioneering case study of the diffusion of hybrid corn in Iowa in the 1930s, the laboratory scientists developed the hybrid seed, the seed company salesmen and farm agencies endorsed its superior qualities and the farmers were the accepters.

¹¹ In particular it bridges one of the main divides in the social sciences between sociology and the assumptions about rationality commonly used in other social science disciplines. Benvenisti and Hirsch (2004) note that the distinction between rational choice and sociological analysis constitutes one of the major dividing lines in social sciences scholarship.