

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.

DIAGNOSING FAILURE

In the multi-level governance framework, failures in international rule making flow from a variety of forms of ‘mismatching’ and ‘misalignments’. For example, a task may be misassigned to the wrong kind of organisation, or there may be a misalignment between the spheres of authority of an organisation and the scale of collective good to be provided, or a mismatching between the substance of a measure and the legal form in which it is conveyed for implementation.

By contrast, in the diffusion framework the issues centre on the first stage of rule making. They centre in particular on the weaknesses of what are known as ‘epistemic communities’ or elites. It is the epistemic elites who play a determining role both in framing the problem to be solved and in putting forward proposals on the substantive content of rules that purport to meet the problem. The advantages of epistemic elites centre on the use of technocratic, evidence-oriented venues. The disadvantages crystallise around the shortcomings of consensus between experts and peer approval as validation for evidence-based rule making. There are extremely strong theoretical reasons for thinking that like-minded groups are especially vulnerable to certain kinds of cognitive failings.¹² These failings lead to defective rules. The new venues try to avoid a sterile type of political contestation. However, a different type of contestation is necessary for assurance that the proposed rules are indeed evidence based. Without procedures and institutions that enable the substance of the rules to be challenged, rule making can go fundamentally wrong.

The two accounts of failure are therefore quite different. The account offered by the multi-level governance framework centres on what might be classed as a category of ‘executive failure’ where governments are at fault for the misalignments, mismatches and mis-assignments. The account offered by the diffusion framework centres on cognitive failure among the elites – failure that stems from the methods elites employ in going about making the rules.

In looking at these two possible sources of failure there are pragmatic reasons for thinking that cognitive failure is ‘prior’. Failings in the original substantive choices made by the experts will not be corrected by changing the forms of organisation, reassigning roles, redefining spheres of authority or by altering the nature of the instruments through which the rules are conveyed.

¹² Cognitive failure can be defined as failure in the method of mobilising and interpreting available information and knowledge, in making causal inferences, and in estimating uncertainties and probabilities.

The diffusion framework also makes clear why governments – elected or authoritarian, do not provide the necessary kind of contestation to correct for any initial failures in the substantive content of a rule. The attention of governments is largely centred on the strategic issues of whether or not to accept the proposed rules. These strategic interests, such as which other governments are likely to accept the rule and to what extent they can be counted on to implement any agreement, are different in their focus from the type of challenge and contest needed in arriving at the substance of the proposed rules.

DIAGNOSING THE DEMOCRATIC DEFICIT

The two frameworks also lead to very different accounts of the sources of the democratic deficit in international rule making. For the architects of the post war international institutions, the problem for democracies was the simple absence of international rules of behaviour. The problem is different now that international rule making has been restored.

According to the multi-level governance framework, democratic rule making involves a combination of traditional forms of political authority, organised vertically, with newer forms of authority organised horizontally. Governments with their traditional instruments of authority can act simultaneously at more than one level of decision taking. They can incorporate the preferences of their own voters at whatever level they choose to act – whether international, national or sub-national. At the same time the networks of the many other actors, in addition to governments, who are involved in rule making at all levels of government provide a form of decentralised governance. These horizontally organised forms of authority provide for diversified voices in policy making, including the voice of civil society. A democratic deficit occurs when the connections between these different forms of authority fail to respect such democratic norms as transparency, representativeness and participation.

The diffusion framework provides a quite different analysis of the democratic deficit that centres on ‘role reversal’, ‘dissonance’ and the treatment of dissent.

‘Role reversal’ focuses on the way in which citizens experience international rules at the receiving end. In democratic theory the citizen is the ‘principal’, the instigator of collective rule making, while experts and governments are their agents and representatives. In practice, in international rule making the roles are reversed. In today’s world of international rule making, experts propose, governments dispose and the citizen is impotent. Citizens are placed in the position of being the accepters of rules made by

others they may not be able to identify, in places they may not be able to trace.

What 'dissonance' refers to in this context is the reasoning that citizens apply to the decisions that are presented to them by experts and governments. The kind of reasoning that citizens engage in as accepters of rules is not necessarily the same as the kind of reasoning that is used by those experts who decide on the substance of the rules. Neither is it the same as the kind of strategic reasoning that lies behind the decisions of governments to endorse the rules. Nor is it just about the effectiveness of the proposed rule. Experts talk about the substantive content of the rule and governments offer narratives in order to frame their endorsement within a context that they hope their electorates will accept and comply with. But electorates may have their own and sometimes dissenting views about whether or not a rule is good for them themselves.

For democracies a problem arises whenever the much more diverse styles of reasoning, sentiment and intuition that electorates draw on in assessing the impact of international rules on their lives run counter to the different types of reasoning found convincing by experts and governments. Such a divergence will not always happen, but when it occurs it raises the basic issue of how dissent is treated in democracies. The way in which dissent to proposed international rules can be accommodated within a democratic framework is thus seen as the fundamental issue according to the diffusion framework.

'LEAST STANDARDS'

The criteria that lie behind and emerge from the diagnosis of the sources of failure and the roots of the democratic deficit incorporate minimum standards or the 'least standard' in each case. The least that can be expected from experts is that they respect the evidence. They must therefore observe epistemic standards that are about respect for evidence in the way in which they frame, interpret and analyse policy problems and in the way in which they make recommendations about appropriate solutions. The least that can be expected from democratic systems of government is that they give opportunities for the expression of dissent and the voicing of minority views. A critical dividing line between democracies and authoritarian governments is that authoritarian regimes suppress dissent. Democracies may differ in the way they treat dissent – majorities may be allowed to override minorities or, alternatively, democracies may offer some form of power sharing or constitutional protection. But, in one way or another, provision that respects the place for dissent is the distinguishing feature of democracies.

There are more expansive and demanding standards that could be applied both to experts and to democratic systems. For example, experts might be subject to rules governing conflicts of interest or remuneration or funding. Similarly, higher standards might be applied to democracies, such as criteria for representation or criteria addressing the substantive goals of democratic politics such as social justice. But higher standards require their own further justification. Moreover, if adopted as part of the starting framework they risk slanting the entire subsequent analysis.¹³

REMEDIES

The diffusion framework not only leads to a different diagnosis for the failures of international rule makers and for what lies at the root of the democratic deficit, it also offers a different perspective on the potential remedies.

The need to give central place to how dissent is to be treated in any democratic system of international rule making focuses the debate on the relative merits of participatory politics as the vehicle for 'socialising' differences in comparison to the rival attractions of governing rules that protect different voices. According to the first approach, dissent marks out the international policies that have to be taken out of expert and government dominated arenas and brought into the public political arena. According to the second approach, dissent marks the areas where different discourses need their own autonomous space.

The first approach calls for some kind of political transformation at the international level. The second approach calls for comprehensive principles, grounded independently of the political process, that can mediate relationships between overlapping jurisdictions including the international.

The diffusion framework leads eventually however towards a third approach to the treatment of dissent and that is to introduce specific governing rules.. A mandatory period for reflection, debate and review after the conclusion of any international agreement, in whatever form the agreement takes, and before formal ratification, would provide citizens with new space for consultation, challenge and review, including judicial review.

The same approach applies to remedying the epistemic vulnerability of the rule makers. In order to respect the evidence, the experts need to operate within a formalised system of challenge that applies throughout

¹³ Moravcsik (2004) warns against unrealistic or 'utopian' standards.

the regulatory cycle so as to ensure that their treatment of the evidence has not simply been validated by peer review and consensus. The challenge system must always make explicit space for competing views about the problem, for tracking the key decision points where choice is narrowed down, for indicating the uncertainties attached to any decision and for auditing the causal thinking behind the decisions or conclusions.

Both types of governing rule need to be externally enforced. Rather than respecting signs of dissent, governments are all too often content to obfuscate the sources and origins of the rules and rely on their powers of coercion to impose the rules. Public opinion is treated at best as something to be manipulated and at worst as an inconvenience to be ignored. Rather than exposing the way they frame problems and ground their preferred solutions, experts also prefer to operate without systematic challenge within a more comfortable world marked by peer approval. The public is asked to rely on the self-restraint of governments and the self-discipline of elites. It is not enough. Externally imposed governing or constitutional rules are needed.

TRADE-OFFS?

There is a very traditional view that democratic forms of government involve compromising with effectiveness – that effectiveness and democracy do not go hand in hand. The same point is sometimes made in connection with international rule making – that a system that achieves effectiveness does it necessarily at the expense of democratic values.¹⁴ The diffusion framework questions this presumption. It suggests that there is a different connection between democratic values and the effectiveness of international systems of governance. The connection is that the foundation for effectiveness in rule making and the foundation for democratic procedures both require governing rules that entrench opportunities for organised challenge.

SPECIFIC GOVERNING RULES

A number of influences are coming together that call for renewal of the architecture for international rule making. The failures in respect of international financial regulation have prompted calls for a 'New Bretton

¹⁴ Dahl (1994) offers one account of the tension between effectiveness and democratic values.

Woods' – a reference to the conference in 1944 that established the post war rules of financial behaviour and the International Monetary Fund (IMF) and the World Bank. The rise of India, China and other centres, including in the Middle East, also suggests the need to rebalance existing arrangements that were drawn up 70 years ago predominantly by just two powers – the US and the UK – with the US in the driver's seat. There are new scientific challenges, new security challenges.

A necessary precondition for the renewal of the international order is however the need to rebuild confidence in international rule-making procedures. The principal thrust of the analysis in this book is that the sources of the systemic failures in international rule making that we see today, and the sources of the democratic deficit as well, are symptoms of a failure to give proper weight to processes relative to the time and attention devoted to form. This means that the two key deficiencies of the existing system – its proneness to the epistemic failings of elites and the lack of respect paid by governments to dissent – have to be corrected.

An approach that targets specific procedural weaknesses with specific governing rules seems to lack ambition. Certainly, it is much less ambitious than approaches that call for some kind of political transformation of international rule making or that call for the application of overarching general principles to mediate different international discourses. But while the approach recommended in this book is limited and specific it can also be seen as the first step in a much broader, longer term agenda. It would provide a first step towards bringing constitutional disciplines to international rule making – to experts and elites as well as to governments.

THE DISCUSSION

The first chapter sets the historical scene and briefly accounts for how we arrived at the present arrangements for international rule making. It describes a collision between the assumptions on which the international architecture for the post war world was based with the post war reality. The architecture was built on false premises. The collision with reality created a compelling imperative to improvise in international rule making. With improvisation came a neglect of normative standards. At the same time, in both the construction of the original architecture and in the improvised changes that followed, the emphasis was on form. The chapter also describes the start of the debate in the 1940s about the role of processes in relation to form.

The second chapter sets the scene in a different way by reviewing the international rule-making structures as they now operate. It compares

two styles of rule making. In practice, both are intermingled. It is the resulting mix of venues and instruments that characterises contemporary international rule making. It is in this mix that rule making has failed and democratic norms appear to have been lost.

The chapter also looks briefly at whether the current mix of institutions and instruments involved in international rule making is stable or whether a new universal organising logic is likely to emerge – possibly built around a combination or ‘hybrid’ of old and new styles of rule making. The analysis draws on two different types of theorising – the transaction costs approach of economists and congruence theory from political science. They suggest continuing flux and the use of differing mixes of venues and instruments. They also suggest that the criterion for judging the mix should not be formulated in terms of a goal of stability but in terms of a system for ‘managing strain’.

Against this description of the present scene and how we got there, the third chapter explores the two different frameworks for analysing the nature of the shortcomings in international rule making. The key elements in the prevailing approach of ‘multi-level governance’ that focus on forms of authority are set out. So too are the key elements in the process-oriented framework drawn from diffusion theory. Both are deployed in the subsequent analysis.

In order to carry forward the analysis of the potential sources of failure in international rule making and the sources of the democratic deficit, the next two chapters (Chapters 4 and 5) examine more thoroughly the factors that determine the mix of institutions and the mix of instruments used in international rule making.

In the case of the mix of institutions, explanations that focus on form identify the different logic behind different forms, why one kind of venue might be preferred to another and how they come to be combined. Explanations that centre on processes look to a common world of expert elites. In this world, the mix reflects fluid boundaries between professional disciplines and shifting relationships from cooperation to competition.

In the case of the mix of instruments used in international rule making, an account that emphasises form attributes the use of a wider mix of instruments to the need to achieve flexibility in the scale or reach of government in different policy areas and to the widening participation of non-governmental actors with authority in policy making. An account that focuses on process looks at the different kinds of reasoning used by governments in their approaches to negotiating an international rule with other governments and in negotiating implementation with the targets of the rules. The mix of instruments arises as a result of the need to link together the two settings and the two styles of reasoning.

Chapter 6 evaluates the sources of failure in the current system of international rule making identified in the earlier discussion of venues and instruments. It distinguishes between three possible sources of failure. One possible source is 'executive failure'. Accounts of rule making that focus on form identify types of failure that fall within this category. A second possible source of failure stems from shortcomings in what is labelled 'organisational culture'. A third source lies in cognitive failings. The chapter discusses these distinctions and the relationship between these three sources of failure. It sets out the particular characteristics defining epistemic elites that make them so vulnerable to particular types of cognitive failings.

Chapter 7 discusses the democratic deficit in the light of the earlier discussion. It looks at three ways of viewing the underlying issues. The first looks at the issues raised by the need for 'conciliation' between the different styles of reasoning used by different actors at different stages of the rule-making process and the different rationalities involved in rule making. Conciliation methods used in international rule making are crude. 'Muddling through' and what is known as 'satisficing' remain the norms.¹⁵ The differences with conciliation processes used within national jurisdictions reintroduce the case for achieving greater congruence between the methods used in international rule making and the methods used in national contexts. Congruence, therefore, provides a second way of viewing the issues. The discussion distinguishes between institutional congruence (where the focus is on looking for analogous institutional arrangements at different levels of government) and value congruence where the emphasis is on aligning values. The third perspective focuses on 'dissonance' – the reasons why electorates may reject, for their own good reasons, the reasoning of elites and governments. Dissonance puts the spotlight on how democratic dissent is to be treated in international rule making.

The discussion continues by looking at the potential remedies for both the managerial deficit and the democratic deficit. Chapter 8 examines the key features of an institutionalised challenge system that goes beyond peer review in order to ensure that unelected bodies observe more stringent principles and procedures in their rule making. The old international architecture has been pushed to one side partly because it had built in an unproductive kind of contestation. However a new and different kind of contestation remains necessary over the regulatory cycle.

Chapter 9 looks at how to treat dissonance and dissent as a foundation

¹⁵ 'Satisficing' means taking decisions in order to respond to time pressures to 'do something' while leaving the underlying issues, including normative issues, unresolved.

value in a democratic framework. The case for a political transformation of the international level is discussed along with approaches embracing comprehensive governing rules that try to provide for over-arching mediating principles between different types of discourse. The case for the introduction of specific governing or constitutional rules is set out.

A brief concluding chapter summarises the analysis.