The Coherence of Multilateral Regulation

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Abstract

The multilateral system of international institutions established at the end of World War II was created to function as intergovernmental fora within which nation states, using diplomatic means, could communicate, cooperate and coordinate responses to global issues and crises. Since then, even though the structure of multilateral system has retained its institutional focus, the primary function of many of those institutions has changed. Rather than performing the predominantly organisational function of facilitating diplomatic exchange, the multilateral system is now comprised of a network of institutions that also administer a growing inventory of international regulatory arrangements. The objective of this article is to examine the regulatory coherence of multilateral regulatory arrangements in light of the gradual systemic shift from intergovernmental to regulatory multilateralism.

Introduction

While much scholarly attention has been directed towards the transformation in domestic governance arrangements that has been occurring in many industrialised countries over the past several decades,[1] a related transformation that has been taking place at a much broader level seems to have gone somewhat unnoticed. At the same time national governments have been transferring increasing administrative decision-making responsibilities to domestic regulatory agencies, they have also been transferring increasing regulatory responsibilities to an array of multilateral institutions. However, it is not the creation of new, or expansion of existing multilateral institutions that has gone unnoticed. It is the gradual, functional, transition from intergovernmental to regulatory multilateralism that has largely escaped attention.[2]

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1 A large body of research examining the motives underlying this transformation and its operational characteristics has emerged to explain the trend away from the more centralized model of governance associated with the welfare state (Cass Sunstein, *After the Rights Revolution* (1990); Richard Pildes & Cass Sunstein, 'Reinventing the Regulatory State' (1995) 62 *University of Chicago Law Review* 1; Giandomenico Majone, *Regulating Europe* (1996); Martin Loughlin & Colin Scott, 'The Regulatory State' in Patrick Dunleavy, Ian Holliday, Andrew Gamble & Gillian Peele (eds), *Developments in British Politics* 5 (1997); Julia Black, 'Decentring Regulation: The Role of Regulation and Self-Regulation in a 'Post-Regulatory' World' [2001] *Current Legal Problems* 103; Michael Moran, 'Review Article: Understanding the Regulatory State' (2002) *British Journal of Political Science* 391).

2 Although this phenomenon has been described as a transition to a 'rules-based' system, the transition has greater implications if considered within a broader governance context. However, rather than considering the governance implications, this paper will focus on the regulatory characteristics and issues arising from this transition.

The multilateral system of international institutions was established towards the end of World War II. These institutions were created to function as intergovernmental fora within which nation states, using diplomatic means, could communicate, cooperate and coordinate responses to global issues and crises.[3] Since then, even though the structure of a multilateral system has retained its institutional focus, the primary function of the multilateral institutions has changed. Rather than performing the predominantly organisational function of facilitating diplomatic exchange, the multilateral system is now comprised of a network of institutions that administer a growing inventory of international regulatory arrangements.[4] This shift towards a regulatory function performed by the multilateral institutions is called, for the purposes of this article, *regulatory multilateralism*.

Regulatory multilateralism differs from *intergovernmental* multilateralism in several ways.[5] Intergovernmental cooperation through diplomatic processes is suited to dealing with specific issues and crises. However, a growing number of international issues have emerged requiring ongoing administration of commitments made between nation states. These commitments are governed by prescriptive, rules-based, codes of conduct. International agreements that create rights and obligations of a regulatory nature are more complex than intergovernmental agreements and diplomatic accords between nation states. International regulatory agreements often require the creation of institutional structures, the formation of substantive rules and processes and administrative mechanisms to monitor and enforce the more elaborate arrangements. Finally, international regulatory agreements require an upward delegation of sovereign power from nation states to a multilateral organisation empowering it to administer a regulatory scheme.[6]

The transition from intergovernmental to regulatory multilateralism coincides with increasing demands upon the international community to respond to a range of issues flowing from the deepening economic, social and political connectedness of nation states.[7] Globalisation is dramatically altering the social context contributing to the transition to regulatory multilateralism; however, the absence of any corresponding structural reform of the multilateral system is creating fundamental incoherencies in the composition and administration of multilateral regulatory arrangements. The growing divergence between the structure and function of the multilateral institutions sits at the core of two questions that are examined in this article. First, in light of the transition to regulatory multilateralism, the question arises how the absence of structural reform of the multilateral system is impacting upon the *systemic coherence* of multilateral regulatory arrangements? Second, how is the transition to regulatory multilateralism affecting the *instrumental coherence* of multilateral regulatory arrangements?

3 Robert Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (1990).

4 Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283.

5 Bruce Cronin, 'The Two Faces of the United Nations: The Tension Between Intergovernmentalism and Transnationalism' (2002) 8 *Global Governance* 53.

6 John McGinnis, 'The Political Economy of Global Multilateralism' (2000) 1 *Chicago Journal of International Law* 381.

7 Jan Aarte Scholte, *Globalization: A Critical Introduction* (2000).

These questions are considered in four steps. First, in Section 1 the notion of regulatory coherence is introduced and its relevance as an underlying theme of the article is described. In Section 2, a conceptual framework is presented that identifies important factors and relationships that comprise the international regulatory process that are considered in more detail in subsequent sections of the article. In Section 3, issues affecting the *systemic coherence* of multilateral regulatory arrangements are considered. In Section 4, consideration of *instrumental coherence* is undertaken by analysing the World Trade Organisation (WTO). A discussion and summary of the relationship between coherence issues and how they may contribute to current tensions affecting regulatory multilateralism are presented by way of a conclusion.

1. Legal Theories of Coherence and Multilateral Regulation

Several different analytical approaches examine the question of legal coherence, and its relevance, from a different analytical dimension.[8] The feature common to all approaches is their broad agreement on the same general principle: to have and maintain coherence and integrity; the purpose of law, the structure and function of legal systems and the integrity of legal processes all must exhibit some degree of consistency and coherence. In a mechanistic sense, coherence can be described as an organising principle that exhibits certain properties. The basic properties it exhibits emerge when it is used to evaluate the characteristics of linkages among and between abstract concepts. If a linkage of concepts or ideas is not coherent, the outcome will be cognitive friction and conceptual instability.[9] This may be described as an incoherent outcome. If the linkage of ideas exhibits a more logical and functional interoperability among inter-related concepts, it is probable that more stable, predictable and consistent outcomes will be achieved. Coherence, in brief, describes qualitative patterns in the arrangement of abstract ideas.

When applied to the analysis of regulation and regulatory schemes, coherence theory is closely related to the concept of regulatory failure. Although there is little agreement in the literature as to what exactly regulatory failure is or how it can be objectively recognised or explained,[10] Breyer's classical legal definition of regulatory failure provides a useful starting principle. Breyer's definition states that regulatory schemes fail when

8 Coherence can be used to analyse systems of law, the relationship between legal principles or the linkage of ideas in the legal reasoning process. The theories and approaches can be divided into two broad types: structural theories of coherence which explain the linkage and interaction of parts of a legal regime (Ronald Dworkin, *Laws Empire* (1986); Joseph Raz, *Ethics in the Public Domain* (1994)); and the more mechanical, interpretive theories that focus on processes of legal reasoning and the linkage of arguments (Neil MacCormick, 'Coherence in Legal Justification' in Aleksander Peczenik et al (eds), *Theory of Legal Science*, (1984)).

9 An idea common to all applications is the fundamental principle that a legal regime is more likely to generate incoherent outcomes if the relationship between the parts of the whole is not, conceptually, in alignment with components both of the legal system itself, but also with other social structures extending beyond the legal system (Jack Balkin, 'Understanding Legal Understanding: The Legal Subject and the Problem of legal Coherence' (1993) 103 *Yale Law Journal* 105).

10 Martin Lodge, 'The Wrong Type of Regulation? Regulatory Failure and the Railways in Britain and Germany' (2002) 22 *Journal of Public Policy* (3) 71.

regulatory instruments are mismatched to the context in which they are applied.[11] Although broad, the definition implicitly identifies the requirement for consistency between the social problem underlying the need for a regulatory solution and the choice of regulatory machinery implemented to address that problem.

To satisfy coherence requirements, a regulatory arrangement should exhibit three levels of regulatory coherence: systemic coherence, policy coherence and instrumental coherence. Systemic coherence is an actual or ideal feature of a regulatory arrangement where its components fit together: either all of them (global systemic coherence) or some of them (local systemic coherence). Figure 1 illustrates how a regulatory arrangement is *systemically coherent* where the underlying social need for regulation and the normative policy foundations formulated to address that need are theoretically in alignment. In making the conceptual linkage between social need and normative policy, systemic coherence implies a requirement for a logical connection between the motivation for regulating (foundationalist approach) and the theoretical concepts that shapes a regulatory order (non-foundationalist approach).[12] This notion of a systemic coherence is also reflected in the constructivist ideal that regulatory institutions and rules are abstract social constructs created to serve the needs of a social order (or relevant sub-orders) in accordance with a particular social context. As the needs of societies and communities change, so too should the regulatory institutions and instruments that govern them.[13] Regulatory policies that do not evolve and regulatory instruments that are not reformed to reflect systemic change will eventually fail in their regulatory objectives.[14]

The next level of regulatory coherence identified in Figure 1 is the requirement for alignment between the normative policy foundations and positive rules referred to as *policy coherence*. Policy coherence encompasses an internal and external dimension. Internal coherence is determined by whether the normative policy foundations are in alignment with policy choices embodied in the positive legal instruments formalising the regulatory architecture. External coherence, also known as comparative coherence, has two sub-dimensions: within category and across category coherence.[15] Within category coherence is defined as regulation that is consistent with other regulations of the same general type. Regulations are coherent across category where the overall pattern of regulations makes sense across different regulatory categories. Policy coherence is not examined in this article because no single specific WTO agreement is analysed. The WTO administers a number of agreements covering a range of subject areas, each containing regulatory obligations fashioned having different policy bases. Instead, in this article, a broader analytical lens is used to examine the general structural characteristics of the WTO as an example of regulatory multilateralism.[16]

11 Stephen Breyer, *Regulation and its Reform* (1983).

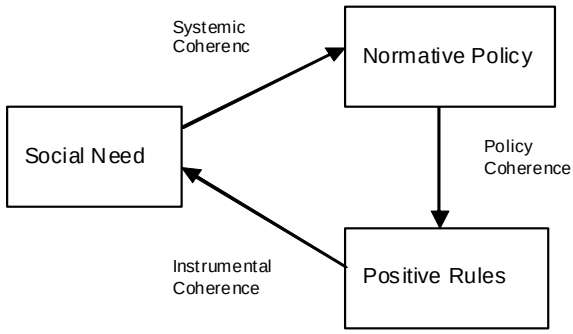
12 Stefano Bertea, 'The Arguments from Coherence: Analysis and Evaluation' (2005) 25 *Oxford Journal of Legal Studies* (3) 369.

13 Tony Prosser, *Law and the Regulators* (1997).

14 Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

15 Cass Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, 'Predictably Incoherent Judgements' (2002) 54 *Stanford Law Review* 1153.

Figure 1



Finally, *instrumental coherence* reflects the positive dimension of regulation and is evaluated on the basis of whether the regulatory machinery, or means chosen is consistent with and contributes to a *well functioning* regulatory system. Regulation fails to make instrumental sense if its underlying social motives and normative policy foundations are not reflected in the positive instruments chosen and implemented. Instrumental incoherence arises where regulatory instruments (institutions and rules) are ineffectual, produce unintended consequences, or impose far too many costs relative to the social benefits they achieve.[17] Regulatory coherence, therefore, implies a consistency among all three dimensions of coherence.

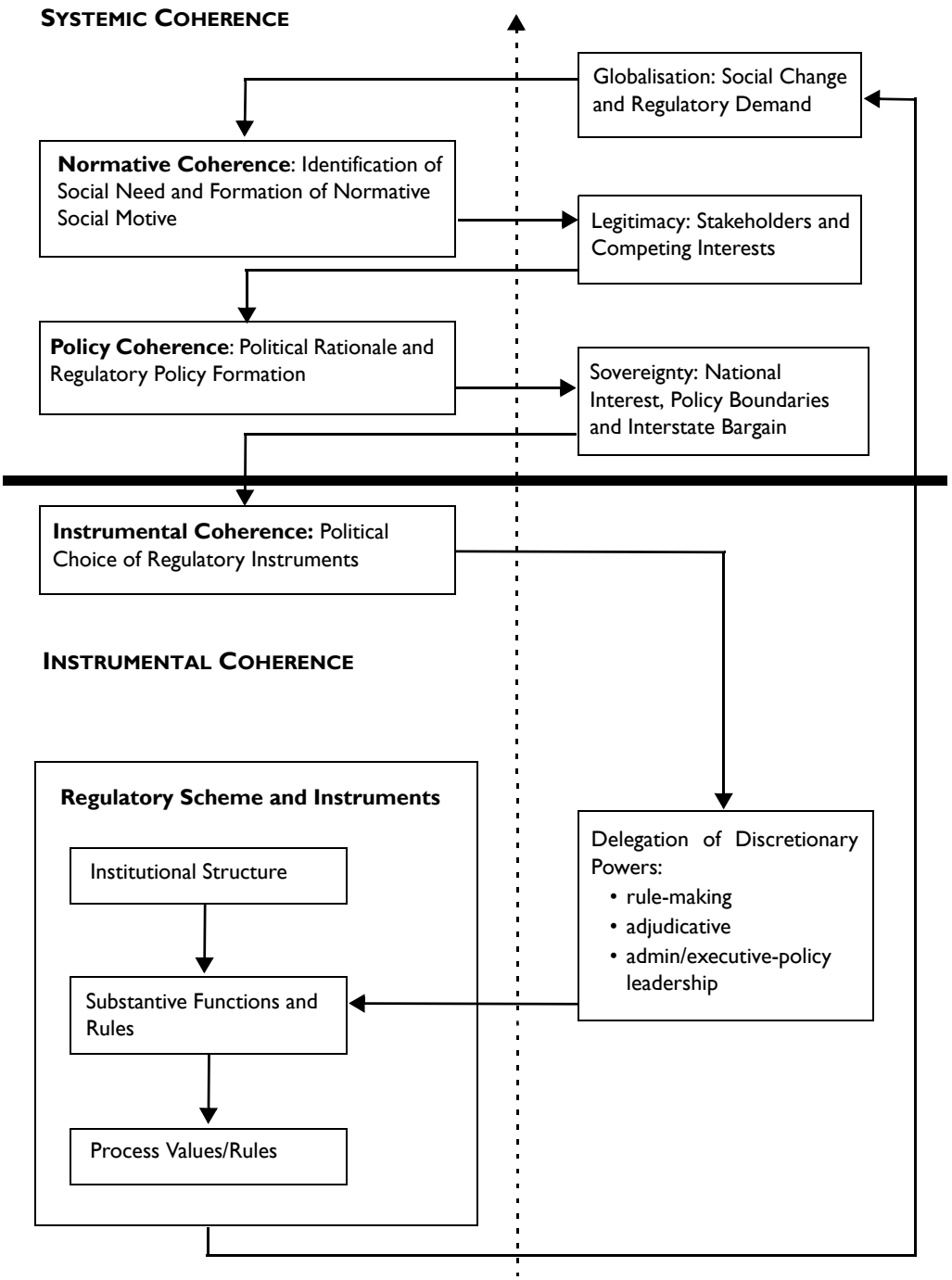
2. Conceptual Framework

Before conducting an analysis of regulatory coherence, it is helpful to place the different dimensions of regulatory coherence discussed in Section 1 in some context. In Figure 2, key decision-making steps in the international regulatory process as well as important determinants influencing those decisions are identified. The top portion of Figure 2 illustrates key relationships impacting on the systemic coherence of international regulatory arrangements. The lower portion of Figure 2 focuses on key relationships affecting the positive characteristics of a regulatory scheme and its instrumental coherence. Although conceptually divided, the two dimensions are inter-related.

16 Policy coherence is relevant where a specific policy/regulatory structure is examined; for example, policy coherence is particularly relevant in an examination of global warming (OECD, *Improving Policy Coherence and Integration for Sustainable Development: A Checklist Policy Brief* (2002)).

17 Cary Coglianese, 'Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy' (2002) 54 *Stanford Law Review* 1217.

Figure 2: Conceptual Framework



In addition to the system/instrumental distinction, Figure 2 is also divided between 'regulatory decisions/choices' (boxes appearing on the left side of the figure) and the major 'determinants' influencing those decisions (on the right). The decisions on the right broadly parallel the generic decision-making steps that occur in a regulatory policy formation and implementation process. However, it is the determinants on the right that are the source of, and account for, differences that are unique to the international context.[18]

Beginning at the top of Figure 2, the first determinant, globalisation, is a contemporary euphemism for the concept of global social change. Increasing levels of global connectedness over the past several decades have contributed to social change that is universal in scope and convergent in trajectory. A growing number of issues and problems that were once contained within a national context now have trans-border effects. Social and economic issues having trans-border effects fall outside the capacity of nations to effectively solve acting unilaterally. Figure 2 draws the link between globalisation as a determinant of social change that is impacting upon the need for developing international regulatory policies.

Accurate identification and understanding of the social need and motives for international regulation is the first critical decision made in the international regulatory policy process. Characterisation of the problem and identification of the social motive for regulation establish the normative boundaries of a regulatory policy. The normative boundary setting process is, in turn, linked to questions relating to the legitimacy of a regulatory arrangement. A regulatory policy is more likely to gain acceptance and confidence of the community it serves (and hence, regulatory legitimacy) if the community most affected by the regulation plays a role in the policy-making process.[19] In more practical terms, this means that as part of the boundary setting process, an identification of issue stakeholders as well as mechanisms enabling those stakeholders to meaningfully participate in the regulatory process must occur.[20]

Regulatory legitimacy, as defined by the extent of stakeholder participation, is a determinant that influences the normative foundations of regulatory policy. Given the international dimension of this process, a range of actors including nation states, national and transnational private actors, NGOs and even the multilateral themselves, all having

18 In general terms, the formation of international regulatory arrangements is similar to domestic processes in that it includes a sequence of steps encompassing: the identification of regulatory need, normative policy formation, structural/institutional choice, formulation and application of substantive rules, administration of the regulatory scheme and evaluation of its behavioural and systemic effects (Barry Mitnick, *Political Economy of Regulation: Creating, Designing and Removing Regulatory Forms* (1982); John Wilson, *The Politics of Regulation* (1980)). It is increasingly being recognized that if there is insufficient coherence among all of the steps, there is a higher risk the regulatory arrangement will fail- hence the close relationship between regulatory coherence and regulatory failure.

19 Ayres & Braithwaite, above n14; Anthony Ogus, 'Comparing Regulatory Systems: Institutions, Process and Legal Forms' (2002) *Centre on Regulation and Competition Working Paper Series No. 35*.

20 Ayres & Braithwaite, above n14; Michael Zürn, 'Global Governance and Legitimacy Problems' (2004) 39 *Government and Opposition* (2) 260.

different and competing interests that may require consideration and representation in the policy formation process. However, an optimal normative policy choice is disciplined by a very important determinant- the concept of sovereignty. The classical legal concept of sovereignty influences the legal boundaries of international regulatory arrangements by shaping the composition of political bargains struck among participating nations.[21] The bargain reflects a consensus among nation states that is formalised in the form of regulatory instruments drafted to implement the policy.

The step from regulatory policy to regulatory instruments is the dividing line between systemic and instrumental coherence. The legal instruments containing the upward delegation of power from nation states to an international regulatory authority, therefore, describe the architecture of an international regulatory arrangement. It not only provides for the compositional aspects of the regulatory arrangement (the institutional structure, administrative procedures and substantive rules targeted to give effect to the regulatory scheme), it also determines the scope and depth of rule-making, adjudicative, administrative/executive and policy-making/leadership functions vested in the regulatory authority (involving a combination of none, some or all of these powers). To function well, a regulatory system must possess an instrumental coherence evident in the legal as well as discretionary mechanics of the regulatory arrangements.

3. The Systemic Coherence of International Regulatory Arrangements

The analysis of the systemic coherence of a regulatory arrangement is accomplished by examining the theoretical consistency (at minimum) between the social need for the regulation and the normative policy choices made in response to those needs. This can be more simply stated as the relationship between 'identifying what the problem is and how best to solve it'. Although apparently simple, the functional transition from intergovernmental to regulatory multilateralism has complicated this analysis by altering conceptions of what qualifies as a problem requiring a collective international response and what the response to those problems 'should' be. Several points of tension between the existing structural characteristics of the multilateral system and its changing function have arisen in respect of:

- The relationship between globalisation and changing conceptions of social and regulatory need;
- Changing conceptions of the community to be regulated;
- Changing conceptions of the sovereignty in the face of increasing needs to form collective responses.

21 Slaughter, above n4.

A. Globalisation and Social Need

The traditional approach to determining social need for international regulation is closely related to traditional conceptions of the nation state as being the central actor in the international regulatory process. As the central actor, each nation state has the ultimate authority to determine those issues that are important, or not, in respect of a given territory and people. A nation state will be motivated to agree to a collective regulatory solution only if: a) an issue is beyond its jurisdictional capacity to resolve; and b) that issue is sufficiently important to the national interest to justify international cooperation. Therefore, before a nation state will agree to the terms of an international regulatory arrangement, a pre-condition is that any agreement must satisfy a test of national interest.[22] Hence, within existing institutional arrangements, social need for regulation is determined from the perspective of the nation state.

A systemic friction can occur where national interest motives conflict with the broader 'international public interest' motives for regulation that is increasingly transcending nation state interests as a consequence of globalisation and international social convergence. The friction arises where regulatory motives based on international public interest considerations do not accord with perceptions of what is in the national interest, and vice versa. Consequently, characterisation of regulatory need using either of the two perspectives may yield different policy solutions. Although a first-best policy solution should be dictated by the nature of the problem itself, national interest considerations can subvert the policy process resulting in sub-optimal or no policy being fashioned. International climate change is, according to some analysts, an example of 'interest' conflict. The conflict is reflected in the systemic incoherence between a universal social need for international regulation, on the one hand, and the sub-optimal policy choices that have been shaped by national interest considerations on the other.[23] The essence of this conflict is identified by Albert who states that:

> if there is such a thing as 'world society' [common social interests and values] out there, then the idea of enclosed 'national' societies- or better national "state-society" complexes- which logically underpin the traditional notion of multilateral 'international relations' becomes highly problematic.[24]

Hence, issues that may be in an international interest to regulate are not addressed adequately or at all where the national interest oriented structure of regulatory multilateralism provides a mechanism that justifies non-cooperation.

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22 Robert Keohane, 'Theory of World Politics: Structural Realism and Beyond' in Robert Keohane (ed), *Neorealism and Its Critics* (1986) at 158. Keohane argues that national self-interest as an actor motivator is a concept that is too constraining, and therefore, an ill-conceived way to approach both theorizing about international relations and using as a policy-making determinant.

23 Matthew Schaefer, 'Sovereignty, Influence, Realpolitik and the World Trade Organization' (2002) 25 *Hastings International and Comparative Law Review* 341.

24 Mathias Albert, 'On the Modern Systems Theory of Society and IR' in Mathias Albert & Lena Hilkermeier (eds), *Observing International Relations - Niklas Luhmann and World Politics* (2003).

B. Regulatory Legitimacy and Normative Policy Formation

The concept of regulatory legitimacy differs from broader notions of political legitimacy discussed in relation to multilateralism's undemocratic structure.[25] Regulatory legitimacy is a more modest concept, based on the principle that to have legitimacy, a regulatory arrangement must have the confidence of the community it serves.[26] In addition to the wider public interest, the community a regulatory arrangement serves is determined by examining which actors are: 1) most directly (and indirectly) affected by the issue to be regulated, and 2) most affected by the regulatory measures put in place.[27] Within this context, regulatory legitimacy is defined as the integrity of a regulatory arrangement evaluated on the basis of its transparency, accountability, procedural inclusiveness and fairness.[28]

The relationship between legitimacy and participation, on the one hand, and the policy formation process on the other is identified in Figure 2. This relationship presents another source of systemic friction impacting on the systemic coherence of regulatory multilateralism.[29] The structure of the multilateral system (which, traditionally, is seen as regulating the relations between states), which excludes the role of non-state stakeholders in the international regulatory process is becoming increasingly contentious. The international environment has evolved considerably since the multilateral institutions were established. Growing numbers of highly mobile private actors such as multinational citizens, multinational corporations, so-called civil-society actors (non-governmental public organisations), transnational advocacy networks and transnational protest movements are all participants in the system.[30] As the effects of globalisation have deepened, the nature of the interests of non-governmental stakeholders affected by regulatory action has become more complex.

Because the structure of the multilateral system excludes participation by non-state actors in the international policy formation process, there is a greater tendency for state-centric rather than problem-centric regulatory solutions to be fashioned. This exclusion raises fundamental questions whether there a systemic coherence can exist between the normative foundations of a good regulatory policy and international regulatory arrangements that exclude (except via indirect means) participation by affected parties? Given that, in order to have regulatory legitimacy, some degree of inclusion of stakeholders in the international policy formation process accords with generic conceptions of what constitutes good regulation, the absence of structures and mechanisms enabling participation raise additional technical questions whether international regulation fails to meet basic standards of transparency, accountability and, particularly, procedural fairness. This question is linked to further issues of legitimacy discussed below.

25 Allen Buchanan & Robert Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* (4) 405.

26 Ogus, above n19.

27 Mitnick, above n18; Wilson, above n18.

28 Prosser, above n13.

29 Steven Charnovitz, 'Citizen Participation in the Global Trading System' (2004) 56 *Rutgers Law Review* 927.

30 Albert, above n24.

C. *Sovereignty and the Political Choice of Regulatory Instruments*

Sovereignty is a fundamental determinant of the formal policy choices made between nation states in fashioning multilateral regulatory arrangements. In Figure 2, it is depicted as a determinant that disciplines the choice of regulatory instruments. Traditional legal doctrine asserts that sovereignty is indivisible and cannot be delegated. In practice, the rise of the regulatory state and regulatory multilateralism suggests that national sovereignty is frequently divided, unbundled, re-allocated and delegated away (downwards and upwards) from national governments.[31] Upward delegation presents unique political problems. On one hand, nations appear quite willing to delegate regulatory powers to international organisations; on the other hand, politicians face domestic political pressures to safeguard sovereignty (and preserve national autonomy and power), which influences their decisions in minimising the scope and depth of international delegations.[32] Although sovereignty has many conceptual dimensions, the conventional legal definition has the most influence on the contextual boundaries and structure of multilateral regulatory arrangements. The legal concept of sovereignty encompasses the extra-constitutional principle that nation states must ensure that national interests are not compromised if sovereign autonomy is affected (either through delegation or pooling) by entering into international commitments.[33] This imposes a legal obligation on national decision-makers to ensure that no more power than necessary is ceded to international institutions.

Unlike domestic regulatory arrangements, international regulation does not conform to traditional hierarchical and authoritarian control structures. Nation states, according to the principle of sovereignty, are equal. The disciplining influence of sovereignty is put into effect by operation of the obligation of reciprocity. Reciprocity is defined as a fundamental rule by which plural parties maintain the balance of treatment by means of granting the same or equivalent rights and benefits and/or undertaking obligations to each other.[34] A reciprocal relationship can be explained as a balanced condition in which one side accords another certain treatment in return for equivalent treatment.[35] This brings the 'tit for tat' dynamics that justifies retaliatory behaviour if the expectation of reciprocity is not met. A failure in reciprocity triggers a right of retaliation, the threat of which is the source of the force that disciplines the regulatory model.

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31 David Lake, 'The New Sovereignty in International Relations' (2003) 5 *International Studies Review* (3) 303; David Lake, 'Delegating Divisible Sovereignty: Some Conceptual Issues' (Paper presented at Workshop on 'Delegating Sovereignty: Constitutional and Political Perspective', Duke University Law School, March 2006).

32 Richard Shell, 'Trade Legalism and International Relations Theory' (1995) 44 *Duke Law Journal* (5) 829.

33 Curtis Bradley, 'International Delegations, the Structural Constitution, and Non-Self-Execution' (2003) 55 *Stanford Law Review* 1557.

34 Soji Yamamoto, 'The Functional Change of Reciprocity in International Economic Law' in Yuichi Takano (ed), *Issues in International Relations Law* (1988) at 238.

35 Carolyn Rhodes, 'Reciprocity in Trade: The Utility of a Bargaining Strategy' (1989) 43 *International Organization* 273-299. Keohane extracted two essential dimensions from reciprocity: contingency and equivalence, where 'actions that are contingent on rewarding reactions from others and that cease when these expected reactions are not forthcoming': Robert Keohane, 'Reciprocity in International Relations' (1986) 40 *International Organization* 1-27. Reciprocal relations require antecedent actions of one side that induce the other to act in consequent responses. The contingent actions, therefore, are inevitably taken in such a way that 'good is returned for good, and bad for bad': Keohane, infra, 8.

The interconnection between the principles of sovereignty and reciprocity can contribute to a systemic incoherence where the convergence of the principles creates an incentive for national policy-makers to deviate from normative first-best policy formation processes. Further reinforcing the sovereign obligation to protect the national self-interest, the reciprocity principal encourages national policy-makers to ensure that policy commitments should not be so (jurisdictionally) broad or (discretionarily) deep that obligations having unforeseen and unintended consequences may be inadvertently created. In order to stay safely within the legal boundaries, second or third best policy outcomes are produced as a compromise.

In addition, the dynamic interaction between sovereignty and reciprocity provides insight into why nation states are hesitant to broaden the structure of regulatory multilateralism to include greater participation by non-state actors. Reciprocity can function as a disciplinary force between nation states but cannot be extended to act as a source of authority to discipline the activity and behaviour of non-state actors. Accordingly, non-state actors can only be regulated under the jurisdictional authority of national governments, subject to legal obligations imposed upon them by individual nation states. Without a better understanding of the dynamics effects and impact of reciprocity and sovereignty upon regulatory design, there is a high risk of systemic incoherence creeping into multilateral regulatory arrangements.

4. The Instrumental Coherence of International Regulatory Arrangements

The objective of this section is to examine those relationships identified in Figure 2 to determine how the functional shift to regulatory multilateralism is affecting the instrumental coherence of multilateral regulatory arrangements. A regulatory arrangement is instrumentally coherent if the instruments chosen (comprised of institutional structure, substantive rules and procedural characteristics) facilitate *a well-functioning regulatory system*. A regulatory system that functions well is one that not only achieves its objectives, but also does so in an efficient and cost effective manner, fairly and consistently.[36] The instrumental characteristics of international regulatory arrangements are contained in the constituent treaties and/or agreements that prescribe: 1) the structural architecture of a regulatory scheme; 2) the scope of jurisdiction and depth of discretionary powers delegated to the regulator created to administer the architecture.[37] In Figure 2, the regulatory architecture is identified as encompassing:

- *Structure:* the type and organisational characteristics of a regulatory arrangement specifying which actors participate in the scheme, their relationship to each other and the organisational constructs created to carry out the objects of the regulatory scheme;

36 Coglianese, above n17.

37 Dan Sarooshi, 'Some Preliminary Remarks on the Conferral by States of Powers on International Organizations' (2003) 4 *Jean Monnet Working Paper*.

- *Substantive functions and rules:* the scope of jurisdiction (field of regulation), the enumeration and specification of functions of the decision-making authority and proscriptive rules and/or prohibitions;
- *Process values/rules:* methods and procedures governing how regulatory tasks are to be performed including regard to values of procedural fairness such as due process, transparency and accountability.

It is important to make a distinction between institutional structure and regulatory composition; a regulatory scheme is little more than an empty institutional shell without the delegation of adequate administrative powers. The delegation specifies the depth of decision-making powers to a regulator across a range of functions within a particular jurisdictional scope of authority. An upward delegation is defined as the transfer of constitutionally assigned [federal] powers (treaty-making, legislative, executive and judicial powers) to an international organisation.[38] The relationship between regulatory architecture and delegated powers is illustrated in Figure 2 where the scope and depth of powers is shown as a determinant influencing how the regulatory arrangement operates.

Not all regulatory schemes require a full complement the rule-making, adjudicative and executive powers. What powers are granted depends on the circumstances, objectives and functions of a regulatory scheme. As a result, there is a complex and dynamic relationship between how the regulatory architecture operates and the nature of the delegated powers granted to the administrator. Instrumental coherence in an international context, therefore, can be more specifically described as coherence between regulatory architecture and the scope and depth of powers and jurisdiction delegated to the regulatory authorities. The means by which the two are linked is through the composition and administration of the substantive rules. An example of regulatory multilateralism that is also good analytical template is the WTO. Although it is only one example, its stage of evolution and the comprehensiveness of its activities make it an interesting international regulatory scheme to examine. In the sections below, the structure, substantive functions and procedural characteristics of the WTO are examined as to whether they are instrumentally coherent and whether the WTO satisfies the standards of good regulation to qualify as a well-functioning regulatory system.

A. *Regulatory Type and Structure*

The basic structural characteristics of a regulatory scheme are determined by its type (or technique), its organisational/institutional characteristics and the legal relationship between the actors involved and affected by the scheme. Different regulatory techniques utilise different methods to both discipline actors and encourage compliance with a particular scheme; for example, compliance may be achieved through cooperation, consensus, incentive or the use of coercive authority.[39] The most appropriate and effective regulatory model chosen will be dictated by the circumstances giving rise to its need.[40]

38 Bradley, above n33.

39 Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (2007).

Two commonly used regulatory types are the traditional command and control technique, at one end of the spectrum, and the many variants of what is known as self-regulation on the other. The command and control technique employs a direct disciplining method where a breach of the rules gives rise to sanctions administered by a strong central governing authority. Self-regulation, by contrast, is the 'delegation of the state's law making and/or enforcement powers to an agency, the membership of which wholly or mainly comprises representatives of the group whose activities are being regulated'.[41] Although self-regulators may be given latitude in forming the rules that govern that group, government maintains discipline through an implicit threat to revoke the self-regulatory licence if that right to self-regulate is not exercised effectively and responsibly. Regulatory multilateralism differs from techniques used domestically because of the flat authoritarian structure arising from the principle of sovereign equality of among and between WTO Member States. Although it is often said that compliance with international agreements is achieved through consensus where benefits outweigh costs of non-compliance,[42] a key disciplining force encouraging compliance with multilateral regulatory arrangements is embedded within the international legal concept of reciprocity.

The preamble to the *General Agreement on Tariffs and Trade 1947* ('*GATT 1947*') provides insight into why the arrangement can be classified as a reciprocity model of regulation. The preamble provides that WTO Member States agree to enter into 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade… '. The words 'reciprocal and mutually advantageous' lack any sense of command and control and, instead, imply cooperative benefit and consensus among equal participants in the process (a reflection of international legal concepts of sovereign equality). However, reciprocity is a two-sided principle that, in addition to cooperative benefits, also implies an obligation, the breach of which entitles retaliation (which is why it is insufficient to classify many international regulatory arrangements as being based upon a consensus oriented technique).

The right of retaliation which is embedded within the international legal principle of reciprocity is evident in how the WTO agreements are *self-enforcing* agreements. This means that it is the individual WTO Member, not the WTO as an administrative entity, that has the 'broad discretion in deciding to bring a case against another Member' should a dispute arise' (WTO *European Communities – Regime for the Importation, Sale and Distribution of Bananas*).[43] The onus, therefore, is on WTO Members, not an enforcement organ of the WTO to: 1) identify where rights have been infringed; and 2) to take the initiative in

40 Mitnick, above n18; Wilson, above n18; Breyer, above n11; Ogus, above n19.

41 Anthony Ogus, 'Self Regulation' in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics* (2000) at 587.

42 Andrew Guzman, 'The Design of International Agreements' (2005) 16(4) *European Journal of International Law* 579.

43 *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, 17 November 1997, para. 133.

enforcing those rights by bringing a complaint. Rights under the WTO Agreement are, therefore, in the nature of private, reciprocal, contractual entitlements; not publicly enforced obligations.

The influence of the reciprocity principle is also reflected in the organisational structure of the WTO. Article IV of the *Agreement Establishing the World Trade Organisation* ('*WTO Agreement*') describes the main bodies of the institution. The principal body of the WTO is the Ministerial Conference. It is 'composed of representatives of all the Members' and is empowered to perform a plenary function. The Ministerial Conference is the repository of all delegated general powers giving it 'the authority to take decisions on all matters under any of the Multilateral Trade Agreements'. This provision is extremely important in that it explicitly ensures that the majority of power remains within the domain of the Member States rather than the General Council ('the Council'), the WTO's main administrative body. The Council is established to perform a quasi-executive role and 'carry out the functions assigned to it by the Agreement'. Among those functions is to convene the Dispute Settlement Body which under the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ('Dispute Settlement Understanding' or '*DSU*') is charged with the responsibility for the adjudication of disputes. Although this structural framework can be said to loosely resemble conventional notions of a constitutional separation of powers between the legislative, executive and judicial branches of government, the WTO is not governed by a constitutionally entrenched separation of powers doctrine. As a consequence, the absence of a formal separation of powers affects the operational functions of the different organs of the WTO and how rule-making, adjudicative and administrative functions of the institution are administered.

The relationship between the reciprocity model and the absence of a separation of powers doctrine is central to understanding the distribution of power within the WTO. The reciprocity model motivates WTO Member States to retain control of key decision-making powers rather than allocating them to an executive regulator. In order to ensure national sovereignty is not undermined, Member States determine how WTO powers will be exercised collectively (in a rule-making context) and when it will be exercised in an individual capacity (in relation to enforcement of rights). Given that the majority of powers are either held by the Ministerial Conference or individual Member States, questions regarding the well-functioning of the regulatory scheme, and hence its instrumental coherence, arise.

In instrumental terms, what are the implications of the functional shift to regulatory multilateralism? It is clear that, structurally, the distribution of powers within the WTO reflects the original, member/institution-centric, conception and function of multilateralism. On the other hand, the fundamentals of good regulatory design require that a regulator be granted sufficient power to enable it to carry out the objectives of a scheme efficiently and effectively. In the case of the WTO, a potential source of incoherence is that the same Member States who are subject to the regulatory obligations also control all aspects of the enforcement and rule-making processes. This creates a

concern that important rule-making and enforcement decisions are governed by 'national-interest' considerations, (see Section 3 Part B) rather than being guided by good regulatory practice. A consequence of this imbalance is evident in criticisms that the WTO and other multilateral institutions are suffering from institutional inertia.[44] Even where incremental reform is required, it is difficult to obtain a consensus among Member States, and changes are slow and cumbersome (discussed in further detail below).

B. *Substantive Rules and Functions of the WTO*

The relationship between delegated powers, the composition of substantive rules and regulatory functions of the WTO is also illustrated in Figure 2. Noting that the Ministerial Conference is the main repository of powers, the role and function of the Council (being the main administrative body of the WTO) is provided in article III of the *WTO Agreement* which states that the WTO 'shall *facilitate* the implementation, administration and operation and further the objectives, of this Agreement…'. The jurisdictional scope of the Council appears on the surface to be very broad covering the 'implementation, administration and operation' of a range of matters including trade in goods, services, trade-related investment obligations and intellectual property protections. However, the scope and depth of the Council's powers are shallower than article III appears to envisage. The article III powers conferred upon the Council are administrative in character and do not include any substantive decision-making functions. A better sense of the scope and depth of the Council's discretionary powers is gained by examining three key decision-making functions that are often allocated to regulatory authorities. These functions, identified previously, include: rule-making, adjudicative and administrative/enforcement functions. Each of these discretionary functions and their instrumental coherence are discussed below.

(i) Rule-Making Functions and Discretion

Regulatory rule-making responsibilities are determined by the type of rule-making power granted to a regulator that may be categorised into two types. Substantive rules that relate to core obligations and responsibilities fall within the domain of representative legislatures to make; but may be delegated to regulatory bodies provided that the scope and depth of that power is constrained within a clearly articulated legislative grant of authority. On the other hand, the power to make technical rules relating to operational and procedural aspects of a regulatory scheme are frequently delegated to the regulatory authority responsible for administering the scheme and if they are not explicitly delegated, a procedural rule-making power may even be implied.

A limited rule-making power to create, amend and interpret operational rules, if responsibly exercised, can serve several purposes that contribute to the well-functioning of a regulatory scheme. It enables a regulator to adjust (not create) substantive requirements, regulatory settings and procedures (management/due process settings).

44 Edward Luck, *Reforming the United Nations: Lessons from a History in Progress* (2003); Jean Krasno, *United Nations: Confronting the Challenges of a Global Society* (2004).

This enables the regulator to better execute its regulatory mandate by correcting gaps in the empowering legislative directive or because of vague or ambiguous wording of the legislative directive.[45] The need for a limited technical rule-making power, therefore, stems from lessons learned by the regulator in the conduct of its activities identifying a need for adjustment to circumstantial change.[46]

In turning to the WTO as an example of regulatory multilateralism, the first question is whether the Council possesses any autonomous/internal rule-making powers? The answer to this question is simple: no.[47] The WTO's rule-making functions are set out in article III(2) of the *WTO Agreement* that provides that:

> The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

Interpretation of article III(2) indicates that all 'matters dealt with under the agreements' fall within the domain of the Members obligation to negotiate, and as a consequence of agreement, effectively legislate amendments or new rules. With respect to the legislative process, the function of the Council is only to 'provide the forum' with no mention of any active formal participation in the rule formulation process. The Council is merely a facilitator of the negotiation/legislation process and therefore has no autonomous power to shape or alter the rules once set by the Members.

The allocation of *all* substantive and technical rule-making powers to the Ministerial Conference is an imperfect separation and balance of regulatory powers. As mentioned previously, it is motivated by the desire of Member States to retain as much individual control as possible consequent to the complex relationship between sovereignty and the reciprocity principle. The effect is an instrumental incoherence that negatively impacts upon the WTO's change processes and development path and, as such, is one potential source of institutional inertia. Institutional inertia arises in two respects. First, the imbalance in the separation of powers combined with the politically complex and cautious exercise of those powers by WTO Member States means that legislative (substantive) rule change will only occur if new commitments satisfy national self-interest tests (and minimal effects on sovereignty) and do not impose a risk of unforeseeable obligations (arising from the operation of the reciprocity principle).[48]

45 Richard Steinburg, 'Judicial lawmaking at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98 *American Journal of International Law* 247.

46 Steven Croley, 'Theories of Regulation: Incorporating the Administrative Process' (1998) 98 *Columbia Law Review* (1) 1.

47 Armin Von Bogdandy, 'Law and Politics in the WTO- Strategies to Cope With a Deficient Relationship' (2001) 5 *Max Planck Yearbook of United Nations Law* (1) 609.

48 Claus-Dieter Ehlermann & Lothar Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 8 *Journal of International Economic Law* (1) 51.

Even where consensus decision-making can be achieved, consensus inherently favours the status quo making it difficult to achieve the degree of change required to advance the regulatory capacities of the organisation.[49] Second, in the absence of a limited rule making power, functional change on an incremental basis cannot occur. This affects the WTO's agility in responding to changes in the regulatory environment necessary to ensure that the regulatory arrangement continues to function efficiently and effectively in an operational sense.

(ii) Adjudicative Functions and Discretion

Even though the WTO Council has no direct rule-making authority, the WTO does have an indirect rule-making power incidental to the adjudicative functions specified in the DSU. The DSU provides the Appellate Body with the authority to exercise some discretion in the course of adjudicating disputes arising between WTO Members. WTO adjudication has the same two potential law-making dimensions as a more general rule-making power: filling interpretive gaps and clarifying ambiguities.[50] This works in respect of two different types of law: rules of institutional procedure and substantive rules governing obligations.

For historical reasons, the DSU is silent on many procedural questions. The desire to keep WTO dispute settlement an open and flexible process allowing for an inter-play between diplomacy and rules provides some basis (and need) for the Appellate Body to make procedural rules. An often cited example is *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ('*The US Shrimp-Turtle Case*')[51] in which the Appellate Body ruled, in the absence words to the contrary, that dispute settlement panels can receive amicus curiae briefs submitted by non-state actors. The Appellate Body relied upon DSU article 13, which provides that panels have a right to seek information and technical advice from any individual or body that it deems appropriate. The decision, it is argued, is contrary to wishes of the developing countries that had opposed similar propositions in negotiations and therefore, in the normal course of negotiations, would never have consented to allowing third party submissions.

The Appellate Body also has some discretion in the creation of substantive law, or rules that may impact on the positive obligations of Members. In three decisions, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,*[52] *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,*[53] and *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea,*[54] the Appellate Body produced a refined

49 Richard Blackhurst & David Hartridge, 'Improving the Capacity of the WTO Institutions to Fulfil Their Mandate' (2004) 7 *Journal of International Economic Law* 705.

50 Gap-filling refers to Appellate Body law-making on a question for which there is no legal text directly on point, whereas ambiguity clarification refers to law-making on a question for which there is legal text but that text needs clarification (Steinburg, above n45).

51 *United States - Import Prohibition of Certain Shrimp and Shrimp Products; Recourse to article 21.5 by Malaysia*, Report of the Appellate Body, WT/DS58/AB/R, 6 November 1998.

52 *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* Report of the Appellate Body, WT/DS177/AB/R, WT/DS178/AB/R, 1 May 2001.

interpretation of the broad 'injury' provisions of the WTO *Safeguards Agreement*. Although Uruguay Round negotiators had intended a broad meaning, the Appellate Body effectively created WTO law by directing national authorities to consider not only the nature but also the 'extent' of other potential causes of serious injury. This interpretation has a substantial impact on how national regulatory authorities are to conduct the serious injury analysis, and also effectively creates new obligations that Members had not negotiated amongst themselves.

Fundamental uncertainty surrounding the use, scope and effects of the DSU's adjudicative discretion is another source of instrumental incoherence affecting the efficient functioning of the WTO. Since the DSU possesses an indirect and limited rule-making capacity, its effectiveness as a source of renewal and development is limited. First, only rules that are the subject of a dispute fall within the interpretative authority of the DSU. Rules and processes that require change but fall outside the scope of a dispute, obviously, cannot be addressed. The effect is that rule interpretation and, hence, regulatory change cannot be targeted to priority areas which are not the subject of a dispute. Furthermore, DSU Appellate Body decisions are not binding as a matter of international law and WTO law. Although Appellate Body decisions are considered persuasive, interpretations flowing from Appellate Body decisions are, from time to time, ignored by Member States.[55] This undermines the authority of the DSU and its decision-making function contributing to questions surrounding the WTO's effectiveness as a global regulator.

C. *Executive/Administrative Functions and Powers*

An administrative decision-making discretion is routinely delegated to enable regulators to manage a range of processes related to critical functions of a regulatory system. Three important functions that generally require discretionary administrative powers are: investigative and monitoring functions, compliance/enforcement functions and policy-making functions. The three are inter-related in that the first two functions provide important insight into the operation of a regulatory scheme influencing the third function. However, the depth of administrative decision-making powers delegated to the Council is very narrow and shallow.

The narrow delegation can be traced to the pre-World War II, US constitutional doctrine of non-delegation. The non-delegation doctrine is based upon an interpretation of article I of the US Constitution purporting that the US Congress did not have the authority to delegate power to make national policy to non-elected bodies such as regulatory agencies.[56] The non-delegation doctrine kept agencies small and weak up until the emergence of the New Deal regulatory agencies were created in the mid-1930s. By the time the GATT was created in 1947, US negotiators were well aware of the potency

53 *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* Report of the Appellate Body, WT/DS166/AB/R, 22 December 2000.

54 *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, Report of the Appellate Body, WT/DS202/AB/R, 8 March 2002.

55 Kym Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1 *World Trade Review* (2) 123.

of administrative powers delegated to regulatory agencies. A decade of New Deal administrative institutions having broad discretionary powers was a regulatory model that US negotiators wished to avoid in the international arena. Accordingly, as a means of maintaining control over the GATT/WTO, few executive/administrative functions are delegated to the GATT Secretariat/WTO Council.

In terms of compliance monitoring and enforcement, the Council's discretionary authority is almost non-existent. For example, the Council has no authority to exercise 'public' style investigative or prosecutorial functions on behalf of the organisation or international community generally. Although a trade policy review mechanism ('TPRM') does exist, Annex 3(i) to the WTO Agreement restricts the use of the TPRM by defining its purpose and function to provide that:

> the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements, or to impose new policy commitments on Members.

Compliance and enforcement, therefore, also falls within the discretionary domain of the individual Member States (a decision which is closely tied to the reciprocity principle).

The Council's most significant delegated power is as a collector, keeper and disseminator of information. Not only does it collect and disseminate data provided by Members to others in the organisation, but it also collates and organises, and often creates, the data sets on trade flows and trade restrictions used as bases for trade round negotiations.[57] WTO research provides opinions and support for broader institutional initiatives mandated by the Council; however, no independent policy development is permitted outside the scope of Council directives. As a consequence, WTO policy is constrained to develop following the interest bias of its Membership (often determined by the most powerful Member States. Questions arise as to the first-best nature of this policy bias given that it is likely to reflect the influence and pressures of initiatives of the stronger Members.

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56 In *Panama Refining Co.* v. *Ryan* 293 U.S. 388 (1935), the Court struck down portions of the *National Industrial Recovery Act* 1933 as too broadly delegating authority to the National Recovery Administration to establish a code of fair competition for various industries. *In Schechter Poultry Corp.* v. *United States* 295 U.S. 495 (1935), the Court considered the Act again and struck it down in its entirety. One key defect in the Act was Congress's delegation of policy-making power to private groups that themselves were subject to the competition codes. These cases established the legal rule that in order for a delegation to be constitutional, Congress must define an intelligible principle to guide administrative regulation and to limit administrative discretion.

57 Judith Goldstein, Doug Rivers & Mike Tomz, 'Institutions in International Relations: Understanding the Effects of GATT and the WTO on World Trade' (2007) 61 *International Organization* (1) 37; John Barton, Judith Goldstein, Timothy Josling & Richard Steinberg, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (2006).

It can be argued that the absence of centralised administrative and executive powers affects the instrumental coherence of the WTO agreements in relation to consistency in enforcement of obligations and policy leadership. Policy leadership within the WTO and its predecessor, the GATT, has historically been driven by the most powerful Member States. As a consequence, policy initiatives and the direction of policy change reflect the priorities of those Member States rather than a broader collective good. As a further example of instrumental incoherence flowing from an imbalance in the separation and distribution of powers, the power imbalance between the executive and legislative bodies of the WTO is a source of inconsistency in enforcement (where smaller countries choose not to pursue their rights fearing retaliation), as well as a national interest bias in policy formation reflecting the interests of the more powerful Member States.[58]

D. Process Values and Procedural Rules

The third component of regulatory architecture illustrated in Figure 2 encompasses the process values that determine access to, operation of and culture of a regulatory arrangement. There is a strong link between process rules and the culture and history of the WTO and its predecessor, the GATT. A long-standing debate is whether the WTO is primarily a diplomatic and political organisation that should function within a framework of loose and flexible principles or whether it should be a 'rule-based' system having clear and transparent processes and procedures to provide fairness, certainty and stability.[59] Although this debate is most heated in terms of the dispute settlement functions of the WTO, it applies as well to legislative rule-making and administrative functions.

Domestic regulatory arrangements must satisfy basic constitutional requirements of procedural fairness and due process. Apart from the very basic procedural rules governing dispute settlement procedures, the rules of procedure governing the functions and activities of WTO organs are obscure and would not satisfy domestic standards of due process, transparency and accountability. The formal instruments establishing the WTO and its organs (with the exception of the DSU) provide few procedural rules to govern the activities and functions of the WTO organs. Article IV of the WTO Agreement provides the General Council and main working Councils with a general power to establish 'rules of procedure'. To the extent that procedural rules can be created, this is allowed only on an ad hoc basis, reflecting the 'loose and flexible' political culture of the organisation. In a slightly more proscriptive sense to meet some of the

58 This is also evident in the self-enforcing structure of the scheme. Because the onus is on individual nations to enforce their trading rights, the decision to initiate a complaint is a political decision as much as it is a matter of right. Rationally, countries will only seek to enforce rights where the expected benefits exceed the expected costs, which include not only legal expenses but also whether a complaint may negatively affect other economic and political interests. A question that must be considered by a complaining country, therefore, is whether the political costs of initiating a complaint will outweigh its economic gains (for example, where a potential complainant fears that aid allocation decisions may be influenced as a retaliatory response).

59 Ernst-Ulrich Petersmann, 'How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System' (1998) 1 *Journal of Economic Law* 25.

fundamental requirements of due process, the DSU contains 'Working Procedures' contained in Appendix 3 of the DSU. Panels are not, however, strictly obliged to follow these working rules and can decide otherwise after consulting with parties to a dispute.

In a functional context, the WTO is extraordinary for its almost complete absence of formal process values. Among those frequently noted are the absence of transparency and accountability. A large literature citing numerous examples of its lack of transparency point to the negotiations process, how most of the negotiations are conducted in secret, are dominated by a small group of more powerful Members and are carried out excluding the majority of Members.[60] Policy-making, bargaining and critical choices are all made far from public view and without broader participation (even among Members). A further example can be found in the DSU procedures that provide for dispute settlement panels to 'meet in closed session'. Even the parties to the dispute are given only basic access in that 'parties to the dispute, and interested parties, shall be present the meetings only when invited'.

Accountability is another fundamental process value that is a basic requirement of good regulation. The accountability of the WTO has long been an issue. Although the draft *Charter of the International Trade Organization* ('ITO') (the much more ambitious and comprehensive institution that preceded the formation of the GATT because it failed to gain approval of the US) did provide for the possibility for appeal to the International Court of Justice, no similar provision was included in the GATT 1947 or the 1994 WTO Agreements. This means that the WTO remains politically accountable only to its Members and is not subject to any formal judicial review procedures.

If domestic constitutional and administrative law standards of procedural fairness are applied to the WTO, it would fail to meet even the very basic procedural expectations and requirements of due process, transparency and accountability. In the absence of clear and certain rules of process, national interest considerations driving more powerful nations can influence critical functions and activities. The absence of rules of process (which if present would have some mechanistic effect in neutralising the abuse of political power) means that political pressures are more likely to influence the bargaining/legislative process favouring the interests of large nations over the smaller. The absence of credible procedural mechanisms is a fundamental source of instrumental incoherence if the WTO is judged against domestic regulatory practices and standards.

Summary and Conclusion

The conclusion of this article is that current multilateral arrangements show signs of being both systemically and instrumentally incoherent. A more in-depth understanding of these incoherencies points towards both structural and substantive weaknesses as being likely sources of multilateral regulatory incoherence. Before elaborating, it is important to keep in mind that nearly all of the multilateral organisations share basic structural characteristics such as consensus based decision-making and an absence of

60 Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (2003).

proscriptive processes in keeping with the political desire to keep these organisations loose and flexible. The stability of the multilateral institutions regulatory has largely been achieved because nations recognise and adhere to the spirit of the international law of the obligations of nations based upon principles of voluntariness and reciprocity.

A further consideration is that, paradoxically, when examined in a historical context, regulatory multilateralism has been anything but an ineffectual failure. For example, the WTO has achieved much towards its objective of liberalising world trade. However, that does not mean that the WTO, as with other multilateral institutions, is not suffering from regulatory failure now. As a consequence of globalisation and systemic change, the underlying need for international regulation has changed (as discussed in Section 3). The international system is no longer just a community of nations and the nature of the problems requiring regulatory attention can no longer be addressed by regulating relations between nations.

One conclusion of this article is that, as a result of a systemic incoherence, regulatory multilateralism may have reached a tipping point arising from structural rigidities that are contributing to institutional failure. The historic intergovernmental structure of regulatory multilateralism is a source of systemic incoherence between contemporary conceptions of what constitutes the 'international community' and the choice of organisational structures that comprise the multilateral institutions. This systemic incoherence has a flow-on effect that both contributes to, and exacerbates, an instrumental coherence.

Using the WTO as an example, a second conclusion of this article is that an instrumental incoherence in the legal architecture underlying multilateral institutional arrangements is contributing to a substantive failure in the regulatory arrangement. In an effort to keep the institution weak, the WTO Council has been granted almost no substantive rule-making and relatively weak administrative powers. Although this reinforces the objective of keeping the WTO a Member-driven organisation, it also ensures that important forces that would otherwise make the WTO a more dynamic and responsive institution are absent. The absence of a proactive policy-making role of the WTO further detracts from the potential effectiveness of the institution in several ways. First it denies the institution the special expertise of its personnel. By shifting power into the hands of institutional decision-makers who are obligated to exercise their decision-making powers for the good of the collective organisation rather than having policy dominated by the stronger Members, one step towards a greater systemic alignment is achieved. This is one example of how altering instrumental settings can have broader, positive systemic effects.

Second, a more centralised policy-making function and discretion would provide a much-needed and more objective evolutionary direction for the organisation. Finally by providing the regulator with greater administrative powers to monitor and enforce obligations, a more equal distribution of benefits to all Members could be achieved. This final point highlights a structural/administrative incoherence that also relates to fundamental process values. Rather than a system that discourages the smaller Members

from pressing their rights, a more neutral compliance mechanism administered by the WTO would alter the dynamic balance of equities within the organisation in favour of the smaller Members.

To remedy these weaknesses, it is hardly a novel suggestion that significant structural and substantive reform is required. The value of this article, however, is that it brings attention to the fact that substantial reform may be required to remedy some of the more fundamental problems affecting regulatory multilateralism. With a better insight into some of the specific systemic, structural and administrative deficiencies, a reform blueprint can be developed to ensure that change does not occur in an ad hoc manner and to better address the fundamental weaknesses impeding the development of the multilateral institutions.