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egulatory Co-operation for an Interdependent World

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Regulatory Co-operation for an Interdependent World

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Foreword

The premise of this report is that government regulation in OECD countries is, increasingly, the product of co-ordinated derisions and actions between national, international, and subnational levels of government. Many vital economic, social, and environmental issues faced by the industralised democracies can be addressed only through mutual action that combines the resources of all relevant actors. How are endangered species to be preserved? How is international crime to be controlled? Governments have responded to these kinds of problems through regulatory co-operation in its many forms.

This terrain, of course, is well-ploughed. Many others have observed that the world is becoming more interdependent and, as a result, so are government policies. It is less often, however, that the question arises: what does interdependence mean for how government functions? In particular, what does it mean for how government regulates? That is the subject of this report.

One of the great challenges of contemporary government is the building of democratic institutions and processes within which governments can work confidently together to address urgent common problems. It would be a lamentable government failure if progress in addressing these problems was cut short by administrative constraints. This does not suggest that an international Leviathan is needed or wanted. Rather, co-operation occurs primarily through the regulatory institutions and processes of *national* governments, which are linked formally and informally with their peers in other governments, becoming, in effect, simultaneously national and international in scope and outlook. If they are to deliver satisfactory results, these sorts of intergovernmental networks must work at least as well as do separate national institutions, notwithstanding the difficulties in managing and co-ordinating the actions of multiple partners.

Participation in such a multi-governmental regulatory system will profoundly affect administrative styles, governing cultures, and power relations within national governments themselves, as well as their capacities to protect and serve national values. How, for example, can a national government carry out regulatory policy when it has less control over its own actions, but more influence over the actions of others? It is not a question only of implementation: underlying regulatory policies and objectives will likely also change as problems and solutions are redefined, and as new opportunities are recognised for beneficial co-operation.

National- and international debates on various arrangements, such as the GATT, NAFTA, the EC, the Montreal Protocol, and dozens of other co-operative efforts involv-

ing regulation, have highlighted many difficult issues inherent to the long-term process of change that is now underway. Growing concerns about trust and mutual confidence, erosion **of** national values, democratic accountability, national sovereignty, and complexity must be addressed explicitly and resolutely if the public is to accept that co-operative action is in its longer-term interests.

The purpose of this report is to understand better the dynamics of the emerging multi-governmental regulatory system, and the relationships, institutions, and processes that comprise its working parts. It attempts to suggest practical approaches by which national governments can establish solid managerial foundations for regulatory co-operation, within the constraints of democratic and open government.

The Public Management Committee of the OECD, in order to provide a forum for Member countries to exchange views and experiences on this set of issues, held a Symposium in October 1993 on ''Managing Regulatory Relations Between Levels of Government". The Symposium was attended by representatives of national and subnational governments, international organisations, business and trade union groups, and academia. It was chaired by James Martin, Director of Regulatory Affairs, Treasury Board of Canada Secretariat, and by Jakob Suppli, Chief Advisory Officer, Ministry of Finance, Denmark. The rapporteur was Professor John Braithwaite from The Australian National University in Canberra.

The Symposium, which was organised by Scott H. Jacobs of the Public Management Service, was conducted as part of the Committee's work programme on Regulatory Management and Reform. Most OECD countries have launched public sector initiatives aimed at improving the performance and institutions of regulation. The work of the Committee in this area seeks to support these reform programmes by monitoring activities in OECD countries and providing information – drawn from **practice,** comparative analysis, and international exchanges – on their results and on emerging common issues.

This volume collects the papers, several of which have been expanded and revised, originally prepared for the Symposium, along with a concluding chapter assessing the main themes and principal lessons that emerged from the discussions. It is published on the responsibility of the Secretary-General of the OECD.

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Executive summary

Global interdependence in economic, social and environmental spheres is reducing the effectiveness of national governments when they act unilaterally. In response, governments of OECD countries are addressing common problems by creating co-operative arrangements linking supra-national, national and subnational levels of government. Such co-operation – in the form of a vast array of treaties, agreements, accords, and other co-ordinated arrangements – creates new opportunities, and imposes new constraints, on how national governments exercise their regulatory powers.

This report examines the impact of policy interdependence on how governments regulate. It has two purposes. The first is to understand better the dynamics of the emerging multi-governmental regulatory system, and the relationships, institutions, and processes that comprise its working parts. The second is to suggest practical approaches by which national governments can establish solid managerial and administrative foundations for regulatory co operation, within the constraints of democratic and open government. The chapters in the report are based on papers prepared for an OECD Symposium on ''Managing Regulatory Relations Between Levels of Government" held in October 1993, and on discussions at the Symposium.

Chapter One, ***Regulatory Co-Operation for an Interdependent World: Issues for Government*** by Scott H. Jacobs, examines the economic, social and administrative pressures leading to regulatory co-operation, and the impacts of co-operation on the regulatory institutions and processes of national governments. Co-operatinn is driven essentially by pragmatism; that is, governments are co-operating to find more powerful means of problem-solving in response to the intense pressures of interdependence.

Today, a comprehensive view of regulatory co-operation reveals a network of vertical and horizontal links between all levels of government, often stretching from municipal governments to supra-national bodies. This is called here the *multi-layered regulatory system.* Traditional government structures are ill-suited to this multi-layered system characterised by interaction, diversity, and innovation. The systems and institutions of national governments must adjust so that they can operate effectively in the new environment, while protecting values of openness, accountability, and national sovereignty. More information is needed on how strategies of co-operation such as harmonization, mutual recognition, and co-ordination work in practice. What is important at this stage is that the transition to co-operative government becomes a learning process by which costly mistakes are avoided.

Chapter Two, ***The Weakest Links: Building Organisational Networks for Multi-level Regulation*** by Les Metcalfe, examines the problems of managing regulatory regimes in which policy formulation and implementation involve the concerted efforts of networks of organisations. The familiar hierarchical model of regulatory management – relying on central controls and direct supervision – was adequate for stable conditions and well-defined regulatory problems within established institutional contexts, but is ill-suited to dealing with dynamic regulatory environments that involve co-operation between organisations at different levels of government. **A** new model of management is needed in which regulatory regimes are viewed as *organisational networks.*

To come to terms with this higher order of complexity, regulatory management must go beyond the micro level of individual organisations. It must also design, at the macro level, the network of relations among organisations and develop capacities to ensure that the system as a whole functions effectively. Reliability. trust and mutual confidence in particular must be created and sustained. The chapter considers three ways in which the reliability of regulatory regimes can be enhanced: *co-ordination, administrative partnerships,* and *accountability frameworks.*

Chapter Three, ***Managing Regulatory Rapprochement: Znstitutional and Procedural Approaches*** by George **A.** Bermann, deals with practical institutional and operational issues that national governments face as they create and manage a programme of intergovernmental regulatory co-operation. Governments attracted by the prospect of co-operation need to know the reasons for, and virtues of, regulatory co-operation; the range of mechanisms available to them; and the domestic institutional arrangements that will be needed to accommodate and support co-operation. They must also introduce a healthy measure of openness, participation, and accountability in the intergovernmental process itself.

The issues are both institutional and operational. To a large extent, they relate to the efficiency of the system in bringing about the desired rapprochement. But they also raise questions of integrity. While efficiency is important, processes of regulatory co-operation must respect each national system's core procedural precepts.

Chapter Four, ***Seeking Mutual Gain: Strategies for Expanding Regulatory Co-operation*** by James K. Martin and Alan Painter, identifies. based on the experiences of Canadian officials, problems that can inhibit success as governments seek to expand beneficial co-operation. Successful co-operation requires substantial time and effort; the participation of elected officials; the participation of industry and interest groups; a clear understanding of objectives and obligations; and an implementation strategy that may require the development of new administrative control systems. Each government must decide, and must communicate to other governments, the extent to which it is prepared to restrict its sovereignty in the pursuit of mutual benefit.

Governments should co-operate more on regulatory matters than has been the case. Guidelines to increase the frequency and effectiveness of regulatory co-operation are presented in "checklist" form. Governments should develop a strategy that will: define and balance policy objectives, assess the likelihood of success, establish trust and flexibility, identify optimal co-operative approaches, and ensure that co-operative arrangements are practical and enduring.

Chapter Five, ***Regulatory Co-operation through Computer Assisted Solutions*** by Jon Bing, discusses how computerised information systems can help regulatory managers learn about regulations at other levels of government, thereby providing a basis for regulatory co-operation by improving communication and information-sharing. One typical situation is for regulatory managers on the national level to gain *access to international regulations*. The CELEX system, for example, offers access to EC law for member countries. Several systems, such as one used by the World Health Organisation, permit the *monitoring* of *national implementation* of international regulations. In the areas of health, environment, and labor law, international databases give *access to the national regulations* of various countries. Drafting and accessing documents in other languages pose special problems, and some attempts at coping with these are mentioned, as are the possibilities of *improved communication* between regulatory managers by computer systems. An example is the International Legal Information Network, an initiative of the **US** Library of Congress.

Chapter Six, ***Lessons for Regulatory Co-operation: The Case of the OECD Test Guidelines Programme*** by the OECD Secretariat, examines, as an example of successful co-operation, how the 1981 *Decision of the Council Concerning the Mutual Acceptance of Data in the Assessment of Chemicals* has been carried out. Since 1981, 84 test guidelines have been adopted, and data generated by using these guidelines are freely accepted in all OECD countries. The programme illustrates the advantages of personal contacts over time, of a predictable and step-by-step process of consensus-building, of clarity and transparence, of flexibility, and of a bottom-up process driven by the participants rather than by fixed targets and schedules.

Chapter Seven, ***Comparing Strategies of Regulatory Rapprochement*** by Giandomenico Majone, looks in more detail at various strategies that have been followed by international bodies and supra-national institutions like the European Community for making national laws and regulations more similar. Several strategies are discussed: tacit co-operation; mutual recognition and regulatory competition; delegation to non-governmental bodies; partial harmonization; and total harmonization. After a brief description of each method, the paper presents a comparative assessment of strengths and weaknesses. Also discussed are the special problems of international regulation that distinguish it from regulation at the national level.

It is important to understand under which conditions a particular strategy may be successful. Mutual recognition is appropriate when the underlying market failure is insufficient information, but not when it is **a** negative cxtcrnality such as transboundary pollution. In the latter case, harmonization is needed. Often a mixture of strategies has to be used; the paper suggests ways of achieving the best fit between problems and solutions. Also emphasised are the importance of information exchanges, non-binding rules, and mutual trust.

Chapter Eight, ***Towards a European* Community *Regulatory Strategy: Lessons from "Learning-by-Doing"*** by Jacques Pelkmans and Jeanne-Mey Sun, analyses how the regulatory strategy of the European Community has evolved as a consequence of the "1992" internal market programme. It demonstrates that the task of "completing" the EC's internal market – efficiently, effectively, and in a politically feasible way – required

a set of five guiding regulatory principles (the "regulatory quintet"), which themselves emerged over time, and only as a result of cumulative learning.

Today, the EC relies on a combination of minimum harmonization and mutual recognition strategies to integrate the economies of its members. This approach, in turn, is expected to lead to regulatory competition based on business-government interaction. The dynamics of regulatory competition are discussed in detail. Finally, it is argued that for the internal market to function properly, intense and continuous regulatory co-operation is needed among member states, and between member states and the Commission of the **EC.**

Chapter Nine, ***Prospects for Win-Win International Rapprochement of Regulation*** by John Braithwaite, examines six policy objectives – some seemingly incompatible – for international regulatory rapprochement: reducing 1) duplicative inefficiencies, 2) non-tariff barriers to trade, and *3)* free-riding on efforts to tackle international problems; and increasing 4) popular sovereignty over the regulatory process, *5)* regulatory innovation, and ***6)*** the capacity of firms to shop for lowest-cost regulation.

A ten-step strategy is then advanced for simultaneously achieving these objectives. The strategy depends on strengthening international bargaining forums where governments can agree on acceptable regulatory outcomes. Regulatory competition should then be allowed between differing standards that achieve those objectives. Practical capacities for national parliamentary oversight should be established, and international NGOs should have access to technical discussions about standard setting. The conclusion outlines practical steps OECD countries can take to move the world economy gradually closer to the ideal outlined earlier.

Chapter Ten, ***Lessons for Regulatory Co-operation*** by John Braithwaite, summarizes major themes and lessons learned from the OECD Symposium with respect to managing regulatory co-operation. One of the key assumptions underlying this report is that interdependence is no longer a policy choice; it is a fact of life. Unless they choose draconian protectionism, governments have no choice but to manage interdependence. Still, governments must be selective in choosing when to co-operate. The benefits of co-operation should be shown to outweigh the costs, which can be high. Yet governments tend to co-operate less than they should. Strategies of regulatory competition and mutual recognition, for example, show great potential in improving regulatory efficiency and consumer welfare.

Once they have chosen to co-operate, governments must engage in strategic planning of how the network of people and organisations will work. Perhaps the most critical variables are trust and mutual confidence among governments. Strategies are needed for building trust within intergovernmental networks. Transparency and generating information can help build trust, and also improve co-ordination between centres of power in co-operative arrangements. It is important, too, that ''democratic deficits" be addressed through participation of public groups such as NGOs. Governments should not try to control co-operation from the top; rather, the private sector should be encouraged to identify opportunities for "bottom-up'' co-operation. Ultimately, the goal should be to develop a more open and better informed regulatory culture, with a higher quality of public debate about regulatory co-operation.

Part I

INTRODUCTION

Chapter 1

Regulatory co-operation for an interdependent world: issues for government

by

Scott H. Jacobs

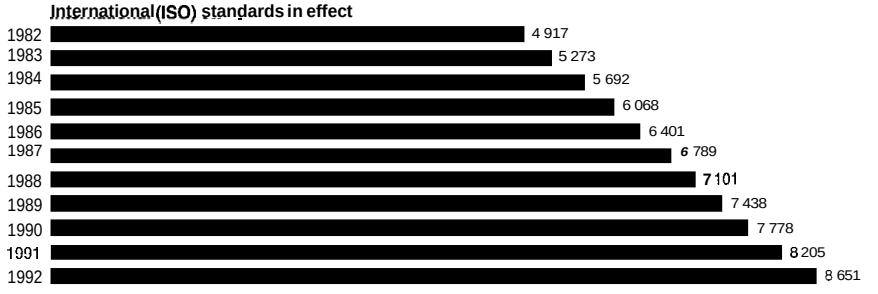
I. Interdependence and regulation

Regulation knows fewer and fewer boundaries. As economic, social, and environmental conditions that were previously regarded as national or even local in nature become more vulnerable to external events, governments of OECD countries are finding unilateral regulatory actions to be less effective in bringing about change. An increasing number of rules must cross political and legal boundaries to engage a wider set of actors in solutions. But regulations do not cross borders easily or without suspicion: regulatory co-operation requires new institutional and procedural frameworks within which national governments, subnational levels of government, and the wider public can work together to build integrated systems for rule-making and implementation, within the constraints of democratic values such as accountability and openness.

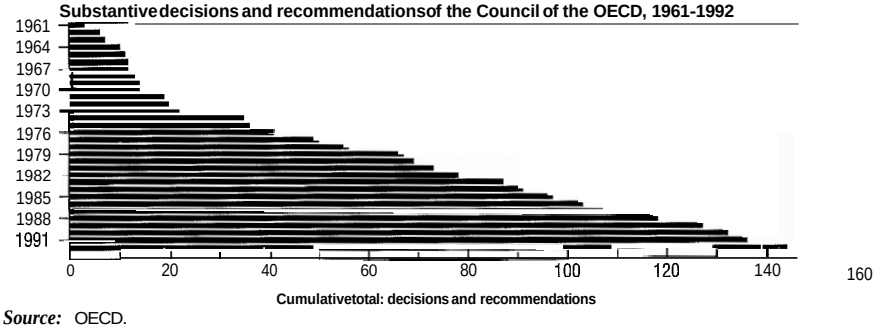
Simply put, an interdependent world requires new forms of governance. Indeed, the transition to co-operative government is already well-advanced as a pragmatic response to the desire for more powerful methods of problem-solving. In co-ordinating their policies with those of other governments, governments are using a variety of policy instruments – financing techniques such as co-ordinated development aid or co-funding of research, monetary instruments such as exchange rate co-ordination, trade instruments such as adjustments of tariff levels and imposition of trade embargos, and even military strategies – but regulation seems to lend itself particularly readily to co-operative action on a wide range of common interests. For that reason, governments seeking to cope with policy interdependence are inclined to rely on regulation in its many forms.

Regulatory actors and processes are crossing national, regional, and local borders, with initial caution but increasing confidence, to share information and ideas, and to co-ordinate the design, analysis, drafting, and enforcement of regulations (see Figure 1). As a result, a web of formal and informal intergovernmental regulatory relationships is emerging in the OECD area (and beyond) that simultaneously empowers and constrains governments with respect to their ability to solve problems through regulation. Although

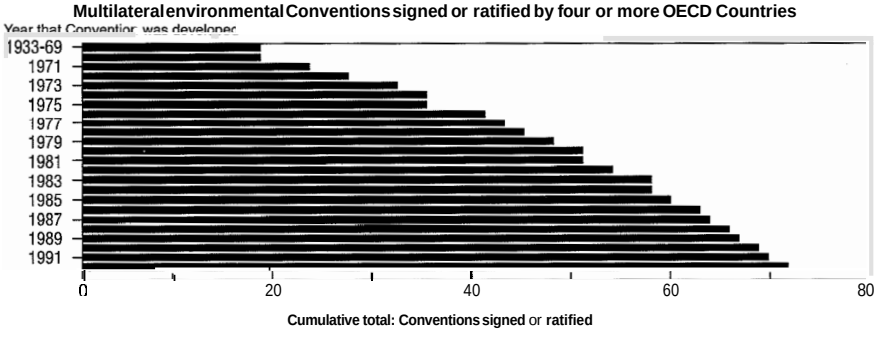
Figure 1. **The Globalisation of Regulation: Three Selected Indicators**



Number of ISO **standards in** ISO **catalogue.**
Source: ISO.



Source: OECD.



Source: OECD **Environmental Data Compendium 1993.**

it is as yet uneven and fragile, this web of regulatory relationships signals the evolution of the sovereign state toward a state that is, *de facto*, somewhat less sovereign, but is better adapted to promote its citizens' interests within the realities of the contemporary era.

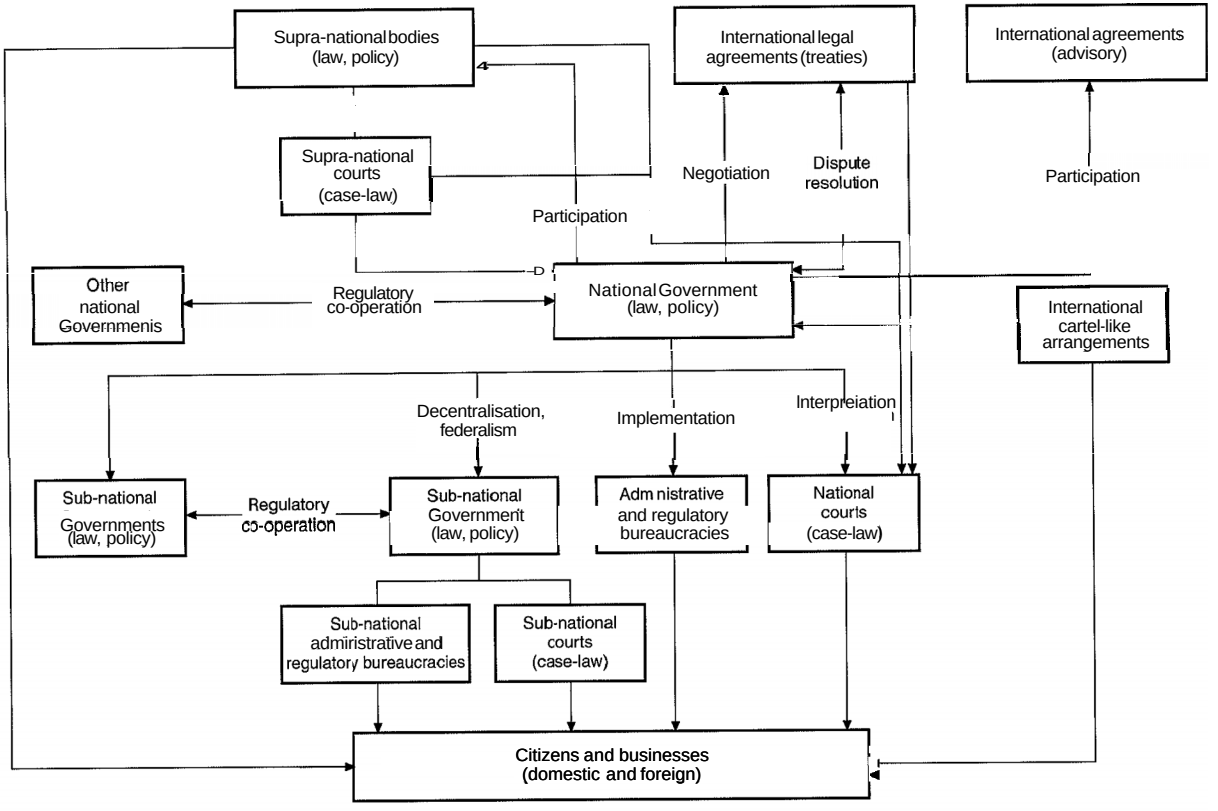
Integration of regulatory systems at all levels of government is evident in most policy areas, ranging from food safety and environmental and labor standards to telecommunication technologies and financial services. Practical arrangements for co-operation – articulated through a vast array of agreements, treaties and co-operative activities between various tiers of government – are so complex as to bewilder the average citizen (and not a few experts). These arrangements range from supra-national institutions (for example, the European Communities has adopted no fewer than 22 000 regulations), through international multilateral agreements (the North American Free Trade Agreement, the Technical Barriers to Trade Agreement in the GATT, Decisions of the OECD Council), bilateral treaties and co-operative agreements (such as the Australia-New Zealand Closer Economic Relations agreement), national-local arrangements to share responsibility for making and implementing rules (in most OECD countries, both federal and unitary), to regulatory agreements between subnational governments (negotiations among Canadian provinces to reduce provincial trade barriers, regional agreements on river basins). The mix of arrangements affecting each government is, of course, unique, since each country enters into only those arrangements that suit its particular configuration of political and pragmatic needs.

As these few examples suggest, a comprehensive view of regulatory co-operation reveals an intricate network of vertical and horizontal links between all levels of government, often stretching from the lowest to the highest levels. That is, regulatory systems in the OECD area are growing progressively more complex and *multi-layered* (see Figure 2). No single participant in the network has a monopoly on regulatory decisions affecting issues addressed co-operatively. On the contrary, tasks are shared or scattered throughout the network. Implementation of regulations, for example, may be carried out by parts of government far removed from where decisions were made, as when environmental health inspectors employed by local authorities in the United Kingdom monitor how refrigerator repairmen handle ozone-depleting chemicals under the terms of the Montreal Protocol. Popular terms such as "globalisation" or "decentralisation" capture only parts of this picture; a better description of the long-term dynamir is "regulatory diversification."

The reasons for regulatory co-operation in multiple policy areas are varied and complex, and, because they arise from the perceptions of national governments of their own state interests, arc highly specific to the issue and country involved. In general, governments co-operate in response to opportunities or problems in three major issue areas involving economic values, non-economic values, and interactions between economic and non-economic values. Increasingly, governments also use intergovernmental co-operation to seek administrative advantages.[2]

The most obvious pressure for internationalisation has been *advancing integration of the world economy*, largely through growing trade and capital flows, requiring co-ordinated regulatory and deregulatory strategies to reduce trade barriers, to reduce the costs of transactions across borders, to develop stable international "rules of the game", and to respond to technological advances and trading of previously unregulated goods

Figure 2. A multi-layered regulatory system



and services (OECD, 1993). In particular, the inclusion of non-tariff trade barriers in trade agreements has vastly expanded the scope and reach of international agreements with respect to national and subnational regulatory decisions. Indeed, the traditional role of national governments in organising economic activities within their borders is undergoing a fundamental re-evaluation in light of the changing nature of the multinational corporation, the complexity of economic transactions across borders, and the importance of mobile and intangible economic assets less constrained by political borders (Dunning, 1993). Each of these factors weakens the effect of national rules, and encourages governments to move to co-operative strategies applicable to economic rather than territorial spaces.

Economic efficiency gains, increasingly important under competitive pressures, can also arise from international standard-setting, harmonization, and mutual recognition. A clear example of this is from Europe, where fragmentation of the European market due to regulatory barriers and restrictions on competition was shown to be detrimental to European industrial performance in some sectors (Pinder, 1988, p. 44). Yet over-centralisation can also damage economic performance. When local conditions vary sufficiently, efficiency gains can be achieved by decentralisation of regulatory authority to local governments. Finally, it must be understood that new regulatory arrangements that serve economic ends also serve *strategic functions*, that is, as tools through which nations, industries, and interest groups seek economic and political advantage or protection.

Non-economic values have stimulated a considerable and growing body of co-operative efforts. Much international regulation has arisen from recognition of *positive and negative externalities* in areas such as immigration, consumer protection, crime prevention, and environmental protection. In addition, sharing of regulatory authorities can reflect *political, cultural,* and *democratic values*, as when regulation is decentralised to "bring government closer to the people", or internationalised to express the common interests of countries. Subnational levels of government, which have often felt dominated by national regulatory authorities even when responsible for regulatory implementation, have increasingly asserted their desires to influence regulatory content and to regulate in accordance with local conditions and values. Consequently, even as they have regulated more themselves, national governments have shared regulatory decision-making and implementation with, or even delegated regulatory authority to, subnational levels of government.

In recent years, the *confluence of economic and social policies* has become turbulent, as illustrated by current debates over trade and environment, and trade and working conditions (so called ''social dumping" disputes). In these debates, in which international economic agreements are sometimes seen to override national social policies, many argue that social policies should be elevated to higher decision-making levels, so that ''policy competition" between economic and social policies is presumed to be fairer. "Leveling" in this regulatory climate means progressive centralisation and internationalisation (a process that has been called "deep integration").

Finally, *administrative advantages* may be gained through varieties of regulatory co-operation ranging from informal information sharing to commitments to concerted regulatory or enforcement action. Such relationships may exploit the commonality of issues facing regulators at all levels of government, reduce the "learning curve" with

respect to new or emerging concerns, increase the speed and effectiveness of regulatory action on cross-border issues, and permit efficient use of scarce information and analytical resources. Allocation of analytical and testing responsibilities, for example, can reduce administrative costs, as when Australia, Sweden and Canada co-ordinate new drug assessments to reduce testing costs and speed up government licensing. The OECD Chemicals Programme co-ordinates expensive and time-consuming chemical hazard assessments among countries. These strategies become more appealing as budgets are more strained.

As a result of these internal and external pressures for sustained interaction between governments and levels of government, OECD countries – governments, businesses, and citizens – operate in a more complex and sophisticated regulatory environment offering opportunities for substantial benefits, spectacular failures, and, inevitably, surprises.[3] Tensions – between centralising and decentralising trends, for example, or between international decision-making and national sovereignty – must be carefully handled.

This report explores some practical aspects of this multi-layered regulatory system and its implications for the functioning of democratic governments. It attempts, through a pragmatic look at how thcsc rclationships are working on the ground, to shed some light on the organisation and management strategies needed for their effective operation. How can governments best serve the needs and values of their citizens within a multi-layered regulatory system? Such questions reach deeply into fundamental issues of government effectiveness and capacity in a world of quickening change, and equally into issues of democratic values, national sovereignty, and distribution of powers between levels of government.

Around the OECD area, these issues are entering more explicitly into national dialogues, at both political and administrative levels, about the role and nature of government. Yet the dialogues are not as well-developed as they should be, given the speed, scope, and inevitability of change. Governments are following powerful trends that are moving more quickly than they are, and demands are rising for faster and more flexible responses to the challenges of interdependence. Concern from segments of the public who feel threatened by change is outpacing answers, and the possibility should not be taken lightly that governments will be forced to surrender the economic and social benefits of intcrdcpcndcncc by adopting protectionist or isolationist policies, thereby reducing the capacity of the OECD countries to deal with common issues. The necessary debate goes far beyond the use of regulation, but regulation is a highly-developed aspect of the governmental response to interdependence, and perhaps should be viewed as a bellringer for the effects of interdependence on other policy instruments, or even on governance writ large.

II. The need for management in a multi-layered regulatory system

Study of the multi-layered regulatory system has been dominated by juridical, economic and political analyses of international regulation. In contrast, this report will, borrowing as needed from other disciplines, apply *managerial analysis* to explore how national governments can adapt existing regulatory values and systems so that they work

effectively within an increasingly co-operative regulatory system, seen as a grand and multi-layered whole.

Effective participation in the sprawling, multi-governmental regulatory system is a management challenge of the first magnitude, not least because currently-prevailing styles and cultures of national governments were developed for an historical period that is, to a greater or lesser degree, passing. In the post-war decades, the development of the modem welfare state in OECD countries required that regulatory authority be greatly expanded and centralised at the level of national governments. The structures that emerged were hierarchical, vertical, and determinedly national. For most problems, standardised solutions were preferred.

Changes in the surrounding world threaten to render this regulatory structure obsolete. In 1986, the OECD's Secretary-General observed that "while the world has become more interdependent economically, government arid decision-making patterns have remained firmly embedded in the national-state structure" (OECD, 1987). As this remark suggests, traditional government structures appropriate for stable conditions and well-defined problems inside impermeable borders are increasingly ill-suited to economic and social conditions characterised by interaction, complexity, diversity, and innovation. Much of the impulse underlying economic deregulation and privatisation, for example, has been a recognition that new technologies and opening world markets have invalidated old assumptions about the need for and benefits of certain varieties of government intervention. Hence, along with private sector enterprises, regulatory organisations also face a period of structural adjustment.

In addition to the difficulties of administrative adjustment, governments also face new problems associated with higher orders of complexity. Intergovernmental co-operation – though often described as reducing disorder and inconsistency through the harmonising of regulation – has in truth amplified regulatory complexity by introducing new forms of decision-making involving a range of individuals, institutions, and processes who are outside the traditional scope of government, yet whose actions must nonetheless be dependable, consistent and co-ordinated. Indeed, the complexity of the multi-level system may pose a natural limit to its expansion. As in any interdependent system, the likelihood of failure increases with complexity: policy success will be constrained by the weakest link in this network?

The difficulty and importance of the management issues posed by the emergent multi-layered system are best suggested by example:

√ Linkages between trade and environmental protection policies arise more and more frequently as their mutual effects, even clashes, become clearer (Miramon and Stevens, 1992, p. 25). Just as liberal trading rules can erode environmental rules, environmental rules can create non-tariff trading barriers. On the other hand, co-ordinated strategies can further both sets of objectives. The details of both sets of policies are increasingly examined in international rather than national settings. In a notable case, a GATT panel ruled in 1991 that a national embargo on imports of tuna caught with techniques that killed too many dolphins did not conform with GATT because, if it did, trade would be limited to countries "with identical internal regulations". The ruling has triggered an examination of international

processes and institutions through which trade liberalisation may be balanced with environmental goals.

√ State, regional, and local levels of government wield substantial and, in many OECD countries, growing regulatory powers. They are, for example, "on the ground", and responsible for much implementation of regulations made at other levels. Concerns about the consistency and transparency of local regulation have arisen in unitary states such as the United Kingdom, while arrangements for power-sharing between state and national governments have been necessary in federal countries such as Germany, Austria and Australia before reaching international agreements.

√ The European Community has issued over 1 600 directives and 22 000 regulations obliging its 12 members to take legal and administrative action to achieve objectives ranging from reducing water pollution to improving working conditions. Negotiation and adoption of directives in national legal systems have required new internal policy arrangements and capacities for policy co-ordination, analysis, and implementation. Inconsistencies between long-standing legal cultures, particularly between common law and Roman law systems, have posed difficult problems of integration (United Kingdom, 1993, **p.** ix; Arnesen, 1993). The possibility that citizens will be able to legally challenge governments that have not adequately implemented EC directives has increased scrutiny of government performance.

√ Over half of the 140 multilateral environmental treaties that have been adopted since 1921 were concluded since 1973 (Haas, 1993, **p.** 6). The United States has seen the number of environmental treaties in which it has "a significant interest" grow from fewer than 50 in 1972 to nearly 170 in 1992 **(GAO,** 1992, p. 3). And the new responsibilities facing governments in the environmental area are even greater than the numbers suggest, because the scope and complexity of these arrangements have also expanded. Early agreements dealing with particular endangered species have given way more recently to agreements dealing with multiple pollution sources, industrial processes, and waste streams, requiring far-reaching and costly adaptations affecting many domestic industries. These agreements are raising the full spectrum of multi-governmental issues for governments, ranging from national sovereignty, trust and verification to institutional capacities for implementation.

Impacts on the functions and organisation of national governments arising from these and similar developments are not isolated or short-term occurrences. Rather, **they are part of a profound and long-term change, stretching across a widening spectrum of policy issues, in the way governments define and solve problems.** New management strategies and administrative skills are needed, not only to permit governments to react efficiently to issues involving multiple levels of government, but also to safeguard core interests of the national regulatory system such as:

- ***democratic values*** – regulation is a key instrument of modern governance, and the procedures and institutions by which it is developed must preserve legitimacy and public acceptance;
- ***coherence*** – governments must ensure that co-operative relationships support broader economic and social objectives; and

- ***responsiveness*** – relationships must respond to changing conditions and political demands.

Good management is also proactive. **As** co-operation is integrated more fully into national adminstrative systems, governments must ensure that the right questions are asked from the very beginning and that opportunities for serving national interests are identified and exploited. It is difficult to manage national governments so as to achieve such conditions: how much more difficult it is when other levels of government are involved!

In fact, the multi-layered regulatory system is developing so quickly and involving so many disparate actors and issues that some national officials doubt that strategic planning in the usual sense is even possible. National governments, it is said, may have no other choice than to react intelligently as decisions are thrust upon them. This feeling that events are moving too fast and too powerfully fuels fears that governments have "lost control" of their regulatory decisions. Yet such a formulation of the problem overemphasizes the need for ''control" and under-emphasizes the benefits of "influence". Strategies for designing and managing regulatory relationships appear to offer governments the opportunity to exert influence on **a** wider range of actors with respect to decisions important to their citizens. Government effectiveness may be enhanced, even while "control" is reduced. Strategic planning in this sort of system must begin with the planning of how irikrgovernmental relationships will function and evolve so as to promote national values.

Attention to managing the multi-layered regulatory system usefully coincides with the emergence, since the 1980s, *of* systematic regulatory management in national governments. Most governments began regulatory reform by eliminating or reforming individual rules, a useful step that was, however, soon seen as too limited. Recognising that the most pressing issues of regulation – aggregate costs of multiple regulations, complexity and quantity, flexibility, consistency with other regulations, legal rationality and order, compliance incentives, accountability – arise from the functioning of the regulatory system as a whole, governments are talung further steps to better manage and discipline national regulatory systems. Governments now tend to view "regulations" as only the most visible elements of integrated regulatory systems that involve processes, institutions, and legal instruments, with common and interlocking issues (OECD, 1992; Jacobs, 1992).

Attention to improving national regulatory systems could well intensify as linkages develop between those systems In a multi-level system, the quality *of* national regulatory decisions becomes not just a matter of concern for those at home, but also a concern for those living in other jurisdictions that may be affected. For example, the recently-adopted requirement in the GATT that governments must have scientific evidence to support national regulations restricting food additives illustrates the progiessively empirical and transparent nature of regulatory decision-making. The long-term dynamic is quite positive: "peer" pressure to modernise and upgrade regulatory systems in OECD countries leads to higher-quality and publicly-justified rules.

The "system" perspective adopted in many national reform initiatives is also highly appropriate to multi-layered regulation, which requires increased co-ordination

and interaction between systems divided by layers of government. Metcalfe in Chapter Four calls attention to the need for "well-co-ordinated administrative networks'' among member governments of the EC to carry out regulatory agreements. In many areas, such networks are already emerging: one example is the group of regulators from 144 countries who gather in Rome to make recommendations on food standards under the auspices of the FAO-WHO Codex Alimentarius Commission. Similarly, in areas ranging from capital movements and pilot training to chemical testing and workplace standards, thousands of intergovernmental networks of organisations, administrators, and experts analyse, discuss, negotiate, make, or implement regulatory decisions.

The emergence of decentralised and horizontal networks of regulatory organisations, administrators and experts, linked as much by common policy interests as by political or national institutional loyalties, could permit governments to promote common interests more effectively than ever before. As governments become more comfortable with this style of policy-making, national regulators will be increasingly bound together with their subnational and foreign counterparts in regulatory frameworks that are, as yet, vaguely defined, but that may be prominent elements of future governments.

111. Managing multi-level regulation: issues to consider

National governments still prcdominatc as regulators, and they direct most of the activities and interactions of other regulatory levels. In fact, and perhaps paradoxically, regulatory institutions of national governments are the primary vehicles through which the ''diversification" of regulation occurs. For many reasons, adapting existing national institutions seems preferable to the creation of new intergovernmental organisations. **For** example, costs and bureaucratic resistance may be lower with existing institutions, while concerns about shifts in power are less likely. One implication of this is that the multi-layered regulatory system is not necessarily a centralising system, but is more likely to develop as a decentralised system in which many national and subnational centers continue to act more or less as peers. **A** second implication is that a large part of the burden of responding to and participating in the new regulatory environment falls directly on national governments.

For that reason, we turn now to an examination of how regulatory co-operation looks from the perspective of the national government. Drawing on discussions between OECD countries, on OECD work in other fields, and most substantially from an OECD Symposium in October 1993 (scc the Foreword), **a** number of pressing concerns have been identified, ranging from strategic issues of long-range planning and coherence, to pragmatic day-to-day needs such as improving communication between regulators at different levels.

In this chapter, these topics are organised in three parts, progressing from a general examination of the impacts of multi-layered regulation on the systems and structures of national governments, to a discussion of improving openness and accountability, to a closer look at three common strategies of what is called here "regulatory rapprochement": mutual recognition, harmonization and co-ordination. This chapter has the relatively easy task of trying to identify key issues; it leaves the more difficult task of

suggesting solutions to the chapters that follow. The first two parts correspond with Chapters Two through Six, while the third part raises issues explored further in Chapters Seven through Nine.

To discuss these issues, it is useful to organise the field, since the variety of regulatory relationships is virtually endless. Annex One to this chapter organises regulatory relationships between governments into four categories: *i)* negotiated; *ii)* co-operative (pre-regulatory, regulatory, post-regulatory); *iii)* delegated (supra-national, decentralised, nationalised); and *iv)* semi-governmental. Of necessity, these classifications simplify reality, but may help to clarify and focus discussion in this complex field.

Part One. Managing regulatory co-operation: impacts on national governments

Key Questions: How can national governments participate effectively in the multi-layered regulatory system? What are the major management issues that arise? How can opportunities for mutually-beneficial co-operation be recognised and developed?

Regulatory systems in OECD countries are currently in the process of adapting to the demands and opportunities of the new regulatory environment. Officials at every level of national government – from inspectors in the field to top-level policy-makers – are involved in planning, negotiating, and carrying out regulatory agreements with other governments. Slowly, governments are moving away from traditional administrative hierarchies into more flexible arrangements and partnerships with other governments and levels of government.

But, despite the frequency and importance of these sorts of activities, the multi-layered regulatory environment has had very little impact on the underlying structures and assumptions of national governments. New co-operative relationships and agreements are typically added piece-meal to existing domestic regulatory structures, as if they were simply an unusual species of domestic regulation. There is little longer-term management planning with respect to whether regulatory and policy institutions and processes are suited to working with other levels of government, though it is often recognised (or deplored) that these same institutions and proccsscs are critical to the success of regulatory co-operation. In short, co-operative efforts show the same tendencies that one can see in national regulatory bodies: great efforts devoted to producing new agreements and rules, and relatively little effort spent on shaping high-quality institutions and procedures through which rules are developed and through which they will have effect.

Yet it is clear that the new regulatory environment affects many dimensions of policy-making. In particular, governments adjusting to multi-level regulation are finding themselves faced with management issues associated with *i)* **government institutions and procedures;** *ii)* **policy dynamics;** and *iii)* **administrative cultures.**

i) **Government institutions and procedures.** As noted, co-operative arrangements characterised by complexity, diversity, partnership, and innovation do nnt fit easily into established institutions and procedures designed for hierarchical and stable decision-making patterns. Co-operative arrangements may, for example, escape existing mechanisms for policy oversight and co-ordination, quality control, and consultation. Obligations, legal effects, and jurisdictions may not be well understood or integrated with pre-existing systems. Benefits and costs, including constraints on national regulatory flexibility, may not be defined or communicated to all affected parties. More fundamentally, power relationships may change as organisations are located more centrally or peripherally in the policy process. These effects can ripple through the entire governing system; the roles of courts and parliaments, for example, are changing in ways that are only beginning to be understood.

These **sorts** of problems, which highlight potential gaps between the capacities of existing structures and those required to work effectively within the new regulatory environment, can drastically reduce the ability of governments to solve common problems. **A** number of possible reforms are called to mind. At the centre of government, new mechanisms to plan, oversee, and co-ordinate relationships may he needed. Procedures can be developed for assessing the strengths and limitations of potential relationships and their contributions to national interests. National regulators involved with other governments must find new ways to relate to foreign, trade, and policy offices; to regulators in subnational and other national govcrnmcnts; and to the public whom they serve. Partnerships and networks may be needed within and between governments to co-ordinate regulatory action. Operational missions may need redefinition to improve the "match" between various levels of government. Legal systems may require adjustment to accommodate new forms of law. Parliaments as well **as** governments may need to be involved in these tasks.

Nor is adjustment only a matter of improving or adapting existing institutions: genuinely new governing strategies will also be needed. Consider, for example, the emergence of decentralised networks among bodies making and implementing regulation. While such networks provide flexible and specialised frameworks within which multiple governments can interact as partners, national administrators find them very difficult to manage since they are often informal, responsibilities are diffuse and shared among governments, issues can be technical, and information on what they are doing is not consistent or easily available. Frequently, it is not even clear who is involved in a network. The International Standards Organisation, for example, has a membership of 9G national standards bodies who work with 460 other international organisations through 2 678 technical committees and subcommittees to write standards. It would be a tremendous task for any government to monitor and evaluate, much less take a position or action on, the day-to-day decisions of this one organisation alone. Yet national governments, who increasingly rely on international standards, must be concerned, not only with how well their own national standards bodies function, but how well this intricate network of organisations functions in producing standards.

Moreover, management tasks do not lie solely within national governments. Interaction **between** participating governments must also be managed (in Chapter 2, Les Metcalfe calls this the ''macro level of management"). For example, ensuring the quality

of regulatory decisions arising from various levels of government is a key task shared by all partners. There are many possible measures of regulatory quality, such as market failure tests (Is there a market failure on an international level that demands intervention from a combination of governments?), benefit-cost tests, and proportionality tests (such as are applied by the European Court of Justice, or that are implicit in the GATT preference for the least-distorting policy instrument). Other possible quality standards include clarity, flexibility, and ease of compliance. In some cases, quality must be higher for regulations agreed to between levels of government than for purely national regulations.[5] Yet maintaining regulatory quality is difficult when participants, resources, objectives and quality criteria are not consistent between levels of decision-making. Decisions made on cost-effectiveness grounds at one level may be based entirely on expert judgment or political/diplomatic consensus on other levels. Experience in OECD countries indicates that quality considerations must be systematically and rigorously built into regulatory processes, rather than raised in an *ad hoc* fashion as part of a process of political consensus.

It is not enough to write a good regulation. Implementation problems encountered in national regulatory systems are amplified in multi layered systems, where decision-making and implementation are split among levels of government, with the added complications that monitoring, dispute resolution, and particularly sanctions for noncompliance are weaker or harder to use, and that implementation may involve a number of bodies: parliaments, Governments, national ministries, administrative and regulatory bodies, subnational governments, and courts. The potential for miscommunication and inconsistency, and the many instances of past failure in implementing international agreements, suggest that special efforts must be made to define and plan for implementation issues at an early stage. It is essential that some level of mutual trust and confidence be sustained, especially when problems arise. This requires strong and continuing avenues of communication, and effective means for dispute resolution. The "early-warning" system, for the flagging of potential trade disputes, recently agreed to between the United States and the EC illustrates the kind of creative solutions that managers must develop to protect co-operative agreements against disruption.

Despite past problems, co-operation on implementation has enormous potential. Delegation of responsibilities among governments and among levels of government may take advantage of relative administrative strengths in regulatory bodies. Trading of information and co-ordinating of strategies across borders could reduce complexity. Disruptive and conflict-generating extraterritorial enforcement of national laws might be reduced if national enforcement agencies were to take into account the legitimate concerns of other governments in setting their own enforcement priorities.

Longer-term and more strategic planning by the central management bodies of national governments, although difficult, will provide governments with a firmer basis to address these issues than will *ad hoc* decisions by individual regulatory bodies. One possible role of strategic management is the construction of a framework of principles and good decision-making practices to guide administrators in specialised programme areas throughout the bureaucracy as they design and assess co-operative arrangements. By ensuring that specific decisions are made through a standardised and orderly process, and in the context of general interests, a decision-making framework can make it more

likely that arrangements will be realistic, effective, and supportive of over-arching national values such as transparency or subsidiarity. Common issues that may be addressed in a strategic framework include:

- the ***objectives*** of regulation and decision-making in each co-operative forum;
- the ***competences, strengths*** and ***limitations*** of the institutions, processes, and regulatory instruments involved;
- ***participation*** by national governments and the ***means*** by which the government can influence decision-making;
- ***management of the continuing relationship,*** particularly the flow of information among the parties as a key part of agreement and co-ordination processes, and the design of dispute resolution procedures;
- ***consistency*** with related national goals, processes, and institutions;
- ***legal compatibility*** of traditions and structures, particularly where legal systems are very different;
- ***openness*** and opportunities for public participation;
- ***limitations*** of the relationship (how will its outputs be used in domestic processes? Do competing policies, laws, or accountability concerns constrain regulatory relationships?)

Such strategic assessments of the organisational and managerial aspects of co-operation can be used to design co-operative relationships to meet specific objectives within general constraints. This approach to strategic planning is discussed in more detail in Chapters Two, Three and especially in Four, where James Martin and Alan Painter present a model set of principles in the form of a "checklist" for decision-making.

ii) **Policy dynamics.** Management of relations with other governments is particularly difficult because of the highly political, and uncertain environment in which such relationships operate. Unlike most national regulatory processes, political officials may wish to intervene frequently in the details of co-operative regulatory relationships.[6] Co-operation involving multiple organisations and issues that overlap traditional jurisdictions may set off fierce bureaucratic competition for ownership of issues. Interest groups may use relationships strategically to support favored policy positions, making it difficult for governments to carry out coherent regulatory policies or control regulatory agendas. In short, new regulatory arenas imply new actors, interests, and influences, and these must be carefully assessed and choreographed if they are not to undermine the goals of co-operation.

One vital, if intangible, dimension of the policy dynamic through which agree-, ments operate is ''credibility". Development of a policy environment in which broader and longer-term interests supersede special or short-term interests is critical to the credibility of national governments in carrying out agreements. National governments and organisations with reputations for fair play, predictability, and compliance will find co-operative arrangements easier and less costly to develop, and hence will reap more benefits from a multi-layered system, than will countries with fewer reputational assets.

iii) **Administrative cultures.** Longer-term cultural change may be needed among regulators in OECD countries. Governments no longer regulate in isolation with only

domestic effect. Rather, regulators increasingly operate in an open and outward-looking policy environment in which the activities of other governments become more relevant, and in which national governments have less freedom over their own policies but more influence over those of other governments. This will require considerable sophistication in understanding the respective roles and limits of national and intergovernmental regulation. How should national regulators view their roles in an increasingly interconnected world?

There is no global model for how a government should manage its regulatory relations with other governments. Management strategies must be tailored to the nature of the institutions and decisions involved, the stage of the regulatory process, the political agenda, and existing management structures and capacities within national governments. Yet, with more attention to assessment and evaluation of how co-operation has worked, there may be much to learn from past experience about "best practices" by which governments can be guided.

Issues for continued discussion:

- What is the impact of policy interdependence on the performance and structure of national governments? How should governments adapt existing organisations and management strategies to function within a multi-layered regulatory system?
- How do intergovernmental regulations and processes differ from domestic ones?
- What quality standards should governments apply to regulation made at other levels? How can quality control be built into regulatory relationships?
- How can results be evaluated?
- What regulatory areas would most benefit from expanding co-operation?

Part Two. Openness, sovereignty, and accountability

> ***Key** Question:* How can national governments preserve openness, sovereignty, and accountability in regulatory relations with other governments?

Regulation is a key instrument of the governing process, and hence regulatory procedures, wherever they are placed, must meet appropriate standards of opcnncss, communication, and accountability if democratic values are to be preserved. In practical terms, processes that appear to be too secretive or remote may be weakened by charges of illegitimacy. Moreover, public critique and discussion – by exposing proposals to the scrutiny of practitioners and others directly affected – help to improve the quality of final decisions and public consensus in their worth.

Intergovernmental regulatory processes are increasingly criticised on grounds that they are too closed to citizens? Concerns about communication and openness are implicit in high-profile debates in areas such as the role of environmental issues in the GATT, the inclusion of social concerns in the North American Free Trade Agreement, and the

legislative processes of the EC. Traditions of intergovernmental relations – characterised by closed negotiations, limited participation, and lack of public information on options and consequences – may be inappropriate, given the importance and impact of regulatory decisions made through such processes today.

Effective communication of regulatory processes and decisions to citizens and businesses is a particular concern, given the complexity of a multi-level system. Because information from other levels of government is harder to obtain, more effort is needed when regulation is multi-layered, or when relevant decisions are scattered across regulatory jurisdictions. Clarity, simplicity, and legal transparency of regulatory decisions may need to be given more emphasis, and perhaps should be supplemented by systems for notification, codification, interpretation, and publication to provide consistent and accessible information to domestic audiences. The EC, for example, is examining recommendations for "wide and effective consultation... for making people aware, at the earliest possible stage, its intention to propose legislation" (European Communities, 1992, p. 11). Impact analysis, and particularly benefit-cost analysis, may be especially useful for this purpose.[8] Communication could also be seen as a strategic tool that helps citizens, who may understand only that they seem to be surrendering autonomy, to see the wider benefits of regulatory relations.

Public participation and consultation in intergovernmental regulatory processes could require significant change in the design of such relationships. If it is to be genuine, participation must be informed and occur at an early enough stage to affect decisions. Accessibility to the process should be seen as fair, and not biased toward narrow interest groups. The GATT, for example, has recommended that national review processes be developed "so that all interested parties, and particularly consumers, can express their views on trade policy actions before the decisions are made" (GATT, 1985, p. 36). Such processes must be structured to ensure that they contribute to the quality and credibility of the process, and do not introduce unwarranted delays or costs.

Concrete steps have already been taken to strengthen and diversify the participation of interested groups in international regulatory processes. Environmental, labor and consumer groups are making appearances in fora such as the OECD, GATT, NAFTA, and FAO-WHO, in both national and international contexts. OECD Member countries recently adopted guidelines, printed in Annex Two to this chapter, on procedures to improve transparency and public consultation in the development of trade and environment policies. More can be done; regional and local governments, for example, may be under-represented in international regulatory processes given the importance of their roles in implementation.

While procedures of openness and participation vary according to the nature and significance of individual decisions, a good point of reference in all cases would seem to be the openness of national regulatory processes. Regulatory decisions in most OECD countries are exposed to public consultation prior to adoption. These processes are designed to ensure that citizens have an opportunity to express their views on issues important to them, to permit opposing values to be aired, and, more pragmatically, to collect real-world information on need and impact. On the face of it, it seems that regulatory decisions made with other governments should be no less open than decisions made by domestic regulatory bodies.

Far from being a technical discussion about who sits at the table or what reports are published, debates about "openness" arc really part of a larger set of issues about the legitimacy of intergovernmental institutions. Profound concerns about democratic accountability and national sovereignty lie behind many criticisms of the multi-layered regulatory system. How can governments work effectively together while maintaining the controls on law-making necessary for a democratic system? How can agreements between governments be held accountable to citizens?

Careful thinking is needed on the relationship between intergovernmental co-operation and democratic values. A loss of democratic control in a national context may be inevitable as the monopoly on law-making held by national legislatures and administrations weakens, but compensating increases in accountability may be achieved through the design of networks, markets and international institutions. Here, information, participation, and **performance** indicators can improve accountability. John Braithwaite writes in Chapter Nine that international regulatory processes can actually strengthen democracy at the national level. **As** the GATT process showed, international agreements can, in fact, stimulate useful and informed national debates on fundamental issues of public policy. There are also intriguing suggestions that the sovcrcignty of citizens does not rest wholly with national political institutions. Regulatory competition, for example, allows consumers to choose between alternative regulatory regimes, and hence can supplement "national sovereignty" with "consumer sovereignty" (see Chapters Seven, Eight and Nine).

Issues for continued discussion:

- What are the effects of co-operation on democratic governance?
- What should the standards be for openness, communication, and participation with respect to regulatory co-operation at subnational and international levels?
- How should national governments structure and manage public participation in such relationships?
- Accountability can be blurred by the involvement of several countries **and** several levels of decision-making. How can responsibility for shared decisions be clarified?

Part Three. Choosing the right strategy for regulatory rapprochement

***Key** Questions:* What are the relative benefits and costs of regulatory *harmonization, mutual recognition,* and *co-ordination* between governments? When is each strategy appropriate? How have these various strategies worked in practice? How can governments **successfully** implement each strategy?

In setting the stage for co-operative relationships, it is clear that more understanding is needed of the benefits and costs of the various strategies that link regulations across legal and political borders. Precisely how is a regulation to have effect in multiple jurisdictions? One set of strategies, which are grouped in this report under the term "regulatory rapprochement", concentrates on reducing practical differences between regulations from different jurisdictions, so that, as regulations come to resemble each other or to have equivalent effects, a more unified regulatory system takes shape. Three particular strategies of regulatory rapprochement are proliferating in the OECD area:

- *harmonization* or the standardisation of regulations in identical form;
- *mutual recognition* or the acceptance of regulatory diversity as meeting common goals (it is sometimes called "reciprocity"; a variant in the US-Canada FTA and in some GATT agreements is called ''equivalency");
- *co-ordination* or the gradual narrowing of relevant differences between regulatory systems, often based on voluntary international codes of practice (it is sometimes called alignment).

Although each of these strategies has the effect of reducing regulatory differences, the objectives and practical impacts of each approach may be quite different.

Rapprochement strategies are widely used at supra-national (EC), multilateral (GATT, NAFTA), bilateral (US-Canada FTA, the Australia-New Zealand Closer Economic Relations ngrccment) and subnational levels (between states in federal systems). They may be developed through negotiation or co-operation, formally or informally. They may involve explicit agreement on final standards (such as in the European Community) or on harmonized international recommendations (food standards developed by the Codex Alimentarius Commission, a joint WIIO-FAO agency).

Most efforts at rapprochement today pursue at least one of three objectives. First, free trade has long been underpinned by harmonization and mutual recognition of product and process standards. Mutual recognition of standards is increasing under the EC Single Market, the GATT, various regional trade agreements, and internally within federal systems. Internationally, at least 30 standards organisations have produced over 14 000 separate standards. Product standards and certifications developed by organisations such as the ISO apply in areas ranging from medical devices to airline pilot licenses. while many specialised institutions such as the International Commission on Illumination, the International Dairy Federation, and the World Intellectual Property Organization produce standards in their fields. The economic benefits of reducing regulatory barriers in these ways include greater economies of scnlc for producers who sell in larger markets, increased competition in formerly protected markets, and faster innovation and growing investment as a result of new opportunities. And, of course, harmonization of technical standards is necessary for interlinked technologies, as in the communication sector.

Second, there is increasing effort to reduce regulatory differences in areas such as environmental protection, working conditions and other areas affected by trade and international activities. The intent here may be to promote trade by reducing non-tariff barriers, or, on the contrary, to ensure, by establishing common or minimum standards, that competition between regulatory regimes does *not* occur in these areas (the so-called ''social dumping" conflicts in Europe and fears of "pollution havens" illustrate the

stakes involved in these discussions). Countries with high standards may also fear the loss of capital and **jobs** to areas with lower regulatory standards.

A third reason for regulatory rapprochement is that problems cross political borders, and unilateral solutions may be useless or invite "free riders". Environmental problems such as deterioration of the ozone layer are not resolvable by any one country, and no country has an incentive to take corrective measures unless others do. The convergence of banking requirements expresses the intimate connections between national financial systems, and the externalities arising from bad regulatory decisions by any one country.

A number of critical policy and management issues are raised by regulatory rapprochement. *Regulatory diversity* often is rooted in varying social traditions, values, and economic conditions – a "diversity of preferences" – that may not be well-served by harmonization or recognition of rules based in different traditions. Harmonization in these cases might increase economic or social costs. Health and safety provides a recurring example: some societies are more risk-adverse than others, and want to protect their consumers from more "dangerous" products. Yet these values have also been used to block trade, and hence some judgment of (and means of judging) the worth of regulatory diversity is required.

Concerns about *national sovereignty* have raised reluctance in some countries to use mutual recognition or harmonization strategies, particularly when these relationships go beyond technical issues into core policy areas such as health, safety, working conditions, social protection, and environment. Canada, for example, is examining the option of selective harmonization for medical devices based on recommendations from an advisory panel to ensure that decision-making remains wholly with the national government. Certainly, conflicts in basic goals and values are possible, even probable, in such relationships if underlying guiding concepts are not made explicit and held in consensus (and responsive to changing political direction). These relations must rest on mutual confidence in each other's regulatory systems, a state of mind which is difficult to achieve, and to maintain when problems arise.

Rapprochement has also stimulated considerable discussion about *regulatory quality.* Specifically, the issue is, whether through the dynamic of the mutual recognition process itself (instead of the merits of individual decisions), standards tend to sink to the lowest common denominator, or through harmonization, standards tend to rise to the highest. If either of these tendencies is present, of course, governments will want to seek processes that place more emphasis on the intrinsic merit of individual decisions.

The value of *regulatory competition* has been debated. To the extent that diversity reduces regulatory costs and competition encourages improvement and innovation in regulation, approaches such as mutual recognition that preserve diversity would be preferred. For example, under a mutual recognition policy, a country that used more cost-effective regulatory approaches would give its national producers an advantage, and other countries **an** incentive to improve their regulations. In buying products or services, consumers would be able to, in effect, choose among regulatory regimes, and presumably would tend toward regulatory regimes that gave more value for money. On the other hand, if consumers are unable to obtain the information needed to choose among prod-

ucts, then regulatory competition is unlikely to prove beneficial. More understanding is needed of how regulatory competition works, the role of information, and, as Majone notes in Chapter Seven, the general rules by which regulatory competition can be disciplined so that – as consumers "discover" which regulatory regimes offer the most value – it generates knowledge in the Hayekian sense.

It should not, of course, be forgotten that the response of consumers to these regulatory policies is critical. How do consumers and enterprises react to multiple product standards? The EC has pointed to the need to persuade consumers and firms (especially small firms) "to adopt a confident outward-looking attitude towards the entire body of new rules and procedures... to enable them to enjoy the advantages of a large, frontier-free market" (European Communities, 1992, p. 27).

Our understanding of these issues is not far advanced. Considerable research is needed in selected trading blocs and industrial sectors, such as the pharmaceutical industry, to point out practical approaches to development and implementation of regulatory harmonization, mutual recognition, and co-ordination. Careful planning and design of the relationship seems to be particularly important. As Braithwaite writes in Chapter Nine, relationships are ideally fashioned so that they deliver benefits such as reducing non-tariff trade barriers, reducing the costs of multiple regulations, increasing regulatory innovation, and maintaining efficiencies from competition between regulatory regimes, while avoiding a ''race to the bottom", damage to democratic accountability, and confusion in existing policy and regulatory processes. Achieving all of these goals simultaneously is a management feat of considerable complexity, involving both careful design of the original relationship, and careful attention to its implementation and effectiveness.

Governments have much to learn from current efforts at rapprochement about how and when to use rapprochement strategies. Harmonization, for example, proved politically and administratively to be too costly, time-consuming and contentious (even tedious) a task to be successful in eliminating regulatory barriers to trade in the European Community (this approach could not even keep pace with new regulations issued by member states). Mutual recognition of standards has become the foundation of the internal market programme, supplemented by a growing number of European reference standards and harmonization in limited areas such as product requirements for health and safety. The EC and other experiences suggest that no rapprochement strategy can be used in isolation; rather, a mix of strategies and approaches must be tailored to the situation. Yet troubling issues, such as the practical meaning of "equivalence", continue to crop up within mutual recognition schemes around the world (New Zealand, 1993).

Contrary to the EC's reliance on mutual recognition, however, the federal government of the United States has increasingly relied on national harmonized regulations to avoid regulatory competition and market fragmentation among the 50 states. Why are these two systems moving in apparently opposite directions? One obvious response is that political pressures and institutions differ between the two systems. This suggests that choices between regulatory strategies are as likely to be due to political and institutional environments as to analysis of "optimal" approaches.

Of course, it must be recognised that governments do not have to (indeed, cannot) do it all. Rapprochement has never depended entirely on government action. In many areas, a combination of private and governmental initatives are used, and in others, industries have worked together for decades to establish voluntary standards. How can such public-private and market-driven standards support government efforts?

***Issues** for continued discussion:*

- What are the costs and benefits of the different strategies of regulatory rapprochement?
- In what circumstances is each strategy appropriate? How can these strategies be combined to work effectively?
- How can governments identify appropriate opportunities for beneficial rapprochement?
- How can governments establish and maintain the confidence in each other's regulatory systems that is necessary for such relationships? What are the roles of dispute resolution and judicial review in maintaining these relationships?
- Does regulatory rapprochement tend to encourage rules to sink to the lowest common level or to rise to the highest? Can such tendencies be managed?
- What management issues and practical problems arise from the three types of iegulatoiy rapprochement? Is it possible to identify ''best practices"?

IV. Conclusions

The host of unanswered questions and dilemmas posed above should not obscure the fact that national regulatory systems are already adapting to co-operative regulation. And as governments of OECD countries develop the institutions and processes they need to make regulatory co-operation work, the outlines of new forms of governance are taking shape. What is important at this stage is that the transition becomes a learning process for govcmmcnts, that positivc and ncgativc cxperiences be assessed and recycled to join the collective memory upon which the next steps will be based. Surveillance and comparative analysis of experiences in OECD countries can help make the learning process more systematic, and perhaps – as Pelkmans and Sun state in Chapter Eight – supplant to some degree the traditional "trial and error" approach to learning with all its political pain and economic costs. Indeed, the stakes of failure increase as problems and solutions become more global, and hence more attention is needed to identify the necessary and sufficient conditions for success.

One of the short-term objectives of such analysis must to be to respond to the pressing need for a politically-realistic framework of principles within which governments can approach regulatory co-operation. Strategies are needed to improve information on the dynamics and development of the multi-layered system, to communicate with other governments through channels such as improved information technologies, to build trust and familiarity among administrators and politicians, to protect democratic

processes, to safe-guard the quality of regulation, to evaluate and revise agreements as their effects in the market become clear. and to aggressively seek new opportunities to seize efficiencies in intergovernmental arenas.

It is both striking and heartening that many issues central to the development of multi-layered regulatory systems – even those that are intensely emotional – appear, in fact, to be largely institutional issues. Undesirable effects such as democratic deficits, social dumping, and the erosion of standards to the lowest common level do not seem to be inherent to a system of multi-level regulation. Rather, to the extent that these negative effects actually exist, they seem to result from a lack of understanding of how such systems operate and from poorly designed institutions and processes through which they are implemented. Therefore, these are correctable problems. This important insight should energize our efforts at controlling the weaknesses of multi-level regulation, while exploiting its considerable benefits.

Notes

1. The term "institutions" here includes organisations, informal networks, and rules of behavior, since these methods of organizing action are, in practice, usually inextricably linked. (Haas, *et al.*, 1993, **p.** 5.)
2. It is important to note, however, that issues of regulatory co-operation are not novel to most governments. Regulation involving international and subnational, as well as national, levels of government has deep roots in longstanding organisations such as the **GATT** (which includes over 100 tieaty agreements, ancillary and side-agieeiiients), and in political traditions such as local autonomy and federalism. Increased regulatory co-operation among levels of government is therefore best understood as a change (certainly a significant change) in degree, but not in kind.
3. One unexpected development is the extent to which interest groups and regions are seeking to be represented in international regulatory decisions on their own terms, rather than as voices of national governments. Business groups, for example, tend today to go directly to international standards-setting organisations, bypassing national standards bodies.
4. But redundancy can be used to build a reliable system out of even unreliable parts. As John von Neumann noted in 1956, redundancies within a system allow failures by any one part of the system to be prevented or rectified by another. There is much less risk that two parts will simultaneously fail. This strategy may be usefully applied to multi-layered regulation, but its drawbacks are, obviously, higher administrative costs and ambiguity in terms of responsibility and authority.
5. For example, regulations made among governments should, given the greater likelihood of diversity and change and the greater difficulty of change, be more flexible and responsive to change than are national regulations. Likewise, it has been suggested that international environmental regulations should not simply codify existing knowledge, but should rest on ''an openended process of knowledge creation" through continuous monitoring, information dissemination, and a focus on results rather than rules (Haas *et al.*, 1993, p. 412).
6. Legal analysts have found that the more reliable and precise an agreement, the more its implementation can be delegated to administrative bodies. Trade authorities, on the other hand, tend to prefer ambiguous "grey areas" that permit them flexibility in changing conditions, but which may require continuing political intervention, resulting in uncertainty.
7. Indeed, governments may regulate through international processes in part to escape domestic opposition to policies. The "confidentiality" and "remoteness" of international trade negotiations have, for example, been noted as helpful in overcoming protectionist pressures from national groups (Petersman, 1991, p. 64). Clearly, strategic decisions to shield policy issues from the domestic political process do not rest easily with democratic expectations.

8. Examples of the use of impact analysis to improve public debate on international regulation include: the 1988 Cecchini report estimating that the EC Internal Market programme would yield a highly favorable ratio of benefits to costs; a Clinton Administration statement issued in Summer 1993 assessing the contribution of NAFTA to gains in jobs and exports; and an OECD/World Bank analysis in the final months of the Uruguay Round of gains from trade liberalisation and costs of protectionism *(Trade Liberalisation: Global Economic Implications,* OECD, 1993).

Annex 1

Identifying four types of regulatory relationships

To assess the management needs of a multi-layered regulatory system, some order must be brought to this diverse field, particularly in answer to the question "What is meant by regulatory co-operation?" This issue is basic to the understanding of modem regulatory systems, yet there has been (to the knowledge of this author) little effort to organise any kind of descriptive typology of regulatory relationships between governments. This Annex is an attempt to begin that task. Types of regulatory relationships between levels of government are here organised into four categories – *negotiated* regulation, *co-operative* regulation, *delegated* regulation, and *semi-governmental* regulation – on the basis of the distribution of relative decision-making authority among the parties to the relationship.

I. A note on the legal setting

In international law, the state is sovereign. Its participation in international regulatory activities is voluntary (although the practical consequences of withdrawal from such voluntarily-assumed obligations may be unpleasant).

Domestically, the national government is sovereign in unitary states (subject to constitutional constraints), but not in federal states. The degree of federal authority varies widely. In some federal states, such as the United States, the federal government has broad powers to negotiate with other governments and to make agreements binding on the states. In others, such as Australia and Canada, states and provinces retain more authority with respect to agreements reached at the federal level.

These legal relationships, however important to note, do not take us far in understanding the complexity of regulatory relationships or their real impacts on national governments, or in addressing pragmatic issues **of** management. ''Delegation'', for example, is not primarily a legal concept, but, rather, is used as a practical description of the distribution of responsibilities. And "*de jure* sovereignty and *de facto* control" has been noted in many areas of global interdependence.

11. Types of regulatory relationships between governments

Regulatory relationships take many forms, but a few basic types seem to predominate. Identified below are four main categories of regulatory relationships, two of which are subdivided into sub-categories.

Regulatory relationship type A

Negotiated regulation

Negotiated regulation – of which treaties are a common form – is developed through a formal and legally-binding process of decision-making in which the details of regulatory requirements, legal obligations or responsibilities are agreed by each participating government. Regulation negotiated with other governments is often developed through different administrative bodies, different participants, and often different legal authorities than are involved in national regulatory processes, even though the same issues may be at stake. Regulations, for example, may be set through trade bodies and political negotiation rather than through regulatory processes of domestic ministries. As a result of its legalistic nature, formal processes of monitoring and dispute resolution are likely to be built into negotiated regulation.

Examples: Negotiated regulation between national governments, often called *international regulation,* include most environmental treaties, such as the Montreal Protocol on ozone-depleting chemicals; elements of the North American FTA (which contains commitments to recognise certain regulations as ''equivalent"); the London Guidelines for Exchange of Information on Chemicals in International Trade (which obliges countries to exchange chemical hazard information with each other); ILO agreements on working conditions (which are binding once they are accepted by governments); and OECD Decisions of the Council (such as the Decision establishing a Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste).

Regulatory relationship type B

Co-operative regulation (three subcategories)

National regulatory authorities increasingly recognise the administrative advantages of formal or informal types of regulatory co-operation based, not on formal legal instruments, but on more flexible agreements backed up by enlightened self-interest. Co-operative relationships range from casual contacts and visits to detailed high-level accords, and may occur at all stages of regulation, from coordination of regulatory agendas to coordination of enforcement. **(A** detailed typology of regulatory co-operation, going beyond the simple one presented below, does not seem to be available, but is sorely needed to distinguish the very different activities grouped under this category.)

B *i) Pre-regulatory arrangements:* In the pre-regulatory phase, national governments co-operate in many ways on the *inputs* to regulation – through periodic consultation, notification, mutual participation in rulemaking, coordination of testing and analysis, sharing of information – to support domestic decision-making processes. **Examples:** the OECD Chemicals Programme has developed guidelines for testing of chemicals and mutual acceptance of data; in the UNCED Agenda 21, countries have agreed to "strengthen" mechanisms for international technical co-operation in data collection.

B *ii) Regulatory arrangements:* Agreements are also reached on the *content* of regulatory decisions to, for example, harmonize rules, reduce trade barriers, remove disparities between jurisdictions, or combine expertise. **Examples:** Canada, Australia, and Sweden coordinate drug approval processes so that they do not duplicate testing activities, and accept, with some checking, each other's approve/disapprove **decisions;** in the US-Japan Structural Impediment Initiative Talks, agreement was reached on deregulatory initiatives in areas such as Japan's retail store law; the Nordic Council of Ministers has for years coordinated certain regulatory decisions between the five

Nordic countries; the 1988 Basle accord on capital ratios for banks was agreed to by central bankers from 12 OECD countries.

At the subnational level, Australian states have agreed to enact laws recognising each other's technical standards; Canadian provinces are negotiating the removal of a host of mutual barriers to trade.

B *iii) Post-regulatory arrangements:* Levels of government also co-operate in the *implementation* of regulation. Regulatory enforcement and interpretation is a growing area for regulatory agreement. **Example:** sharing of information to detect international corporate fraud is growing, in response to regulatory gaps revealed by the BCCI scandal.

Regulatory relationship type C

Delegated regulation (three subcategories)

Delegation is a formal regulatory relationship in which competence for an aspect of the regulatory process – procedural, decisional, enforcement – is granted by one level of government, which determines the limits and conditions under which the competence is used, to a second level of government. Delegation implies that some control, either legal or practical, is voluntarily given up to achieve regulatory goals.

In practice, delegation is not easy to identify because "control" is a matter of degree, dcpcnding on the level of oversight, the predictability of application, and the ease by which delegation can be withdrawn. For example, the GATT is a series of negotiated regulations (treaties), but the use of GATT panels to interpret the treaties means that the regulations may evolve and change in ways that governments did not foresee, introducing an element of delegation (strengthening the dispute resolution mechanisms of the GATT will reinforce the implicit delegation). The European Community exercises supra-national (delegated) authority through its processes of qualified majority voting, in which dissenting countries are bound by a decision, but the veto authority of member governments on rules requiring unanimity transforms those kinds of EC regulations into negotiated regulations.

C *i) Supra-national delegation* involves the formal transfer of regulatory competences from national governments to multinational bodies. In their highest forms, regulations from supranational bodies legally supersede national decisions. **Examples:** European Community regulations may be issued by qualified majority voting; some monitoring tasks are placed at the supranational level in the Montreal Protocol on ozone-depleting chemicals (a working group is responsible for determining compliance with the treaty); the International Civil Aviation Organisation adopts, by two-thirds majority, International Standards and Recommended Practices (SARPs) that are, in principle, binding on the over 150 signatories (although compliance with the SARPs is criticised); the Technical Barriers to Trade agreement negotiated in the Uruguay Round of the GATT requires that countries use international standards unless national standards meet certain limited criteria.

C *ii) Decentralisation* involves the formal transfer of national authority to provincial, state, regional or local governments. Delegation of authority may include either rule-making or compliance activities or both. Several OECD countries are pursuing decentralisation policies. **Example:** the ''free municipality" experiments in Scandinavian countries.

C *iii) Nationalisation* of subnational authority through delegations ("upwards") to national governments is less common. **Example** Australian states, agreeing that national regulations are needed in areas such as food standards and workplace safety which are constitutionally reserved for states, have permitted the federal government to greatly expand its regulatory role.

Regulatory relationship type D

Semi-governmental regulation

Much international regulation is developed by private bodies, such as industrial groups, or through semi-public or public-private arrangements of various sorts. *International standards-setting organisations* are a major group in this category. *Industry self-regulation* at the international level may also be semi-governmental when recognised or tolerated by governments. **Examples:** for the first group: among the 30 or so international standards bodies is the International Organisation for Standardization (ISO), and among regional standards bodies is the European Committee for Standardisation (CEN). For the second group: the International **Telegraph** and Telephone **Consulta-**tive Committee, composed of international telephone companies, sets revenue-sharing arrangements that keep prices high.

Annex 2

Transparency and consultation: OECD procedural guideline on integrating trade and environment policies

OECD Member countries recently agreed to procedures to **improve** transparency **and** public consultation in the development of trade and environment policies. Upon the recommendation of the OECD's Trade Committee and Environment Policy Committee, the Council of the OECD at Ministerial level endorsed in June 1993 four procedural guidelines – one of which addressed ***transparency and consultation*** – to improve the mutual compatibility of trade and environmental policies and policy making.*

These procedural guidelines are intended to guide governments in the development and implementation of trade and environmental policies with potentially significant effects on each other and to enable policy-makers to reach better-informed decisions. As such, they provide useful guidance on how to improve the relationship between trade and environmental policies, and embody the first elements of a consensus solution to issues that stand at their interface.

The guideline on transparency and consultation, reprinted below, provides a concrete example of how countries may seek to improve one important aspect of intergovernmental regulatory cooperation. Although the guideline is tailored for the specific policies of interest, it provides a basis for discussion or perhaps even a model for transparency and consultation policies that governments may wish to adopt in other fields of regulatory cooperation.

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Procedural guideline on integrating trade and environment policies

Transparency and consultation

Guideline – ***Governments should provide for transparency and for consultation with interested parties in the development and implementation of trade and environmental policies with potentially significant effects on each other.***

* The other three guidelines address trade and environmental examinations, reviews and follow-up; international environmental co-operation; and dispute settlement. The guidelines can be found in *Trade and Environment, June 1993* [OCDE/GD(93)99].

In view of the expanding interaction of trade and environmental policies, it is important that the development and the implementation of such policies, with potentially significant effects on each other, are pursued in an open and transparent fashion. Effective and timely transparency facilitates input from interested parties, thereby supporting the development of the most appropriate policies and avoiding unintended effects on the other policy area. Policy-makers should provide for the following:

- **Transparency at the inter-governmental level** – In circumstances where a domestic environmental measure may have trade impacts on other countries, or in circumstances where a trade measure may have environmental impacts on other countries, governments should, in accordance with their international obligations on notification, publication and consultation, provide for timely communication, access to relevant information and consultation to governments affected and, as relevant, to other concerned governments upon request.
- **Government pnlicy-making** – Governments should integrate their own environmental and trade policy-making, including through consultation between environmental and trade policy-makers, participation of trade policy-makers in environmental policy-making processes with potential trade effects, and participation of environmental policy-makers in trade policy-making processes with potential environmental effects.
- **Consultation with non-governmental interested parties** – Governments should, where appropriate, provide for input from interested non-governmental parties in the development of their approaches to policies and agreements at the trade/environment interface. Processes for consultation with interested parties will differ according to national political and legal practices and cultures. Such processes might include representation on any trade and environmental advisory committees, participation in trade examinations or reviews of environmental policies and agreements, and participation in environmental examinations or reviews of trade policies and agreements.
- **Availability of information** – Governments should, where possible, provide for public availability of information by *inter alia*, giving advance notice of proposed trade or environmental policies, or substantial modifications of existing policies, with potentially significant effects on the other. Governments should also exercise their best endeavours to encourage transparency at the subnational level.

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Part 11

MANAGING REGULATORY CO-OPERATION: CONCEPTS AND STRATEGIES

Chapter 2

The weakest links: building organisational networks for multi-level regulation

by

Les Metcalfe

I. Introduction

Regulation is one of the oldest functions of government. It is also a common target for public criticism, since regulatory requirements impinge directly on individuals and organisations. Whatever the objectives of regulation, familiar, if contradictory, complaints of bureaucratic inefficiency are likely to be voiced. From the standpoint of those expected to comply, rules and regulations can appear excessively complex, onerous, costly and obsolete. From the standpoint of the intended beneficiaries of regulation, compliance can seem patchy and inadequate, with implementation slowed by opposition and subject to special pleading and political pressure.

Criticisms from both angles are likely to be directed as much, if not more, at the bureaucratic way the regulatory process is managed as at the substantive policy objectives of regulation. The charges of excessively detailed, slow, centralised, inefficient and unaccountable administration, with regulators too rigid and unresponsive to change, require no elaboration here. Moreover, it is not difficult to make such charges stick. Regulation does aim to apply general rules and does require specific and detailed compliance.

One of the obstacles to improving regulatory effectiveness is that regulatory practice has often seemed bound by an increasingly obsolete model of management. Based on standardised procedures and central control of operational decisions, regulatory management is increasingly at variance with today's problems. The main elements of this conventional model are: 1) clearly-defined legal statements of policy intentions to minimise problems of interpretation; 2) standardised procedures for implementation; 3) hierarchical supervision of operational decisions; 4) enforcement procedures in the event of non-compliance; 5) judicial review of administrative action when disputes occur.

Within this framework, regulatory failures are likely to prompt demands for tighter central control and stronger hierarchical accountability. Management structures of this

kind are adequate for stable conditions and well-defined problems, but they are ill-suited to coping with the complexities and uncertainties created by increasing diversity and rapid technological innovation in an increasingly dynamic regulatory environment.

Several OECD countries have recognised these limitations and have made regulatory reform a key element in programmes of public management modernisation. Usually the emphasis has been on streamlining and reducing the scope of regulatory intervention. However, new issues are appearing on the horizon, especially at the international level, where regulatory activity is increasing. National governments are participating in the creation of a widening variety of international regulatory regimes. As this chapter will show, this does not mean that national governments are simply handing over responsibility to international organisations. Rather, they are having to redefine their roles and their relationships with other actors in the process of regulatory innovation.

Internationalisation is a response to the emergence of major economic, environmental and other problems that overlap national boundaries and governmental jurisdictions. But the choice of regulation as a method for governance is influenced by more contingent factors of resources, cost, and convenience. Regulatory solutions do not require the initiating organisations to have large administrative staffs or to make politically difficult budgetary reallocations. **A** large part of the cost of regulation is borne by the individuals, businesses and other organisations that comply with regulatory requirements. The resources needed to produce regulations are small by comparison (Majone, 1991). Since national governments are under financial pressure and most international organisations have very limited financial and human resources, this is a significant attraction.

However, it is important not to underestimate the full costs of formulating and implementing regulatory policies or to adhere to an oversimplified view of regulatory management. Producing regulations can be a complex and time-consuming process in itself. The development of agreed and workable standards for industrial products at the international level is an obvious and important example. It may take several years to reach agreement. But this is still only part of the whole process of regulatory management. Regulations are not implemented automatically and compliance is not guaranteed. Ensuring that standards are appropriately applied is difficult and requires continuous management. And, if international organisations cannot administer regulations directly themselves, they must administer indirectly through partnerships with other organisations, just as many national governments administer regulations through partnerships with subnational levels of government The performance of such multi-level, administrative networks depends on well-designed and managed linkages between the organisations that formulate, define and implement regulations and those that comply with them. *Systems of regulation are only as strong as their weakest links and without careful attention to the relationships between participating organisations, regulatory systems* ***run*** *the* ***risk*** *of being cheap but ineffective.*

Although the problems of managing between organisations are more obvious when multiple levels of government are involved, they are common throughout government. Few public policies are the sole responsibility of a single organisation. While management is often defined as "getting things done through other people", public management

is better understood as ''getting things done through other organisations'' (Metcalfe, 1993). But often the links between organisation are poorly developed and undermanaged. When the effectiveness of a regulatory regime depends on extensive inter-organisation co-operation, weak links are a serious problem.

Regulation at the national level, for example, generally involves collaboration among several, sometimes many, organisations. Usually these organisations are distributed among different levels of government and some may be non-governmental organisations such as technical institutions involved in developing and setting product standards. But at least there is an assumption that all the organisations are within the same constitutional and institutional framework. International regulation introduces an extra degree of complexity into the situation, because there may be no common framework – institutions, rules of the game and operating assumptions – to guide the regulatory process and shape the interaction of participating organisations. One of the greatest challenges facing international regulatory management is establishing a regime which is robust enough to work equally effectively in different national circumstances.

11. Models of regulatory management: hierarchies or networks?

This report is concerned with the broad questions of multi-level regulatory management. A brief examination of what is meant by management is required at this point, in order to be clear about the kinds of management processes and capacities that multi-level regulatory management requires. The main issues can be clarified by contrasting two models of management: the *hierarchical model* and the *network model.*

The hierarchical model is most closely associated with management of individual organisations, and often with routine day-to-day administration within a stable policy framework. Several distinct elements of this model can be identified to point up the contrast with a network model.

- Management is viewed as a purely executive function that presupposes a clear definition of objectives, policies and, where possible, measures of performance.
- Management is regarded as subordinate to policy-making and is often made the responsibility of different units from those who set policy.
- Management within organisations is governed by routines and standard operating procedures. It is an intra-organisational process for controlling the performance of predefined tasks.
- Managerial control is hierarchical. The role of the centre is to direct operations. Co-ordination of work depends upon a system of vertical channels of communication reporting and decision-making. Delegation from the top down takes place so long as it poses no threat to central control.
- Improvements in management within the parameters of this model are assumed to depend on the application of broad principles, already known mainly from business practice and generally applicable. "We know the solutions. The only problem is mobilising the political will to implement them.''

This is a much narrower view of management than that which now underlies best practice in business. Most obviously it lacks **a** strategic management dimension. The assumptions need to be broadened to provide a foundation for multi-level regulatory management. **A** network model of management makes the following assumptions.

- Management is strategic as well as operational. That is, it includes the management of policy development, identification of problems, and formulation of solutions, as well as executive actions required to implement policies.
- Linking operational and strategic management requires close contact and communication between those responsible for policy and implementation.
- Maintaining these links is difficult because responsibilities for the regulatory process are shared among different organisations. Regulatory management is a function of a network, not of a single independent organisation.
- Co-ordination among organisations in a network **is** rarely achieved effectively through the construction of systems of hierarchical control. Usually, co-ordination depends on a mixture of horizontal and vertical linkages and the development of partnerships of various kinds among participating organisations. Much co-ordination takes place without a "co-ordinator". (Though central co-ordination does have a role to play, as discussed later.)
- Improvements in performance depend critically on ensuring that the activities of the component organisations of a network mesh with each other. The division of labour among organisations must be clearly established and the arrangcrncnts for co-ordination among them must be well developed.
- In hierarchies, a crucial structural issue is the balance between centralisation and decentralisation. In networks, the equivalent question is the relationship between macro and micro levels of management. At the micro level of individual organisations are the familiar management tasks of achieving objectives within the constraints and opportunities of the organisational environment. At the macro level are the important, but less familiar tasks of managing the environment in which organisational activities take place.

  The final point requires further elaboration. Organisational environments consist of other organisations. Hence, the macro-management process establishes the regime that governs inter-organisational relations; determines the architecture of regulatory systems by designing the network of relations among participating organisations; and develops the capacities to ensure the effectiveness of the parts and co-ordination of the whole. Since there is no *deus ex machina* to perform the macro management function, the design and development of regulatory regimes must be done by the constituent organisations themselves (Metcalfe, 1978).

The implementation of the single market in the European Community is an important example of the coexistence of hierarchical and network approaches to regulatory management within the same institutional context. The implementation of the single market requires technical harmonization to remove regulatory obstacles embedded in national systems of product regulations, standards and testing and certification requirements. These obstacles add to production costs and maintain the fragmentation of national markets. But removing them and replacing them by EC-wide requirements is a complex process.

This process may either follow what is generally know as the "old approach" or the ''new approach" to technical harmonization. The old approach sought to establish general principles and detailed product specifications that classes of goods had to meet to be marketed throughout the EC. This hierarchical process involved an immense amount of work for the Commission. Protracted detailed investigation and negotiation with national experts/representatives were needed for most product standards. Its *modus operandi* was slow, rigid, cumbersome and subject to political veto. In short, it was vulnerable to many of the traditional criticisms of regulatory bureaucracy with the added political complexities of European policy-making and the weaknesses of European policy implementation. Moreover, the rate of production of European regulatory standards was far outpaced by the production of national standards for new products (Siebert, 1990).

The "new approach" to technical harmonization seeks to overcome the weaknesses of the "old approach" by starting from the premise of "mutual recognition". This is a management-by-exceptionprinciple. Rather than requiring detailed product standards to be developed from first principles, it established a presumption of EC-wide acceptability for products freely available in any EC country unless there are specific safety or environmental reasons for refusing products.

The new approach to technical harmonization requires quite different relationships between the regulators and the regulated and also among organisations involved in the regulatory process itself. It requires a network of links within and between national administrations and the development of organisational partnerships across the EC. It is much more bottom-up than top-down in the way it operates. Instead of a centralised process of defining and implementing regulations, it requires much more extensive development of lateral or horizontal relationships among regulatory authorities and other organisations such as standards institutions working in the regulatory field.

It must be added that the "new approach" has not completely superseded the "old approach". Nor is it the case that the "new approach" yet works smoothly. There are too many weak links between levels of government and significant disparities between national administrations. In this important area, the EC has a significant management deficit. There is still, for example, a long way to go to establish the mutual trust and confidence among different national bodies that are needed to make the regulatory process work reliably. Furthermore, it would be wrong to conclude that this process of regulatory management is totally decentralised. In fact, in some areas there are important back-up arrangements and emergency procedures that do operate through central points in the regulatory network. However, the basic structure and dynamics of the hierarchical old approach and the network-based new approach are quite different and require different management skills.

In general, the problems of managing inter-organisational networks have not received the attention that has been devoted to improving the management of individual organisations. Often, new responsibilities are superimposed on established patterns of relationships whether they are appropriate or not. Multi-level regulatory processes, in particular, have relied on existing national organisations and systems without a sufficient examination of their effectiveness or suitability. Little consideration has been given to the

impact of differences in administrative culture on the cohesiveness and integration of regulatory systems.

Administrative cultures vary in the extent to which they value procedural conformity, allow decentralisation and delegation, relate rewards to measurable results and promote according to seniority rather than performance evaluations, and so on. What is standard practice and normal procedure in one administration may seem too formal and bureaucratic from the standpoint of another or too vague and casual to form the basis for collaboration when judged against the standards of a third. Merely co-opting national administrations and sub-national authorities into the regulatory process without taking account of cultural differences among them may cause frustration and breed mistrust – the exact opposite of what is required to develop co-operative relationships. Although it is often difficult to pin down particular cultural factors that cause uncertainty and unease, failure to allow for them is a potent cause of mutual misunderstanding and an obstacle to the formation of effective working relationships. Divergent assumptions and ingrained beliefs can easily lead to doubts and suspicions about the reliability of other players in the administrative process. **A** simple but important example is the mutual incomprehension which emerges when what is regarded as a "pragmatic" way of solving a problem in one culture seems from the standpoint of another culture to go against common sense. International regulatory management must find ways of overcoming such culture-bound obstacles to co-operation by recognising and resolving the problems that cultural diversity creates.

From a macro perspective, this raises the questions of system architecture referred to above. How should inter-organisational networks be designed and developed? What are the choices to be made in designing organisational roles and working relationships? How can capacities be developed to make a regulatory network of organisations function effectively?

Designing and developing multi-level inter-organisational regulatory systems presents an important, yet poorly explored, task for public management. There are no ready-made solutions or even agreed diagnoses. Indeed, many of the difficulties have been masked by viewing regulation as a legal process and disregarding the problems of co-ordination and inter-organisational co-operation. If these legalistic assumptions are dubious at the national level, adhering to them when multiple levels of government are involved will lead to serious regulatory failures.

The complexities of the regulatory process are again clearly illustrated by the efforts required in the European Community to establish a single market for goods, people services and capital. The end of 1992 was misleadingly set as the date for the "completion" of the internal market. What has been Completed (in large part) is the transposition of relevant EC law into national law. This establishes the legal foundations for regulating the internal market, a necessary but not a sufficient condition for managing the internal market. It has not been completed in the sense that, after the legal framework has been established, a great deal of work remains to be done to establish the administrative infrastructure for managing the internal market as a going concern.

Indeed, in a sense the internal market will never be completed. Industrial change, technological innovation, the prospective enlargement of the EC and the concurrent

adaptation of policy objectives will continually throw up new problems for which new regulatory solutions will have to be found. The internal market, like any inter-organisational regulatory regime, requires continuous management at both the micro and macro levels.

In short, interdependence in the international context is on the increase and must be managed (Haas, 1990). Regulatory management involves a division of labour between organisations, each of which has its own role and responsibilities within the regulatory process. Some organisations are mainly concerned with policy, some with implementation, some with the development of regulatory standards, some with testing and inspection. The organisational division of regulatory responsibilities creates patterns of interdependence which must be matched by inter-organisational co-ordination if the system as a whole is to function effectively.

111. The case for international regulation: negative and positive integration

In principle, the case for regulatory management at the international level rests on the widening scope of problems beyond national boundaries. The central argument is that there are common interests or externalities that, for political or administrative reasons, will not be taken fully into account by nationally-based regulatory regimes. States are less and less able to behave as if their territories are closed systems impervious to external events. The main justification for the development of international or supranational regulatory standards for goods, services, and environmental quality, among others, is that these are more effective in solving problems than relying upon multiple different national standards with the potential for inconsistency, confusion and free-riding. In environmental policy, for example, pollution is no respecter of national boundaries. A government that seeks to put its own house in order by raising and strictly applying environmental standards may find its efforts nullified by the shortcomings or failures of neighbouring countries.

In addition to the argument that important collective benefits cannot be secured by independent national actions, there is a supporting argument that international regulation reduces administrative costs and burdens by simplifying regulatory regimes. A single integrated regime with common standards is more efficient than the disparate standards of separate national regimes. This "negative integration" argument for the removal of obstacles and inconsistency at the national level was a key element of the case for the completion of the EC internal market. Much of the 1992 programme was built around eliminating the "costs of non-Europe" attributable to the administrative burdens and non-tariff barriers created by the pie-existing 12 regulatory regimes (Cecchini *et al.*, 1988).

This said, realising the potential benefits of international regulation is not just a matter of eliminating national barriers and obstacles. As the follow-up of the "1992" programme, foreshadowed in the Sutherland report (Sutherland, 1992), has shown, establishing the institutional framework for the single market is a process of positive integration, not just negative integration. The distinction between the two is of wider relevance

to the subject of regulatory management. Negative integration is the removal of barriers, obstacles, constraints and distortions that impede transactions among economic actors in different countries. Negative integration is closely associated with policies of deregulation at the national level and with philosophies of economic liberalism. Positive integration is the process of creating a comprehensive institutional framework, based on common principles, which both establishes the conditions in which markets operate and defines the rules of the game for non-market activities. Positive integration is synonymous with the macro-management processes of designing and developing inter-organisational regimes (Metcalfe, 1992).

To see the "1992" programme or similar – if less ambitious – developments like NAFTA and recent Latin American and ASEAN initiatives solely from the standpoint of negative integration is one-sided and dangerously short-sighted. Because of the political repercussions of regulatory failures, it is unlikely that national regulations will cease to be applied in practice unless and until there is clear evidence that an international regulatory regime provides a credible and effective substitute. The long-term success of a programme of negative integration depends on the development of a complementary programme of positive integration. For example, dismantling regulatory frameworks at the national level, as the internal market requires, is contingent on constructing new, reliable regulatory frameworks at the international level to replace them.

The remainder of this chapter is an attempt to set out the main problems that have to be resolved in designing and developing multi-level regulatory regimes based on networks of administrative co-operation. Beginning from a consideration of national regulatory reform, the analysis proceeds to the problem of establishing trust and confidence and then to an examination of design issues and options in the architecture of regulatory systems, including the development of co-ordination capacities, inter-organisational partnerships and effectiveness-oriented systems of accountability.

IV. Is multi-level regulation the same as national regulation, or different?

Some of the problems of multi-level regulatory management are already familiar from the efforts that national governments have made to reform and modernise their own regulatory systems. Before proceeding, it is worthwhile going back to basics to ask whether the problems facing managers of multi-level regulatory systems are the same as those facing managers at the national level, or whether there are significant differences when regulatory problems span boundaries. It would obviously be unwise and inefficient to re-invent the wheel if multi-level regulatory reform could imitate and adapt solutions already developed at the national level. But even if the problems are the same, the solutions may be different and will cast organisations in unfamiliar roles. Viewing multi-level regulation from the standpoint of national governments, how does being a participant in a larger, international system alter the roles and responsibilities of national governments? What problems are there in adjusting to the inevitable strains and frustrations of moving from being a big fish in a small pool to being a small fish in a big pool?

There is no straightforward answer to the question of whether multi-level regulation is basically the same as regulation at the national level or whether there are fundamental differences between the two. Chapter One points, quite legitimately, in both directions – to similarities and differences. On the one hand, it argues that regulatory management, whether at the subnational, national or international level, requires the effective performance of basically the same management functions. On the other hand, the context and the relations among the various actors in the process are different. Even if the differences are differences of degree and not of kind, they are significant enough to warrant more explicit and careful attention. At the very least, multi-level regulatory management must cope with greater diversity of context and problems than does regulatory management at the national level in a single country. An international regulatory regime, for example, must allow for differences in national institutions, traditions, cultures and regulatory tasks. Diversity of task environments requires a differentiated management approach: different means to the same ends. But departures from the assumptions of uniformity and standardisation require delicate handling especially if there are marked disparities in the administrative capacities of participating governments or differences in interest and policy preferences.

V. Reliability and trust

What has just been said raises the important but difficult issue of establishing trust and confidence among the organisations participating in a regulatory system. This may seem a vague and woolly idea, but it has an important bearing on the reliability of an inter-organisationdl network and should be addressed openly.

Creating and maintaining a sense of mutual trust is an essential and difficult precondition for effective co-operation among different organisations. But the starting point in the development of inter-organisational relations is one of wariness if not suspicion. Organisations provide a major focus of loyalty for individuals as well as the source of important rewards and sanctions. Individuals who act as representatives in negotiations and working relationships with other organisations are expected to give priority to the interests of their organisation. National loyalty powerfully reinforces these in-group sentiments and easily generates suspicion or even hostility towards others. This has important effects on the dynamics of the system. If tensions build up, working relationships come under strain and the line of least resistance is to withdraw from outside involvements. The centrifugal forces in inter-organisational networks should never be underestimated. In situations of high interdependence, such breakdowns have adverse effects on the performance of the whole system. Maintaining mutual trust is a safeguard against these disintegrative processes.

Two facets of trust should be distinguished and considered separately: capacities and commitment. In the first place, mutual trust depends on a belief that other organisations have the skills and resources required to play their allotted part in a scheme of multi-level regulation. This is a more or less objective, if difficult to quantify, matter of technical competences and organisational resources in relation to responsibilities. The basic issue is "Do they have the capacities needed to do the job?" **A** negative answer

raises doubts about the reliability of the system. But it is often difficult to give a clear answer **because** often **it** is hard to establish which organisations are in the network and what roles they are supposed to play.

Commitment, the second facet of trust, is a more subjective matter of willingness to co-operate. It has to do with intentions and good faith in making and implementing agreements at the interface between politics and public management. International regulatory policies are generally the outcomes of tough negotiations in which important national interests are at stake. The outcomes are closely scrutinised to identify the winners and losers; relative distributions of costs and benefits may be politically more salient than overall gains. It is easy to see why, under these circumstances, special efforts have to be made to maintain mutual trust and goodwill. The basic issues are, "Are we being fairly treated and can we rely on them to fulfil their part of the bargain even if they wcrc dissatisfied with the result?"

VI. The architecture of regulatory systems

With this in mind, how should multi-level regulatory regimes be designed to ensure their reliability? Since trust is not a matter of personal good faith, but a function of the relationships between organisations that understand mid recognise their interdepcndcncc, one of the challenges of regulatory management is to design networks that ensure the development of appropriate capacities and reinforce organisational commitment to regulatory purposes.

While, in broad terms, networking is flexible, responsive and adaptable whereas hierarchies are rigid, unresponsive and cope badly with change, once the focus shifts to choosing between networks of different kinds, more specific questions about the architecture of regulatory systems arise. It is not enough to reiterate that networks are decentralised and give much discretion and autonomy to individual organisations in the management of internal operations and external relations, while hierarchies are centralised and prescriptive. Or to claim that networks allow the voluntary development of task-related patterns of co-operation and encourage managers at all levels to take responsibility for performance, while hierarchies impose bureaucratic channels of authorisation and supervision that delay decisions, slow responses, and restrict discretion. These contrasts between the virtues of networks and the vices of hierarchies are clearly one-sided and overstated.

While the argument here is that network forms of regulatory management have important advantages, their benefits are not likely to be realised without careful attention to the design of the network and the management capacities required to make it function reliably and effectively. Perhaps the greatest danger is that the current discussion of networks may encourage the belief that the right kind of network will emerge spontaneously from the efforts of individuals. But particularly in the context of international regulation, where cultural differences are important and national loyalties a significant factor, deliberate efforts are needed to design and develop networks that are quite tightly-knit to encourage mutual confidence in the reliability of regulatory practices in participat-

ing countries. Loosely-knit regulatory networks are liable to be error-prone and lack the capacities required to detect errors, let alone trigger action to correct them.

Within the framework of this report, it is useful to highlight three topics for discussion: A) Co-ordination; B) Partnerships; C) Accountability.

A) Co-ordination

Multi-level regulatory management requires a division of labour among interdependent organisations and therefore creates a need for co-ordination. The efficiency and effectiveness of a regulatory system depend crucially on the quality of co-ordination among the constituent organisations.

Although its importance to governmental performance is widely recognised, co-ordination is usually discussed in a very imprecise way. The need for co-ordination and the means of meeting it are often ill-defined or interpreted in ways that are more appropriate to sub-units of a single organisation than to a network of organisations. Sometimes co-ordination is equated with central control, a concept likely to be fiercely resisted by organisations determined to defend their autonomy. At other times co-ordination is regarded as no more than an informal process of voluntary co-operation, a precarious basis on which to build a regulatory regime. Despite these ambiguities, the official ''myth'' is that all co-ordination functions are performed effectively. In a top-down perspective, government is a smoothly functioning administrative machine in which the parts mesh perfectly with each other. But in practice, co-ordination is rarely so smooth. Actual co-ordination capacities are often inadequate, especially at the intergovernmental level.

Using the results of research conducted at the European Institute of Public Administration, it is possible to more systematically measure co-ordination capacities and to identify co-ordination needs. This approach separates out different elements of co-ordination, defines their relationships with each other, and provides a practical framework for assessing and developing co-ordination capacities.

The Policy Co-ordination Scale

To analyse co-ordination, a scale was developed from a comparative study of policy co-ordination in the twelve member states of the European Community. The underlying concepts are generally applicable to any network of interdependent organisations and, therefore, to multi-level regulatory management. The novel contribution of this Policy Co-ordination Scale is to differentiate components of co-ordination, which are often discussed in an unsystematic way, and order them clearly so that they relate directly to managerial concerns.

The Policy Co-ordination Scale can be visualised as a series of steps that add successive co-ordination functions in a specific logical sequence. These steps ***do not*** refer to different levels in an organisational hierarchy of authority. In fact, the main purpose of the scale is to provide a means of measuring and diagnosing co-ordination capacities and needs ***between*** rather than *within* organisations. Each step in the scale represents a set of

linkages between organisations in a policy network. Some hierarchical relationships are involved, but as will become clear, effective co-ordination makes extensive use of lateral relationships, voluntary co-operation and partnerships among organisations.

The Policy Co-ordination Scale consists of nine steps, each introducing an additional co-ordination function. The dimension on which the steps are located runs from a clear division of responsibilities among organisations to a totally integrated system. At the lowest level, individual organisations formulate their own policies within their spheres of competence and act independently. At the top of the scale, an overall strategy presupposes the resolution of all problems of inter-organisational co-ordination within a unitary hierarchy.

The steps on the scale are summarized below:

Policy Co-ordination Scale

9. Overall Strategy
8. Establishing Priorities
7. Setting Parameters for Action
6. Arbitration of Policy Differences
5. Search for Agreement on Policies
4. Avoiding Divergences among Organisations
3. Consultation with other Organisations (Feedback)
2. Communication to other Organisations (Information Exchange)
1. Independent Organisational Decision-Making

Further detail on each step is given in the Annex. The Policy Co-ordination Scale is a Guttman scale which means that it is uni-dimensional, qualitative and cumulative. In other words, higher-level co-ordination functions do not "float in mid air". They depend on the existence of the lower steps. For cxamplc, without communication between organisations (step 2) none of the higher levels can work effectively. The potential level of effective co-ordination depends, therefore, on **all** the subordinate steps being in place. Attempts to establish common priorities for a whole regulatory network (step 8) will fail if it is unclear who **is** supposed to do what or if communication networks are inadequate (steps 1 and 2), or if consultation processes (step 3) are poor or arbitration decisions (step 6) are constantly challenged. In practice it is not always necessary to have all co-ordination capacities or to use the full potential of what is actually available. If co-ordination problems can be resolved by, for example, joint policy making (step 5) there is no need to activate higher level co-ordination processes. How co-ordination is achieved in a particular case is a matter of management judgement. The important point is that the potential should be there to be activated if necessary.

Step 1 on the scale may not appear to be co-ordination at all, since it involves the division of responsibilities **and** tasks among the organisations composing a network. But,

in fact, establishing a clear, workable and generally understood organisational division of labour is a very important part of ensuring the effective functioning of a regulatory network. It is important to see this both from the standpoint of the design of the machinery of government and also from the standpoint of operational management.

First, let us consider the design issues. The division of labour among organisations establishes areas of jurisdiction and responsibility. Determining "who does what" focuses the efforts of individual organisations on specific tasks and, if it groups closely-related activities together within the same organisation, lightens the load on higher levels of co-ordination. By the same token, if the allocation of responsibilities among organisations is poorly designed, jurisdictions will be confused and overlapping. Not only will this provide a poor basis for independent organisational action but it will also require considerable investment in inter-organisational co-ordination.

Second, let us consider the operational management issues. If jurisdictions are clearly defined, managers know where they are free to act independently and also where organisational interdependence requires the development of co-ordinating relationships. Where jurisdictions are unclear, conflicting or confused, there is an enormous potential for unproductive bureaucratic politics and damaging conflict between organisations. When regulatory networks span national boundaries special efforts have to be made to ensure that it is clear (or at least easy to discover) who does what.

The second level of co-ordination is the establishment of a communication network, an inter-organisational management information system. Information systems within organisations are accepted tools of management. Information exchange among organisations is more difficult and uncertain, and yet is often less systematically planned and managed. Good communication is essential if all the constituent organisations of a network are to operate on the same information base. But there are significant technical and institutional obstacles to this in large administrative networks. Once a multi-level dimension is introduced, the problems of ensuring that even minimal standards of information exchange are achieved are compounded by loyalties associated with the governments involved, and even by linguistic differences (see Chapter Five).

Good communication is important in its own right and also as the basis of the third component of co-ordination. consultation Consultation in this context means feedback between organisations in response to information received. While communication refers to sending out information, consultation is the process of formulating and transmitting responses – additional information, opinions, criticism and advice – on the basis of received information. Consultation is important in all phases of the management process because it provides a check on whether information has been correctly received and understood, and also on how it is evaluated and interpreted by different organisations ostensibly working together in the same regulatory system.

There appears to be great variety among administrative cultures in the extent to which norms of consultation are established and adhered to in practice. In some countries enormous importance is placed on ensuring that organisations respond promptly and fully to information received. In others, information is kept and, perhaps, filed hut there **is** no sense of obligation to respond. This omission weakens co-ordination because consultation processes are an important binding force, creating cohesion and producing mutual

understanding and responsiveness among different organisations, without infringing their right to make independent decisions within their own spheres of competence. Multi-level regulatory management raises additional problems of establishing consultative relationships across governmental boundaries between organisations that may have hardly been aware of each other's existence, let alone felt any need to keep the other informed or respect the other's views.

Steps 4 and 5 build on the communication and consultation networks. Individual organisations do not just act independently within the framework of divided responsibilities, they also seek to act on an agreed basis in areas where their jurisdictions overlap or where they face common operational problems or policy issues. At these levels a distinction may be drawn between negative and positive co-ordination. Co-ordination at step 4 means reaching a compromise that each organisation can live with in order to ensure that in public, if not in private, regulators "speak with one voice". This is negative co-ordination because it is a reaction to problems of interpretation thrown up by particular cases. Consider, for example, agencies in different countries responsible for administering the same set of regulations on the electrical safety of household appliances who must decide whether a product from a third country meets the requirements. Consultations reveal differences of view. How do the respective agencies react to differences knowing that the same business is seeking approval to import into several countries? Do they make independent decisions which may be contradictory, or do they agree voluntarily on a common line and (temporarily) suppress divergences of views and policies or find (longer-term) ways of positively reconciling differences and conflicts? Co-ordination of the multi-level regulatory system breaks down if organisations dealing with the same policy issues publicly disagree or only agree to differ.

Step 5 co-ordination is a broader and longer-term consensus rather than just an *ad hoc* temporary compromise. If particular cases raise general issues of principle or if consultation reveals differences of practice and policy interpretation, positive co-ordination is needed to agree to new guidelines. There are standard practices for resolving policy differences such as creating a committee or task force or establishing a research team to investigate and develop a long-term basis for agreement on future lines of regulatory policy. It is apparent that this level of co-ordination not only requires willingness to collaborate but also depends on the adequate performance of subsidiary co-ordination functions.

Even if these co-ordination functions are performed effectively, it is not impossible that deep-seated conflicts may occur that cannot be resolved on a voluntary basis by direct negotiation among the organisations involved. It is easy to envisage circumstances in which differences harden along organisational lines and no one is prepared to back down. In such circumstances, an administrative deadlock may be broken if there is an arbitration authority which provides an accepted means of settling disputes. Such an arbitration process constitutes a sixth level of co-ordination which can come into play if problems are not resolved at lower levels. This does not mean a formal legal process, but an accepted institutional mechanism for settling differences.

Although co-ordination is often equated with the intervention of higher authority to impose decisions in the event of disputes, the assumption here is that in a well-managed

co-ordination process arbitration would make a relatively late appearance and only come into play when lower level processes had failed to reconcile differences. Arbitration, therefore, is very much a form of negative co-ordination to produce binding decisions on an *ad hoc* basis. In any regulatory regime, but especially in multi-level regulation, it is particularly important to have an arbitration process within the system. Otherwise, unresolved conflicts will undermine the credibility of the whole system and perhaps lead to excessive reliance on litigation.

Beyond making *ad hoc* arbitration decisions, the development of regulatory regimes appears to require at least two other types of co-ordination capacity at the macro level to assure the integrity and guide the development of the whole system. The seventh component of co-ordination is a macro-level capacity for setting policy thresholds or parameters. These thresholds do not prescribe what each organisation must do. Instead, they set limits defining what they must **not** do. This level assumes that the information traded between organisations is of sufficient quality to permit mutual auditing and checking to ensure that the limits are observed. In order to perform this function, capacities are needed at some focal point in the network.

The coherence of a whole regulatory network and its capacity to guide its own development by adapting policies and undertaking structural reorganisations depends on a macro level process for setting priorities and mobilising action to give effect to them, as in step 8. Again, this requires an institutional focus in the network – a centre but not a centralised process – that builds upon and uses the other elements in the co-ordination scale. Policies and priorities cannot be formulated in a vacuum. Avoiding misunderstandings and preventable errors requires extensive exchanges of information and intensive consultation. Finally, step 9 is included for the sake of completeness, although it is never the case that all co-ordination capacities are fully provided on a permanent basis.

The main practical implication of this analysis is that reliable co-ordination in organisational networks must be developed from the bottom up. Lower levels provide the preconditions for the effectiveness of higher components of co-ordination. It is relevant here to draw a distinction between the perspective of a *user* and a *designer* of a regulatory regime.

Politicians, as users of administrative apparatus, are particularly prone to assume that the capacities needed to give effect to new policies already exist. But in multi-level regulation it is especially important to avoid the error of assuming that international regulation simply involves reprogramming existing national administrative machines with new policies. *Officials, as designers* of administrative capacities, have responsibility for ensuring that the requisite inter-organisational networks are created. Following the logic of the scale, this means defining operational management responsibilities and providing for effective communication and consultation processes within the network before considering how to: *a)* settle minor differences; *b)* resolve more significant conflicts; and c) set common lines of policy. Constructing co-ordination capacities in this way provides the institutional infrastructure for effective regulatory management. It is certainly not a short-cut solution, nor is it cheap. Co-ordination between organisations typically demands the attention of high level personnel who can represent and commit

their organisation. But the investment is worthwhile when the costs of regulatory failure can be extremely high.

B) Partnerships

Like co-ordination, partnership is an appealing idea. Developing partnerships is one of the recurrent themes of network management. It puts emphasis on the voluntary development of horizontal relationships on a more or less egalitarian basis, which implicitly contrasts with the vertical pattern of obligatory hierarchical relationships. It fits with the idea that a great deal of co-ordination can be achieved without a "co-ordinator". Partnerships presume shared or overlapping interests if not necessarily common purposes and, also, a willingness to engage in collaborative action on an enduring basis. Partnerships require more durable working relationships and more co-operation than business relationships in a competitive market environment.

The development of partnerships is an important instrument in the public management tool kit. The concept provides more structure and specificity to the design of organisational networks and the management of inter-organisational relations than network analyses often provide.

But the development of partnerships in administrative networks of even moderate complexity cannot be left to the initiative of individual organisations. Partnerships must be designed within a vision of how the network as a whole is to be organised. Capacities to manage them should also be developed. The capacities required for managing across organisational boundaries depend on the precise form that a partnership takes (Metcalfe, 1981; Waddock, 1991). Partnerships are not all of a kind. Since several forms of partnerships have recently emerged in various public management reforms, it is worth listing some of them before proceeding.

Given the pervasive influence of business management models, it seems appropriate to start with *customer-contractor partnerships,* of which purchaser-provider relationships are an important variant. In these partnerships, contracts provide the basis for setting the terms of co-operation. *Principal-agent relationships* have emerged in governments as an important form of administrative partnership. These partnerships appear, for example, with the disaggregation of ministries into separately organised agencies. Partnerships also sometimes take the form of *voluntary co-operation* and *joint action mediated by a representative organisation.* Here, the representative organisation either provides a common service to the membership or acts on their behalf *vis-à-vis* other organisations. *Professional partnerships* are based on a pooling of expertise to address a common concern, much in the way that businesses form strategic alliances in research in the early phases of product development.

As these examples show, partnerships may develop on the basis of differences as well as similarities. In a hierarchical context, stable working relationships may be established between organisations engaged as superior and subordinate in different phases of the implementation process. Professional-client relationships can also develop in different phases of the regulatory process, where a nominally higher authority must draw in expertise to devise and formulate workable technical standards.

The patterns of collaboration in an administrative network can be thought of as a web of partnerships that serve different purposes and have different management requirements. Some are hierarchical while others are horizontal. Some are symmetrical while others create differences of power and authority between organisations. In each case the form of the partnership calls for corresponding management capacities to ensure that the relationship works. Identifying different forms of partnership provides a way of clarifying the options available and the choices that have been made about the *rules* of particular organisations and their *relationships* with other organisations in the architecture of a regulatory system.

Partnerships provide a range of strategic design options for constructing inter-organisational networks. At the very least, the evaluation of alternative forms of partnership is a corrective to "one-best-way'' reform proposals that arbitrarily exclude useful options from consideration and often focus on finding separate solutions for individual organisations without considering the systemic implications.

C) Accountability

It is difficult to overestimate the importance of reliable and credible processes of accountability in establishing public confidence and trust in a system of regulation. The legitimacy of a regulatory regime is underpinned and strengthened by the existence of a framework of accountability that makes the exercise of power subject to due process and open to public scrutiny and democratic control. From a management point of view, accountability also has important influences on regulatory effectiveness. But often these influences are unplanned, unintended and do not support regulatory objectives. Accountability is too often seen as no more than a clumsy means of attributing blame when things go wrong or punishing obvious abuses of power, and too rarely used to establish the context for effectiveness. A well-designed accountability system, on the other hand, defines the ground rules for inter-organisational co-operation and sets criteria for organisational performance.

The design of effective frameworks of accountability is an underutilised and misunderstood management resource partly because there are so few positive role models. With so much practical experience with badly designed and ineffective accountability systems, it is hardly surprising that the subject is so often viewed with cynicism, or even regarded as a serious impediment to good management rather than a means of assuring and stimulating performance.

This deficiency is particularly important for multi-level regulation because its results are achieved indirectly through relationships that are not under direct control. It is especially important that, when international, national, or subnational regulatory regimes redistribute power and create new centres of power, when the functions of existing organisations are modified, when new organisations are created, and when new inter-organisational partnerships and patterns of co-ordination are developed, frameworks of accountability are at the same time modified to correspond with these changes. However, this is usually not the case. Instead accountability systems remain weak and poorly

developed. Often there are mismatches between a pattern of governance and its accountability system.

Such discrepancies adversely affect performance. A well-accepted sense of legitimacy or ''rightness" increases the probability of voluntary compliance with regulatory norms and policies. Conversely, scepticism and mistrust of the legitimacy of a regulatory regime reduce the likelihood of voluntary compliance and increase the need for more clumsy and heavy-handed methods of enforcement. The debate about the democratic deficit of the EC is a prominent example of a general dissatisfaction with the existing system **of** accountability. But this debate, like most others, rarely addresses the practicalities of designing accountability systems that will improve administrative performance as well as preventing the abuse of power. For, at their best, accountability frameworks have an impact on behaviour within the system as well as on public attitudes and perceptions.

The main obstacle to the more deliberate use of accountability systems to create incentives for effectiveness is the narrowness of the debate on accountability. Accountability is frequently portrayed as nothing but an extra layer of control superimposed on managers. The reflex response to problems of accountability is to ask "Who controls the controllers?". In the present context the question might be rephrased "Who regulates the regulators?". Apart from the implication that this might lead to a futile infinite regress, this formulation of the accountability problem implicitly makes two restrictive assumptions First, **it** assumes that the only form of accountability is hierarchical. Second, it assumes that accountability always imposes constraints on organisational autonomy. While this form of hierarchical accountability is appropriate for superior-subordinate relationships, it is not an appropriate framework for other types of partnership. On the contrary **if** it is used it is likely to have precisely the negative effects mentioned ahove.

What other forms of accountability are available and when are they appropriate? There are three other basic types: *peer-group review, competition,* and *constituency control* (Metcalfe, 1981; 1989). *Peer-group review* has a clear correspondence with professionalisation and the use of professional-client partnerships. Without going into further detail about the pathologies of professionalisation, it may be added that peer-group review should include feedback from clients as well as evaluation against standards set hy other professionals.

Competition is another accountability strategy that has grown in prominence in public mangement reforms in recent years. It is appropriate to exchange-based customer-supplier or purchaser-provider partnerships. Whatever labels are employed to describe the contexts in which such partnerships are formed – internal market, market testing, social market – competition among organisations on each side of the relationship is essential to widen options and reduce the scope for exploiting market power. While the role of competition in imposing constraints and disciplines as well as providing incentives in the private sector and increasingly in the provision of public services is understood, there may be doubts about its relevance as a form of accountability in the field of regulation. But there is a case for considering it, at least in the form of "competition among rules" or mutual recognition of regulatory regimes, where there is an argument that rather than try to establish common rules applying to everyone, governments could enter into regulatory competition.

Finally, controls may be exercised over representatives so that they are accountable to the views of the constituents who select or elect them. This form of accountability ensures that representatives keep in touch with and reflect their constituents' views. Before jumping to the conclusion that this is always a democratic mode of accountability, it must be pointed out that in international policy making, representatives are often acting on behalf of their national government or even a ministry within it. The extent of public consultation, let alone participation, in formulating national negotiating positions may be quite limited. Widening the circle of constituents is necessary in order to make the regulatory process more responsive and transparent.

Even if the debate about accountability is widened to embrace these basic types in addition to the conventional hierarchical form, there is still a strong tendency to focus almost exclusively on the negative function of accountability: its use as a means of preventing or punishing failure and the **abuse** of power. This ignores **an** equally important function of accountability: setting the framework of performance criteria that guide performance and establish incentives for improved effectiveness.

Institutions of accountability should perform the negative functions of establishing checks and balances to limit the abuse and ineffective use of power. But if this is all they do, the consequence will be cautious, defensive administrative behaviour intended mainly to avoid errors and evade responsibility rather than to achieve results. Institutions of accountability should also perform the positive function of establishing a culture of regulatory management that promotes effective performance. This is a major gap at the present. While establishing new structures is usually perceived as a necessary step in multi-level regulations, developing a corresponding new culture is not seen in the same light. In business management thinking, this is no longer the case. The importance of establishing a culture that motivates and guides improvements in performance is now accepted as an integral part of organisational development and strategic management.

For public management in general and regulatory management in particular, the design of accountability systems that match the characteristics of inter-organisational networks is crucial to upgrading performance. The structural and cultural configuration of accountability systems should match and reinforce those of the corresponding management systems: peer group review to set professional standards as well as monitor performance; consensus-building processes to establish norms to guide representatives; market tests to establish terms of exchange and provide the basis for evaluating contract performance; central oversight to supervise hierarchies. Perhaps all regimes will require combinations of all four types, but the synthesis will be different in each case.

VII. Conclusions

Regulatory management is becoming an important area for public management innovation. The conventional hierarchical model of management that relies on direct central control of administrative operations does not address the problems of regulatory systems that involve collaboration among organisation at different levels of government.

A new model of management is needed in which regulatory regimes are viewed as organisational networks, in order to focus on how they are designed and managed.

It should be clear that this chapter has not attempted to make definitive recommendations about how regulatory relations between levels of government should be structured and managed. Given the diversity of contexts in which regulatory regimes develop it would be inappropriate to do so. However, the chapter does provide pointers towards the main kinds of problems of inter-organisational management that must be solved to create and operate reliable regulatory regimes.

Innovation is needed for a second reason. The main direction of public management reform at the level of individual organisations has been towards increased organisational specialisation and managerial independence. But the effectiveness and reliability of regulatory systems, especially where they span governmental boundaries, depend on managing interdependence This requires nnt just building up organisational capacities, but also strengthening mutual confidence in the ability and willingness of the participating organisations to play their allotted roles. Importantly, this means deliberate efforts at positive integration to create tightly-knit networks of inter-organisational co-operation rather than the loosely knit networks that have become such a common feature of public management reforms.

This introduces macro-management issues with important implications for government at subnational, national and international levels. First, an obvious but often neglected need is to know what organisations are part of a particular regulatory network and what roles they are expected to play. Mapping networks of organisations often reveals weaknesses or gaps that are not obvious from the micro-perspective of individual organisations. Furthermore, when such an exercise requires that the organisations themselves map their roles and mutual relations, it can also reveal sources of misunderstanding or disagreements that might prevent or obstruct effective co-operation.

Second, developing co-ordination capacities, administrative partnerships and frameworks of accountability involves a detailed knowledge of the responsibilities and relationships of the various organisations and an overview of the whole structure and organisation of the network. Regulatory management, therefore, requires both a micro and a macro perspective, together with the ability to integrate the two in the process of regime design and development.

Third, since there is no locus of central control in an organisational network, the design and development functions cannot be delegated to a single organisation. They must be performed as a combined effort in which responsibility for steering the regulatory system is shared. Ideally this requires the participation and representation of organisations from all levels of government involved in the functioning of the network.

Annex

Explanation of levels in the policy co-ordination scale

1. **Independent organisational decision-making**
   The first level is where each organisation retains autonomy and independence of action. Individual organisations formulate their own policy positions without reference to what others are doing. They rely on their own legal or political prerogatives. However, these are not unlimited. Each organisation recognises the jurisdictions of others. Each also recognises where its activities are interdependent with those of other organisations and therefore where it must be prepared to engage in managing interdependence.

2. **Communication to other organisations**
   Communication among organisations is the first step beyond independent action. Even though organisations preserve their decision-making autonomy, there may be norms and conventions which oblige them to inform others of what they are doing. At this level of the scale reliable and accepted channels of regular communication exist. Organisations ensure that others know what they are doing. More or less formalized information systems, computer networks and informal "grapevines" are specific means of reporting and acquiring information.

3. **Consultation with other organisations**
   Communication is two-way rather than one-way. As well as informing other organisations of what they are doing, organisations consult and receive advice in the process of formulating their own policies. This influence process may be quite extensive without infringing organisational autonomy. Consultation provides feedback from a variety of sources to an organisation which can then build this into its own thinking and decision-making.

4. **Avoiding divergences among organisations**
   Regulators seek to "speak with one voice". Mechanisms are developed to avoid open divergences of view among different parts of the regulatory process. Before making public commitments, organisations "clear their lines" by discussion and direct contact prior to defining policies and negotiating positions. Negative co-ordination such as this may not do more than hide disagreements from outsiders, but even that is an important pressure on officials to "get their act together".

5. **Inter-organisational search fur agreement**
   Instead of negative co-ordination to avoid revealing differences, regulatory organisations work together more positively to achieve consensus on common objectives and complementary policies. This more intensive positive co-ordination is more demanding and pro-active than (level **4)** negative co ordination. But it is still essentially a voluntary process in which organisa tions engage because they recognise their interdependence and a mutual interest in resolving policy uncertainties and differences.

6. **Arbitration of inter-organisational differences**
   Where inter-organisational differences of view cannot be resolved by the horizontal co-ordination processes defined at levels *2* to 5, central machinery for arbitration is needed. Third party arbitration resolves conflicts that organisations have not been able to solve for themselves. Again, this is negative co-ordination because the process of arbitration is essentially a reactive response to specific problems that have not been resolved by the lower level processes. The difference may be viewed as handing a dispute to a judge rather than settling out of court.

7. **Setting parameters for organisations**
   A central organisation or inter-organisational decision-making body may play a more active role by setting parameters (such as budget constraints) on the discretion of individual organisations. These limits may still leave them with a large measure of latitude within a common set of resource or policy constraints. Level 7 co-ordination defines what organisations **must not do** rather than prescribing what they should do.

8. **Establishing common priorities**
   A macro-level process of steering and guiding the development of the regulatory system as a whole by agreeing on main lines of policy. Clear regulatory priorities give a definite pattern and direction to the work of regulatory organisations and a clear set of expectations about how policy differences should be resolved. Common priorities provide a coherent framework for lower level policy-formulation and co-ordination. At the same time, their formulation and elaboration depend on the effective functioning of the lower level co-ordination functions.

9. **Overall governmental strategy**
   This is a limiting case. The network becomes a hierarchy. The regulatory system is treated as a totally unified policy-making system in which individual organisations are merely technically convenient instruments for elaborating and implementing a strategy based on the best available information and a well-defined objective function. Basic choices are made and handed down from above. This limiting case is included for the sake of completeness.

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Chapter 3

Managing regulatory rapprochement: institutional and procedural approaches

by

George A. Bermann

I. Introduction

National governments increasingly approach regulatory decisions with an eye on the existing or projected regulatory decisions of other governments. One important goal of doing so – in addition to the natural advantages of learning from others – is regulatory rapprochement.

The benefits of regulatory rapprochement are manifold. National regulators themselves may not have to reinvent the regulatory "wheel" if the regulatory problems they are addressing are ones that other governments, facing the same general problems and sharing similar standards of public protection, have recently addressed or are currently addressing. The stronger the technical and scientific component of the problem or probable solution, the greater the utility of co-operating between governments. At the very minimum, co-operation should produce an overall savings in regulatory resources.

Experience has shown too that regulatory rapprochement has the capacity not only to help rationalize rulemaking but also to facilitate various forms of technical co-operation in the implementation of the regulatory policies adopted. This is because, to the extent that their regulatory norms are the same or similar, nations may more freely exchange various administrative services with other countries (and subnational units with other localities). These administrative services include inspections, testing, and certifications. When products or commercial services move in trade across national borders – and especially when services are themselves cross-border in nature – there can be a very substantial advantage to borrowing other countries' administrative personnel, test results or attestations. Without common regulatory standards this cannot feasibly be done. (It should go without saying that nations will not borrow the technical services of foreign governments, even when they can do so, unless they have the requisite confidence in the

other countries' policy and enforcement capabilities. Establishing this is, of course, another matter.)

Industries – national and foreign alike – tend also, for obvious reasons, to favor a common and orderly regulatory environment. The fewer the divergences in regulatory norms, the less significantly businesses will have to adapt their practices to production and marketing rules governing different national and subnational markets. To the extent that they seek to influence regulatory policy, the private sector may also find it more efficient to address a group of national or subnational regulators debating a single regulatory package rather than separate national or subnational institutions debating distinctly local or national solutions.

The main theoretical drawbacks to international co-operation in rulemaking are substantive. First, the resulting regulations **risk** being insufficiently tailored to the individual regulatory needs of a given State or region. That State's problems may be somewhat different than the problems of others, or the solution that appeals to them may be inappropriate to it. In other words, the participants may have sought an unnecessary or undesirable degree of uniformity, and in the process have failed adequately to address issues peculiar to one or more States or regions. Second, the quest for consensus may have produced a "lowest common denominator" of regulation and one that consequently fails adequately to satisfy the public interest affected.

Another series of risks to intergovernmental regulatory co-operation is more institutional in character. Most governments have an established procedural framework within which the processes of national regulation take place. Although these procedures are presumably efficient for regulatory purposes, they may also accommodate other values – notably openness, public participation and accountability. These values may be difficult to reconcile with the realities of regulatory co-operation. Representatives of various public interests, as well, possibly, as small and local businesses, are particularly apt to find processes of intergovernmental regulatory co-operation to be remote and inaccessible, at least as compared to traditional regulatory processes at the national or sub-national level. The challenge is to construct a process of intergovernmental collaboration that, while efficient for its own purposes, still allows interested parties access to the process (including substantive aspects of the policies being considered) and an opportunity to be heard.

These and other risks inherent in regulatory co-operation will be addressed in this chapter.

The process of regulatory co-operation has been an uneven one. For example, Member States of the European Community no longer properly adopt regulations, even of their internal markets, without regard to the policies adopted or being adopted collectively or individually by the other Member States. Most countries, on the other hand, are under no compulsion to practice regulatory co-operation and, when they do, tend to do so unsystematically and less than comprehensively. In many countries – the United States among them – regulatory co-operation is practiced, if at all, on an agency (*i.e.*, ministerial

or sub-ministerial) level rather than a government-wide basis.* This means that whether and to what extent subnational, bilateral or multilateral approaches to national regulation are followed is decided upon a decentralized, agency- and mission-specific basis.

11. The dynamics of intergovernmental regulatory co-operation

The resources of different countries and levels of government obviously can be pooled in a variety of ways to improve regulation at all levels of government. The single term "intergovernmental regulatory co-operation" thus covers a potentially large number of co-operative formats. These run a wide gamut in terms of the closeness of contacts involved, and each formula along the way may he worth considering.

At one end of the spectrum lies a simple commitment on the part of governments to exchange information about existing regulations and about new regulatory initiatives. Under this approach, each participating government advises the others of the regulations currently in force in a given regulatory sphere, as well as any proposals underway (either through legislative or administrative channels) to alter those regulations or to introduce new ones. With respect to proposals, the undertaking could be simply to apprise other governments of the *fact* that they are under consideration, accompanied by draft language; or it could be to furnish the underlying technical and other information explaining the need for change and the reasons for preferring the solution proposed (possibly accompanied by an analysis of the regulatory alternatives that were also considered).

A variation on this theme would be for governments to commit themselves in advance to consulting counterpart agencies in other governments before taking any new action in a regulatory sphere. In the same vein, they may also commit themselves to giving those agencies the regular opportunity to participate in the national rulemaking process on any rule within the sphere of co-operation.

Moving to a still more intensive model, regulatory co-operation may entail the collaborative identification of regulatory problems to be addressed. This would represent a substantive advance on the simple exchange of information because, instead of sharing what each national regulatory regime has independently identified as worthy of further

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* A notable example of an agency-specific programme of international regulatory co-operation is the **US** Federal Aviation Administration's **(FAA)** development of rules on aircraft airworthiness certification in collaboration with the European Joint Aviation Authorities. The author's prior study of that collaboration, conducted under the auspices and with the support of the **US** Administrative Conference, culminated in a report published in Administrative Conference of the United States, Recommendations and Reports 1991, pp. 63 et seq. and (in modified form) in George A. Bermann (1993), "Regulatory Cooperation with Counterpart Agencies Abroad: The **FAA** Aircraft Certification Experience," 24, ***Law*** and Policy In International Business, **p.** 669. Based on this study and recommendations, the Administrative Conference adopted in 1991 a set ***of*** formal recommendations addressed to **US** administrative agencies generally on the subject ***of*** international regulatory co-operation. Many of the observations and suggestions made by the author in this chapter are drawn from the study and recommendations of the FAA study.

study and possible action, the participating governments would jointly discuss and determine their regulatory agendas. This presupposes some form of gathering, presumably periodic, in which representatives of the various administrations discuss, identify and possibly reach agreement on the problems most worthy of attention. Though each government would remain free to initiate a project of legislative or regulatory reform even if the other participating governments do not support it, and though each government would remain free to decline to participate in a project undertaken by the others, there is a good chance that a common core of issues will emerge that may then become the subject for further collaborative effort. Clearly this stage of regulatory co-operation presupposes the creation of some kind of intergovernmental regulatory forum.

This brings us to a third stage of regulatory co-operation, which is co-operation in the performance of various technical and policy analyses needed to arrive at regulatory solutions to the problems selected for action. It is easy to imagine how one or more working groups, composed of persons representing the various participating States and interested sectors, might be assembled to study jointly the technical and policy aspects of a problem. If successful, the working groups would reach agreement on how the problem may best be addressed to achicvc the desired regulatory results. Such groups would presumably report back to the intergovernmental forum that had commissioned their work.

After review, the intergovernmental forum would record in some manner its support or non-support for the working groups' various proposals. It would also strive to produce a regulatory text that meets the essential policy objectives, while also enjoying political support from the participating governments. The length of the process of debate, negotiation and possible reformulation of proposals ohviously would depend on the technical and political difficulty of the problem and on the number and variety of participating governments. The process could be further designed to produce a common regulatory text in draft form that the representatives of each government would undertake to shepherd through the administrative regulatory process in place in that government. Presumably, governments would agree to inform one another of the progress made in adopting the regulatory policy and of the various procedural or substantive obstacles that may have arisen in the process. Participating governments will most likely reconvene to discuss those obstacles and to help achieve a breakthrough if an impasse seems to have been reached or if discrepant regulations are likely to be adopted.

Unless formal arrangements to the contrary are made, all of the above will have been accomplished in the spirit of co-operation and mutual enlightened self-interestrather than out of legal compulsion or under the threat of intergovernmental or international sanctions. It would be possible, however, to place the system of regulatory co-operation that I have described on a formal treaty or other legal basis, expressing a sense of formal obligation for the participating governments. The effect of the obligation would depend in part on the sanctions, if any, built into the treaty framework, but it would also depend on the prevailing legal beliefs and practices in each State concerning the binding effect of treaties and other legal agreements and the effects of non-compliance.

It would, finally, be possible (though not likely) to structure what I have called the intergovernmental forum in such a way that decisions are made other than by unanimous

consent. These decisions might include the decision to study a given problem, to commission technical research, to approve or disapprove a regulatory solution, or to revise that solution in light of later surfacing difficulties (such as obstacles to adoption in one or more governments). If it were combined with placement of the system on a treaty basis or other signs of an international legal obligation, such institutional arrangements would entail in effect a substantial limitation on national sovereignty.

For purposes of this chapter, I posit a form of intergovernmental regulatory co-operation entailing more than the simple exchange of information, but not carrying any formal legal obligation on the part of governments or otherwise lessening their freedom to take or not take particular regulatory action. This assumption is based on the belief that governments that are seriously interested in international regulatory co-operation will support the creation of a regime that directly fosters the joint *development* of regulatory policy, but still disfavor giving up their ultimate regulatory authority.

Although the type of intergovernmental regulatory regime described here lends itself perfectly well to bilateral intergovernmental processes, the assumption is that *multilateral* co-operation will be initiated. It is further assumed, to simplify discussion, that any undertaking to co-operate will be made at the *national* level of the participating States and implemented there. In federal regimes, or other regimes in which the relevant normative regulatory power is lodged at regional and local levels, special accommodations would have to be made, although the basic concepts will still be largely applicable. Finally, as implied by the preceding description, the process would be a largely *co-operative* one that nevertheless allows room for a significant but necessarily indefinite amount of *negotiation.*

III. General management and policy issues

This section addresses problems relating to A) the establishment and maintenance of the kind of intergovernmental regulatory regime I have described and B) the need to ensure the conformity of the system and its results with the national interest and with established national policy.

A) Establishment and maintenance of intergovernmental regulatory co-operation

Putting in place and successfully practicing a regime of regulatory co-operation requires the establishment of certain conditions both at the national level of each participating State, and in the linkages among the various governments. This subsection briefly spells out the most significant of these conditions.

1. Statutory authority to participate

It is probably safe to assume that each participating State has constitutional authority to engage in the kind of regulatory co-operation outlined in Part II of this chapter. Whether the national administration, as such, has independent authority to initiate and

conduct the co-operation may, however, be less clear. This issue (which may raise questions of constitutional law) is particularly apt to arise where national regulatory power, instead of being lodged in a centrally managed national executive (or Government, in the parliamentary sense), is lodged in a series of federal or decentralised agencies each of which derives its authority from a separate and distinct act of the legislature.

2. *Co-ordination among national agencies*

When individual departments of the national government engage in sustained programmes of intergovernmental regulatory co-operation, the question also arises whether and to what extent they need to co-ordinate their activities with other national governmental units, particularly those units having a special interest in intergovernmental affairs. In the United States, for example, it is widely assumed that an agency that co-ordinates its activities with counterpart agencies abroad should inform, and enlist the advice and support of, such other entities as the Department of State (whose field is foreign affairs), the Department of Commerce, the Office of **US** Trade Representative and the Department of Justice.

Where international regulatory co-operation is to be conducted on the basis of a treaty, it becomes more than simply desirable – even essential – that the State Department (or Ministry of Foreign Affairs) be involved. It may actually have first-line responsibility for negotiating and signing the treaty document. This might take the form of a standing ''interagency" advisory group, possibly located in the Foreign Affairs Ministry. Such a group would promote the sharing of resources (including information relating to the effectiveness of the various co-operative arrangements in place). It would also be the natural conduit of information to the Chief Executive of the State.

Such co-ordination may be less important as a formal legal matter when the programme of co-operation involves subnational levels of government, although co-ordination among related regulatory programmes would seem to be wise.

3. *Political support for intergovernmental regulatory co-operation*

Experience suggests that, whether regulatory co-operation is launched centrally by the office of the Chief Executive or by individual national departments, the programme needs to have political support at the highest level of the unit responsible for its performance; otherwise it risks being considered marginal and expendable. By the same token, any understanding that two or more national governments will participate in the programme on a sustained and regular basis should be established directly between or among the highest levels of the responsible national units.

It is also important that authorities engaged in regulatory co-operation keep the confidence of regulated interests by safeguarding their right to information about, and access to, the co-operation process. This need is taken up more fully in Part IV on transparency and participation.

4. Identifying opportunities for intergovernmental regulatory co-operation

A national government may become involved in regulatory co-operation either as a general policy decided upon centrally within the government or legislature or as a result of discrete initiatives taken by national regulatory organisations acting more or less independently. There is no apparent reason to favor one approach over the other. If the former is favored, as it is in Canada, then the government should consider issuing an appropriate instruction to the various regulatory organisations to explore the possibilities within their areas of governance for fruitful regulatory co-operation. Presumably the government will already have in place a set of procedures for reviewing and supervising whether the regulators are satisfactorily following other instructions that it has issued to them, and these procedures could appropriately be used for purposes of reviewing and supervising compliance with this instruction as well. Ultimately, however, regulatory organisations would have to determine for themselves the useful opportunities for inter governmental regulatory co-operation within their respective spheres.

It is not very common that the government will mandate government-wide involvement in regulatory co-operation. More likely, as in the United States, commitments to such co-operation will be made in the first instance by individual regulatory organisations. Whether a given organisation does so will depend on, among other factors, the nature of its regulatory responsibilities and the inclinations of its leadership.

It is not feasible to prescribe an all-purpose strategy for regulatory organisations to follow in identifying opportunities for intergovernmental regulatory co-operation. However, they would usefully consult at least the following considerations:

- the extent to which the regulatory problems with which the regulatory organisation deals are similar to those that counterpart regulators in other governments face;
- the extent to which other governments share the same regulatory objectives in a given field and have similar standards for determining whether those objectives have been met;
- the extent to which the problems and probable solutions depend on social, economic and political – as well as technological – conditions that are similar in other countries or regions;
- the extent to which the identification of solutions entails fast-changing technology or fast-changing standards, and thus entails research and development costs that may advantageously be shared;
- the extent to which regulatory rapprochement in the field is desirable in view of the nature and scope of the activities regulated and the kinds of private interests affected;
- the extent to which regulatory rapprochement in the field would permit the useful sharing of technical services – inspection, testing and certification – among national and subnational administrations;
- the extent to which regulatory organisations have confidence in the technical and regulatory skills of counterpart organisations in other governments; and
- the pre-existence of bilateral or multilateral intergovernmental frameworks on the regulatory subject in question.

Authorities interested in exploiting the possibilities of regulatory co-operation will in any event find that regulatory consensus is easier to achieve if it is sought earlier rather than later in the process by which regulations are developed. Agreement is more difficult to reach after national regulatory positions have hardened. Moreover, success is more likely with regulatory proposals that are well-focused, concrete and narrowly defined rather than broad and overly ambitious.

5. Determining the scope of co-operation

Just as it is impossible to devise a single formula to identify opportunities for regulatory co-operation, so it is impossible to devise one for defining the field within which co-operation should occur or for selecting the governments with which to co-operate. Nevertheless, at some point the regulatory organisation in question must define the field and select its partners.

The scope of regulatory co-operation by a given regulator should in principle turn on the same factors that cause it to participate in such co-operation in the first place. Some regulatory issues will he ones for which regulatory rapprochement is important from the business point of view or from the point of view of economic efficiency; some issues will be ones on which pooling of government research and development resources makes a great deal of sense; some issues will depend on economic conditions, or implicate social or political values, that are likely to differ from one country or region to the next, with the result that a high degree of regulatory uniformity or harmony is not desirable or even attainable. Each regulatory organisation should have a sense of where, within its sphere of activity, regulatory co-operation makes most sense. If it doesn't, it should make the appropriate inquiry. Since all programmes – including intergovernmental regulatory co-operation – have their costs, regulatory organisations should strive to co-operate in the general fields and on the specific subjects that will produce the greatest net regulatory benefits.

Choosing partners for regulatory co-operation is a quite different matter because it involves assessing various attributes of administration in other governments, not in the abstract, but in reference to the particular fields and subjects of co-operation envisaged. The factors that hear on this decision include: 1) the degree of congruence in regulatory objectives and standards, 2) the level of confidence in other governments' regulatory capabilities (which of course have both technical and political components), and 3) the likelihood that the same goods and services will be marketed in the countries or regions concerned or move in trade among them.

There is no optimal number of governments with which to co-operate in regulation. An increase in numbers brings an increase in the scope of co-operation, but possibly also a lowering in its efficiency. It is important to bear in mind that some countries form regional groupings that already conduct a certain amount of international regulatory co-operation among their members by virtue of the association. The European Community is an obvious example. In undertaking to co-operate with the members of such a grouping, a third country will enjoy the benefits of the prior co-ordination taking place among them. For example, the US Federal Aviation Administration's co-operation with national aviation authorities throughout Europe was greatly facilitated by the Europeans having

already combined regulatory forces in the form of the European Joint Aviation Authorities.

6. *Intergovernmental linkages among decision structures*

Intergovernmental regulatory co-operation of the type envisaged in this report assumes an ongoing relationship among regulatory officials, and therefore an institutional (if not a legal) commitment. Because of its intended long-term life, participants need to focus not only on the substantive questions just taken up – whether to co-operate, on what issues to co-operate, with whom to co-operate, what form of co-operation to follow – but also on questions of intergovernmental institutions.

One of the co-operation models described in Part II presupposed that high-level regulatory officials from participating governments would constitute a kind of standing forum for discussion, debate and decision, as well as for follow-up. This forum would establish, however informally, the agenda for regulatory co-operation; it would identify items for immediate study and review; it would debate findings and results; it would seek consensus on regulatory policy on the issues studied and on the action that governments should take to implement it. Finally, it would be a forum for reviewing the progress or lack of progress in achieving the objectives established and for considering further action as needed.

It is suggested that the forum for intergovernmental co-operation established in a given regulatory sphere be convened at regular intervals, for example, annually. Decisions, so to speak, would be taken on those occasions, but would be based on the work accomplished by different technical and policy working groups that will have been established at a previous forum meeting, that will have functioned in the intervals between forum meetings and that will report back to the forum with the results of their work.

It is important, however, to avoid rigidity. The passage of a full year between annual meetings may be too great to accomplish what the participants want to accomplish. Semi-annual, quarterly or special *ad hoc* meetings may be needed; it should also be possible on some issues to delegate decisional authority to an ''executive committee" or "steering committee'' of the forum.

The point is that continuity and accountability in the process of intergovernmental regulatory co-operation require the institutionalization of contacts on a regular basis.

7. *Intergovernmental linkages among decision processes*

Even when national governments engage in regulatory co-operation, the power to make binding regulatory decisions typically remains, legally and politically, in the hands of the relevant national regulatory authorities. As explained more fully below, these authorities are bound, once again legally and politically, to observe the national statutory mandates from which they derive their regulatory powers. Put in operational terms, each national authority ordinarily must take the policies arrived at through intergovernmental regulatory co-operation and channel them through their respective national decision-making processes.

Because regulatory decision-making follows different procedures and timetables in different governments, it is important that participants in a programme of regulatory co-operation be familiar with the forms and processes – and the cultural byways – of regulation in each of the other governments. It is easy to imagine how misunderstandings may otherwise arise out of the special procedures ("impact analyses", for example), the delays and the political vicissitudes that the various regulatory processes may entail.

More generally, heightened knowledge of the other governments' regulatory institutions and processes help to produce and sustain the positive attitudes on which successful intergovernmental collaboration in any form depends. That attitude may be characterised as one of mutual confidence and trust. It seems clear that national offices will not be inclined to invest and keep investing resources in regulatory co-operation if confidence and trust are missing.

Linkage among national decision-making processes is thus simply shorthand for mutual understanding of the special legal and political features of regulation peculiar to each State. This will continue to be important until such time, if ever, as decisional authority is actually transferred by national regulatory authorities to the intergovernmental body in question.

8. Reciprocal intervention in rulemaking

An authority engaged in regulatory co-operation should explore ways to ensure that the authorities of other participating government organisations can take part formally in its procedures for adopting regulations within the sphere of co-operation. It should also secure for itself the opportunity to participate in parallel procedures of the other governments. The form of participation will of course depend on each government's procedural model for rulemaking. The following possibilities present themselves:

- Each government authority should formally notify its counterparts in the other governments of its intention to adopt a new regulation or modify an existing one within the sphere of regulatory co-operation. This will help avoid unintended disparities among government rules.
- Each government authority should inform its counterparts of the substance of the proposal along with the necessary technical and policy background.
- Each government authority should invite its counterparts to file written comments on the proposed rule or modification.
- Each national authority should consider the interventions of its counterparts in other governments to be an integral part of the national rulemaking process and treat those interventions accordingly. (This has particular implications for transparency and public participation in the national regulatory process, covered in Part **IV** below.)
- Participating authorities should consider initiating "parallel" or "concerted" proceedings for the adoption of regulations that they have jointly developed through regulatory co-operation.
- Participating authorities should co-ordinate their rulemaking procedures so as to avoid unnecessary disparities in the wording and presentation of proposals that are intended to be adopted in parallel fashion.

- Participating authorities should, if possible, modify their usual timetables for adopting national regulations where necessary to allow their partners in intergovernmental regulatory co-operation to participate meaningfully.

It is unnecessary to emphasize that, if the authorities involved in regulatory co-operation have followed the suggested practices of convening regularly, setting a common regulatory agenda, conducting joint research and development, and seeking a policy consensus on a particular regulation, this reciprocal involvement in each other's regulatory processes is more likely to occur.

B) Conformity of regulatory rapprochement with national law

The previous snh-section dealt primarily with the institutional conditions of intergovernmental regulatory co-operation. These conditions cannot, however, be viewed in a policy vacuum. The present sub-section addresses the necessity of also squaring intergovernmental regulatory results with national regulatory policy.

1. The policy framework of intergovernmental regulatory co-operation

If national authorities derive their regulatory powers from national legislation or decrees, then thcy must cnsurc that thc policics thcy ultimatcly adopt conform to those texts. This obligation is in principle unaffected by the fact that the authorities have chosen to pursue intergovernmental regulatory co-operation in the course of developing their policies.

It follows from this that each national authority participating in regulatory co-operation should communicate to the others both the national texts that bind them in their policy-making and their interpretation of those texts. Each authority should also conduct itself during all phases of regulatory co-operation so as to remain faithful to the principles embodied in those texts. In the end, adoption in a particular State of a jointly-developed rule may depend politically on its conformity with national law, and it may be subject to legal challenge in national court if it fails to conform with it.

2. *Accommodating regulatory rapprochement to established national policy*

As a practical matter, national legislation on a regulatory matter is often framed in generous terms, with broad delegations of power and generally-framed objectives. To the extent this is so, national authorities enjoy wide opportunities to develop a regulatory consensus with other governments, while at the same time still respecting the substantive requirements of national law. The co-operation model described in Part II encourages govcrnmcnts to scck to bridge their policy differences as fully as possible through negotiation. However, some discrepancies may remain when genuine policy differences among governments so dictate.

National authorities still must face the difficult question of how far to deviate, in the interest of intergovernmental regulatory rapprochement, from the policies that they would adopt if they were approaching the issue at hand from a purely national point of

view. This is inevitably a discretionary matter, one for the exercise of sound judgement. As a general matter, it seems that national authorities should be free to choose, from among several different policies all of which conform to higher national law principles, the policy that best advances the interests of regulatory rapprochement. Once again, however, authorities will be called on to make some kind of tradeoff between maximum achievement of national statutory objectives and maximum contribution to regulatory rapprochement. They should not feel categorically bound to reach consensus on a common text at all costs if their separate national laws or policies prevent that.

It is of course not possible to devise a formula to guide national authorities in their accommodation of these two purposes. **A** useful procedural safeguard against abuse in this respect would be to require that, whenever national authorities have been decisively influenced in their regulatory choices by the desire to achieve intergovernmental consensus (and more specifically to implement policies reached in an intergovernmental forum), they make this fact known early in the course of the national rulemaking process through which the measure is to be considered and eventually adopted into law. Furthermore, if the authorities have significantly altered their domestic regulatory preferences in the interest of intergovernmental rapprochement, they should make that fact known and indicate both the extent of the concession and the reasons for their willingness to make it.

3. Other policy risks to intergovernmental regulatory co-operation

Space does not permit exploration of other substantive risks to regulatory co-operation. One such risk is the possibility that private enterprises may enjoy much greater influence over regulatory authorities in one government than in another. If that is so, enterprises enjoying greater influence may gain an unfair competitive advantage from the intergovernmental co-operation taking place.

A related risk to be considered is that regulatory co-operation may have protectionist results particularly when it favors the business practices of enterprise in one or more countries or regions at the expense of enterprises in others.

IV. Transparency, participation and accountability

Contemporary thinking about administrative law and procedure places emphasis not only on decisional efficiency but also on certain other values, notably transparency, participation and accountability. This presents a special problem for intergovernmental regulatory co-operation because it does not naturally accommodate these values. This section of the chapter brings this problem into focus and suggests modes of accommodation.

A) Transparency

A principle of openness in regulatory decision-making means that persons affected by regulatory decisions are given reasonable notice of them before they are taken,

reasonable opportunity to observe the decision-making process, and reasonable access to relevant government documents. (This naturally leads to the further notion that such persons should also have reasonable opportunity to *participate* in the decision-making process itself. This last aspect is dealt with in the next section.)

Intergovernmental negotiation is not a procedural model that lends itself very well to openness. Left to themselves, intergovernmental negotiators naturally prefer the flexibility that comes with proceeding outside the glare of publicity. On the other hand, if transparency requires basic public information about the processes and policies of government, and if regulatory co-operation is to play an important role in those processes and policies, then transparency may require that information be made public about them too.

1. Public access to the intergovernmental co-operation process

Authorities that engage in regulatory co-operation thus need to decide when, how and to what extent they can afford to make the fact of such co-operation known to affected interests and to share with them procedural and substantive information about the co-operation that actually occurs. More specifically, authorities may consider the following steps:

- disseminating basic information about the scope and procedures of such co-operation and about the other governments involved;
- publicizing the agendas of the principal meetings of the intergovernmental fora managing the co-operation, as well as the principal policy conclusions reached at those meetings and the reasons for them;
- allowing representatives of the major affected interests to attend at least a phase or segment of the principal intergovernmental meetings;
- making public the principal written studies and reports made by the technical and policy working groups that the intergovernmental authorities have commissioned.

2. Disclosure of intergovernmental co-operation

The steps just proposed should in theory be taken at such a time and in such a way that interested persons may be aware of the process of regulatory co-operation at the time it is taking place. An obvious advantage is that these persons may then be in a position to communicate their views when those views may still make a difference **in the** co-operation procedure itself.

It should be remembered, however, that since the policies reached in regulatory co-operation still must be formally adopted as national policy in each participating State, there will be a second established opportunity for interested persons to become apprised of and acquainted with the process and results of the co-operation. Though it is then too late for them to influence the intergovernmental process as such, it is not too late for them to raise procedural or substantive objections to this process as a basis for challenging the policy then being debated in the national rulemaking process.

To provide for transparency at this later stage, national authorities may consider:

- disclosing in the national regulatory process the fact of the co-operation and the influence it may have had in shaping the national policy under debate:
- more specifically, indicating the regulatory alternatives that were or might have been considered to achieve national objectives, and the importance of regulatory rapprochement in leading national authorities to favor one result over the others; and
- estimating the sacrifice of national objectives that may have been made in order to form and preserve an intergovernmental regulatory consensus, and the importance of achieving such consensus on the regulatory issue at hand.

In the United States, which has an established public regulatory procedure, with hearings and a public regulatory file, it is easy to imagine how information about the previous intergovernmental co-operation, about its technical and public bases and about its influence over the resulting national **proposal** could be integrated into the national deliberative and decisional process. The same will be true of many other nations' regulatory procedures.

3. Conformity with national transparency legislation

This report cannot address the specific national transparency laws that may be in force in States opting to participate in regulatory co-operation. It is assumed that such laws – including laws on public access to government documents, laws on access to privacy files, laws on openness of meetings, etc. – must in principle be obeyed by national authorities even when engaged in intergovernmental regulatory co-operation.

On the other hand, such laws vary widely in nature and scope from country to country, and they may in any event contain different express exceptions for certain aspects of regulatory co-operation (*e.g.* a diplomatic negotiation or foreign affairs exception). It is obviously beyond the scope of this chapter to speculate on how such laws or their exceptions should be construed or applied. The matter, however, is an important one for national regulatory authorities to consider in determining the kind and degree of transparency with which they should operate.

B) Participation

A second norm increasingly respected in administrative law and practice is that of participation. This norm posits that persons affected by governmental measures should have a reasonable opportunity to be heard – that is, to express their views – on the merits of those measures before they are adopted.

I. Public participation in regulatory co-operation

Like transparency, participation is a difficult norm to integrate into the intergovernmental regulatory process. Once again, authorities engaging in regulatory co-operation need to consider when, how and to what extent they can afford to open that process up to public participation. In this section I consider whether the steps proposed in the previous

section on transparency may be extended so as also to allow public participation. Authorities accordingly may consider the following steps:

- allowing representatives of various interested groups to comment on the agenda of the principal meetings of the intergovernmental forum and on the principal policy conclusions reached at those meetings;
- allowing representatives of various interested groups to make written and/or oral presentation at those meetings, or at least at a phase or segment of them, on the principal regulatory issues under debate: and
- allowing representatives of various interested groups to comment on the principal studies and reports made by the technical and policy working groups commissioned by the intergovernmental authorities, and even to have a formal advisory role throughout all stages of the groups' work.

The authorities may actually take positive steps to encourage the useful presentation of information and views by interested groups. They may encourage these groups to form their own multinational or multi-regional groupings in order to share ideas and jointly develop solutions, and to present them to the authorities at the appropriate juncture.

The authorities should also consider whether representatives of regulated industries, other private interests and public interests (consumer protection, environmental protection, worker protection) are sufficiently inclusive and sufficieiitly representative so that no group with a claim to be heard finds that it is wholly excluded from the process. There are obviously severe limits, however, on the extent to which all of these interests may be allowed to participate in the intergovernmental process. The process risks becoming unwieldy and unworkable if the number and assortment of participants becomes too great or their mode of participation too intrusive.

2. ***Opportunity to be heard on the impact of regulatory co-operation***

As in the case of transparency, it is possible to create a second opportunity for public participation at the national adoption stage. As before, the national regulatory process presumably already affords some occasion for public participation, both in the expression of information and views and in the opportunity to comment on the information and views expressed by others. It should not be difficult within such a model to create an opportunity for interested persons to be heard on the process and substance of the previous regulatory co operation relating to the national mcasurc under discussion, as well as on the influence it may have had on the form and content of that measure. Once again, national authorities may consider extending the opportunities for transparency at this stage to provide for public participation as well. They might invite and otherwise permit interested parties to be heard:

- on the influence that prior regulatory co-operation may have had in shaping the national policy under debate;
- on the regulatory alternatives that were or might have been considered to achieve national objectives, and on the importance of regulatory rapprochement in causing national authorities to favor one result over others; and

- on the sacrifice of national objectives that may have been made in order to form and preserve an intergovernmental regulatory consensus, and on the importance of achieving such consensus on the regulatory issue at hand.

3. Conformity with national participation legislation

As previously noted, each State participating in regulatory co-operation may have a domestic rulemaking model that guarantees interested persons timely opportunity to be heard on proposed national regulations prior to their adoption. It is not the function of this report to address the scope and form of public participation in rulemaking at the national level. It is nevertheless worth suggesting that when national authorities afford interested persons the opportunity to be heard that is required under national procedural law, they treat the fact and the substance of intergovernmental regulatory co-operation, as well as its influence on the proposed national policy, as appropriate subjects for comment during the public participation period.

C) *Accountability*

Accountability raises the question of whether national authorities engaged in intergovernmental regulatory co-operation should render account to certain other designated authorities about those activities. We have already in effect discussed accountability to the public in the preceding two sections of this Part (under the rubrics of transparency and participation), and will 'not pursue that matter further. This section deals with accountability to other governmental officials.

There is a long list of public authorities to which departments engaging in regulatory co-operation could plausibly render account. Which of these should in fact be accounted to in any given State depends of course on that State's internal allocations of responsibility for governance. Listed below are the authorities and institutions to which an accounting might most appropriately be made:

1. The chief executive

When a State's Government or chief executive has mandated a policy of intergovernmental regulatory co-operation, it is important that it have the means of knowing whether the various national regulatory organisations required to conduct such co-operation are doing so and doing so effectively. Even when authority to initiate and conduct regulatory co-operation is lodged in individual national regulators, acting independently, the Government or chief executive has an interest in ensuring that their activities do not run at cross-purposes with each other or otherwise thwart overriding national policies.

2. Interagency advisory group

Reference was made in an earlier section to the utility of creating a standing interagency advisory group, which would assemble those departments of the national government having a "standing" interest in international or subnational political and

business affairs. These departments would ordinarily include the Ministry of Foreign Affairs, the Ministry of Commerce and the Ministry of Trade, to name the most obvious candidates. Such a unit is a natural clearinghouse of information about the practice of regulatory co-operation in general, but it could also be the office to which each agency engaging in regulatory co-operation could give an accounting of its activities. As earlier noted, this would also be a natural conduit of information to the chief executive for its own supervisory purposes.

3. Government management oversight agency

Even in the absence of an interagency group as described above, the executive branch has in all likelihood a unit charged specifically with oversight of the policy and efficiency aspects of government operations. (The nearest equivalent in the United States is the Office of Management and Budget or the OMB.) The effectiveness of a programme of intergovernmental regulatory co-operation, whether government-wide or department-specific, is an appropriate subject for its review and reporting (the latter, presumably, to the Government or chief executive).

If no such general oversight agency exists within the administration, consideration should be given to establishing a government-wide unit specifically charged with co-ordinating the country's intergovernmental regulatory efforts. One of the specific recommendations adopted in 1991 by the Administrative Conference of the United States on international regulatory co-operation (see footnote p. 75 *supra*) was that a meeting of the heads of relevant agencies be convened to discuss the need for establishing "a permanent, government-wide mechanism for organizing, promoting, and monitoring international regulatory co-operation on the part of American agencies".

4. Legislative oversight

The legislature also has an interest in reviewing both the efficiency of regulatory operations and the conformity of government programmes to national legislative policy. It would be possible for every committee of the legislature to review the intergovernmental regulatory co-operation programmes (along with the other programmes) conducted by the executive departments that operate within the fields for which that committee is primarily responsible. But the national legislature may also have a unit with surveillance authority on a government-wide basis. (In the United States, the General Accounting Office is such an organ.) Such a unit would be justified in conducting a generic review of the conduct of regulatory co-operation and a generic study of the effect of such co-operation on the achievement of legislative objectives.

It would be duplicative and wasteful for national government departments to give accountings of their intergovernmental regulatory co-operation efforts to all of the institutions mentioned. Where surveillance authority is most appropriately lodged is a question to be answered on a strictly national basis. In most countries, however, the Government or chief executive would probably seek and manage to assert this authority.

5. *Judicial review*

In few countries are national departments likely to report directly to the judicial authorities on the performance of regulatory co-operation, and that performance is unlikely as such to be the subject of judicial review.

It is nevertheless worth mentioning that when the courts review the legality of regulatory action taken, they most often review its conformity both to higher substantive law and to general norms of administrative procedure. If in its search for regulatory rapprochement, a regulatory organisation sacrificed prescribed national objectives or violated basic procedural norms (including transparency and public participation), the resulting measure may risk invalidation.

Judicial review is in general, however, a very indirect way to secure the accountability of agencies on account of their regulatory co-operation activities. **It** is the political branches of government, again mainly the executive, that are best situated to provide accountability.

V. Conclusion

This report has covered, in its author's view, the essential procedural and substantive issues to be addressed by national regulatory authorities as they embark on a programme, however limited, of intergovernmental regulatory co-operation. **As** noted, it assumes that governments wish to do more than merely exchange information or conduct occasional consultations. On the other hand, it assumes that ultimate decisional authonty continues to rest in national hands.

Even within the limited model of regulatory co-operation dealt with in this report, many of the questions raised have no simple answer. There is virtue, however, in identifying the procedural and substantive issues that those seeking to reconcile the virtues of regulatory rapprochement with the dictates of national law will have to address.

National authorities should accordingly give consideration to the following:

- Intergovernmental regulatory co-operation can run a wide gamut in form and entail a wide variety of mechanisms (*e.g.*, exchange of information, common agendas, parallel rulemaking, etc.). National authorities need to select among them.
- The decision in principle to commit resources to regulatory co-operation can either be made centrally or left to individual regulatory offices as they deem best. Certain institutions – like the Ministries of Foreign Affairs or Trade – may have a generic interest in the undertaking and should be associated with it. Through one mechanism or another, intergovernmental regulatory efforts of individual regulatory offices need to be co-ordinated.
- Any significant programme of regulatory co-operation presupposes the existence of a standing intergovernmental regulatory forum to provide the necessary linkage among governments' decision structures. By the same token, mutual

understanding of the other governments' distinct decision processes will promote the confidence and trust needed to sustain the programme.

- **A** variety of steps were recommended to integrate the regulatory institutions of other governments into the informational and decision processes prevailing in domestic law and practice. Regular notification of rulemaking is essential. One way to promote an even higher level of symmetry in this respect, and to maximise regulatory rapprochement, would be for government authorities to commence and maintain regulatory proceedings as far as possible on a parallel basis, to participate actively in other governments' processes, and to invite and welcome their reciprocal participation.
- Participating authorities nonetheless remain bound to respect established national law and policy on substantive aspects of the matters treated intergovernmentally. **As** long as these substantive limits are observed, regulatory rapprochement may be legitimately pursued. National authorities must set limits on the concessions to be made in the interest of co-operation.
- Where rapprochement has been a decisive factor in the national authorities' development of policy, it may be useful and proper for them to disclose that fact to participants in the national decision process.
- One way to compensate for any deficiency in transparency, participation or accountability is to ensure that the significance of these intergovernmental efforts are **fully** subject to disclosure, comment and accounting within the subsequent national decision process. Each participating government must in any case seek to bring its intergovernmental practices into line with binding national norms of transparency (including document disclosure), participation and accountability.
- On the subject of participation, governments have ways of giving interest groups an opportunity to know, influence, and even play an active role in the workings of intergovernmental processes. This can be made more effective by encouraging parallel co-operation among counterpart interest groups within participating governments. It can also be made fairer by widening the circle of interests and viewpoints represented. Shortcomings can be mitigated by expanding the opportunities for interested parties to comment in the national decision process on the possible impact of regulatory co-operation.
- Accountability needs to be provided through a means that is institutionally suitable for the particular government. In general, oversight responsibility is most effectively lodged in a unit of the Government or executive rather than in other arms of the government, although the legislature plainly has an interest in ensuring that intergovernmental regulatory co-operation is supportive of its policy mandates.

Chapter 4

Seeking mutual gain: strategies for expanding regulatory co-operation

by

James K. Martin and Alan Painter

I. Purpose

Chapter One, ''Regulatory co-operation for an interdependent world: issues for government" poses two important questions regarding the future of regulatory co-operation:

- What new or expanded approaches would be mutually beneficial at various levels of government?
- How should governments proceed to explore and promote these approaches?

In this chapter, the Treasury Board of Canada Secretariat (TBS), the central organisation responsible for the Government of Canada's overall regulatory policy, addresses both questions in order to identify:

- problems that can arise when governments try to co-operate; and
- a "strategy" that may prove useful to governments in determining how best to pursue co-operation.

Following an overview of TBS's position on regulatory co-operation, the third section reports on the experiences of Canadian officials involved in intergovernmental collaboration on regulatory issues. These experiences have not always been positive, but valuable lessons can be drawn to help identify those conditions that will open up future opportunities. The fourth section, building on these lessons, presents an approach that might be employed by governments to identify opportunities for collaboration, and to make success more likely. The chapter ends with a few key conclusions.

11. A synopsis of the TBS position

Chapter One describes well the new forces at play in the world – forces inevitably leading to the need for more regulatory co-operation. The TBS strongly believes in collaboration with other governments and levels of government in all aspects of regulatory programme management. This applies to both provincial and other national governments, and it applies whether collaboration is bilateral or multilateral. In fact, collaboration is a key requirement of the Government of Canada's comprehensive regulatory policy, approved by the ministerial-level Treasury Board of Canada in February **1992.'**

There are several reasons why Canada has adopted an explicit policy of intergovernmental regulatory co-operation. It has long been recognised, of course, that effective collaboration between governments can facilitate trade. While international economics **is** beginning to recognise that free trade is not always the best policy, we would agree with Paul Krugman that the gains from clever intervention over the free trade alternative are unlikely to be very impressive, even under the most supportive of conditions (Krugman, 1993). And we are not confident in the ability of any government to be consistently so clever. Gains from trade can be substantial, and trade can and should be facilitated through collaboration between governments.

For what may be very good reasons, some governments may be reluctant to pursue full-scale harmonization, but this need not interfere with the pursuit of significant mutual gain from other forms of co-operation with other governments. Substantial collaboration in programme management *below the level of harmonization* can also benefit all parties. Canada supports more co-operation than has been the case to date because it offers very practical benefits:

- Many critical problems can be solved only by working together, particularly in areas such as environmental protection, nuclear materials control, and international financial institutions;
- Markets, production, and financing are becoming global. Barriers to participation in the world economy would lower Canada's standard of living;
- Agrccmcnts such as the North American Free Trade Agreement have been signed, and their implementation requires greater regulatory co-operation;
- Within Canada, intergovernmental barriers to trade have become too costly to sustain;
- Canadian economic opportunities have been hurt by the trade barriers of subnational governments in other countries; and
- There is a growing gap between what citizens are prepared to pay for governments and the costs of governments. To the extent that collaboration leads to administrative savings, it must be pursued.

In short, there are good theoretical and practical reasons why Canada supports the pursuit of regulatory co-operation, and why the Treasury Board Secretariat welcomed the OECD initiative to hold a Symposium (see Foreword) on intergovernmental regulatory relations.

111. Lessons from the field

A) Progress takes time

In many national governments, line regulatory departments have had an almost exclusively domestic or subnational focus. Issues that crossed borders were generally poorly understood and often beyond the mandate of regulators; habit led to resistance to co operation. Government in Canada has not been immune from these tendencies, but regulators have had some experience in trying to expand the focus of domestic regulatory programmes to take into account cross-border issues.

At the international level, for example, the Canada-US Free Trade Agreement (CUSTA) established technical working groups to promote harmonization. Success seems to have been proportional to the previous experience in intergovernmental affairs of participating officials; progress was greatest when officials had been consulting with their counterparts for a number of years. Even where little progress was made, Canadian participants found the experience useful – attitude change has been significant, and networks between Canadian and American officials with similar responsibilities have formed. Such "on-the-job" training does not happen overnight.

Time has also been needed to resolve internal (*i.e.* inter-provincial) trade barriers within Canada. While an issue for provincial Premiers and the Prime Minister since the mid-1970s, serious priority was given only in 1984, and the first important success came a further seven years later in the form of an agreement on government procurement. Work had generally addressed individual trade barriers, and there exist hundreds of these. Obviously patience was a critical characteristic for anyone wishing to work on this dossier. Ministers, however, have been somewhat less patient; to achieve more rapid progress, Canadian governments launched in 1993 a GATT-like comprehensive negotiation process. The next year or so will demonstrate whether a comprehensive approach is more effective than an issue-by-issue approach.

The regulation of the transportation of dangerous goods in Canada is an example of how effective collaboration between diffcrcnt lcvcls of government can grow over **time.** While the courts have never established exactly where federal authority ends and provincial authority begins, the administrative system that has emerged works well. The regulations themselves are developed federally in consultation with the provinces, and are referenced in provincial legislation. The division of administrative responsibilities vanes by province, but full coverage is offered everywhere, and most everyone seems to be happy with the system that has evolved. So, for example, industry faces just one set of regulations throughout the country.[2] However, joint responsibility requires substantial consultations, and changes can be especially difficult to implement, given the complexity of the system. Amendments to the *Transportation* of *Dangerous Goods* ***Act*** initiated in 1990 were not enacted until two years later, due in large part to the time required to ensure that all provinces supported the new system. Substantial time and effort is also needed to co-ordinate day-to-day enforcement activities between Ottawa and the provinces.

Intergovernmental collaboration and co-operation requires significant attitude change, an appreciation of the benefits, an understanding of the interests and practices of other participants, and trust – and this takes time. It is a mistake to assume that anticipated mutual benefit is a sufficient condition for bringing about change. Progress can be slow, but substantial benefits can come with perseverance.

B) Progress requires substantial effort

Article 708 of the Canada-US Free Trade Agreement states that:

consistent with the legitimate need for technical regulations and standards to protect human, animal and plant life and to facilitate commerce between the Parties, the Parties shall seek an open border policy with respect to trade in agricultural, food, beverage and certain related goods.

Quoting from the same agreement, the goal was:

to harmonize their respective technical regulatory requirements and inspection procedures, taking into account appropriate international standards, or, where harmonization is not feasible, to *make equivalent their respective technical regulatory requirements and inspection procedures.*

This is an ambitious objective, one unlikely to be fully attained Despite significant progress in some areas, regulatory differences continue to restrict trade.

What were the barriers to harmonization? Canadian participants felt that progress was limited due in large part to cultural and administrative differences between the two nations. Here are a few examples:

- **policy preferences:** American approaches to labelling tend to emphasize informed consent, consistent with US reliance on tort liability as a regulatory tool. Canada tends to give more scope to the judgement of government officials, down-playing the role of the courts. This is just one example of a policy difference making harmonization difficult.
- **priorities:** Given limited resources, governments must be selective in the issues they pursue. Canadian and American priorities did not always coincide.
- **legal systems:** Different approaches to defining liability made harmonization of regulatory requirements impossible in some areas.
- **language:** The federal government's commitment to bilingualism is beyond question in Canada, and this made complete harmonization impossible in a number of areas.
- **the authority to negotiate in areas of sub-national jurisdiction:** The authority of each federal government relative to sub-national governments is complicated and often very controversial. Understandably, it was very difficult to reach agreement on issues largely beyond the control of the negotiators. Beyond the jurisdictional questions, both countries were reluctant to make the first move, since the disruption on domestic industries protected by trade barriers at the sub-national level would in some cases have been substantial. As a practical matter, officials on both sides could not always guarantee results.

- different interpretations of the same science: In many areas of health and safety. knowledge is uncertain. Uncertainty requires that political judgement be exercised, and the factors affecting Canadian and American decisions are usually different.

The North American Free Trade Agreement (NAFTA) includes a more detailed yet less ambitious approach to harmonization, as compared to the CUSTA. For agri-food products, for example, existing international health and safety standards become the baseline. However, each government has the right to set higher standards, provided they are scientifically based, internally consistent, and grant national treatment to firms from all signing nations. Signatories can be challenged under these provisions before a neutral commission, and retaliation is permitted if these requirements have not been met. While the goal of the CUSTA was harmonization, the NAFTA recognises the need for exceptions, but introduces discipline into the system to ensure that arbitrary standards are not implemented in order to create trade barriers.

It is important to set realistic goals, taking into account the many barriers to progress that may arise. Even if harmonization is not possible or desirable across the board, mutual benefit can still be gained by going part way – examples include providing for national treatment or mutual recognition of regulatory standards. Finally, harmonization may cost more than it is worth – a thorough cost-benefit analysis needs to be done.

C) Progress may require political involvement

The CUSTA technical working groups tended, not surprisingly, to be most successful on technical matters. There was real progress in many areas from the point of view of harmonization and facilitating trade. For example, the vast majority of differences in technical standards for veterinary biologics were resolved.

More progress was, in general, made by commodity-based working groups than by those who dealt with a number of different and often unrelated products. In part, the slower progress on issues that went beyond the solely technical was because officials were not prepared to deal with differences in policy. Differences in scientific interpretation can be resolved by experts, while policy differences require the participation of elected officials.

Policy matters and political issues inevitably arise as governments try to work together. To resolve non-technical issues when these arise, procedural mechanisms must be developed to ensure rapid access to elected officials who need, therefore, to be made aware of emerging issues on a continuing basis.

D) Progress requires industry and public involvement

In pursuing regulatory co-operation, governments will often be confronted with one obstacle above all others – they will have to cede some sovereignty to have more say over the actions of other governments. The public is understandably concerned when the

people they elect lose some control over matters that are important to them. Even if these issues can be resolved between governments to the satisfaction of all participants, public support is unlikely if the benefits of restricting sovereignty remain unclear.

Clearly the citizens of different countries or regions have different conceptions of the role of government regarding both what should be done and how it should be done. For example, governments in Canada place restrictions on the provision of private health care that would be viewed as inappropriate in the United States. The Canadian public believes markets should not operate in the area of primary health care; scarce health resources should be allocated in accordance with social insurance principles. Similar circumstances can arise in regulating other activities; it is not always appropriate to promote standardization in the face of national or regional preferences. Governments must be clear about the boundaries within which they wish to retain complete sovereign control.

The first lesson, then, is that governments need to be careful when examining actions that might limit sovereignty. The second lesson is that the costs associated with current entrenched approaches to policy, and the potential benefits of more co-operation between governments, must be shared with the public. Indeed, politically unacceptable proposals will emerge from intergovernmental negotiations if ways are not found to bring the public along. The technical demonstration of mutual benefit may not always be sufficient – intergovernmental co-operation must be seen and felt by the public as being in its interest.

Besides political acceptability there are sound reasons for ensuring adequate public input. Most importantly, officials may get it wrong; input from groups covering a broad range of interests and expertise is needed both to negotiate and implement agreements. For instance, Canada discovered, after it had already signed an international convention on the movement of hazardous waste, that it had a significant and unintended impact on the trade of scrap materials between Canada and the United States. Consultations with industry had been insufficient.

During the negotiation of the CUSTA, a number of Canadian businesses complained that the value of investments made under the existing regulatory environment would in some cases decline significantly if certain changes under discussion were implemented. This placed Canadian negotiators in a difficult situation, and in some cases led to the removal of particular proposals from the table. To what extent should government take these concerns into account? It does seem unfair that businesses should be punished for making decisions in response to what they assumed would he a stable environment. This is not the place to resolve this issue, only to point it out as a potential obstacle to achieving agreement. Certainly government needs to be aware of these effects, and presumably should also apply this knowledge. One approach would be to extend phase-in periods if the value of existing investments would otherwise decrease substantially.

The experiences of the federal Department of Consumer and Corporate Affairs[3] with nutrition labelling demonstrate the importance of consultation. A new system was established in the United States by the Congress in 1993; the only realistic option for Canada to achieve harmonization would have been to accept the American approach.

It might be thought that Canadian importers and exporters would support harmonization Through consultation with industry and public interest groups, however, it has become clear that the American system would make little sense in Canada because of excessive costs and the public's acceptance of existing approaches to promoting good nutrition. Where harmonization did make sense was in product compositional standards; having the same compositional standards in Canada and the United States will promote trade. On the other hand, the information presented to consumers will probably continue to reflect values that differ in the two countries.

It makes little sense to support regulatory co-operation when it runs against the legitimate concerns of industry and the public.[4] Harmonization, even if the normal ''default option", should be employed carefully and only after sufficient consultation.

The participation of the public, special interest groups and sub-natinnal governments is needed to ensure that agreements are both realistic and acceptable.

E) Progress requires that government obligations be spelled out

The CUSTA, as noted, set an ambitious goal (harmonization) without defining in detail the responsibilities and duties needed to achieve it. Many Canadian participants in the technical working groups felt that, in the absence of well-defined obligations, both sides were reluctant to make commitments that might be viewed as restricting national sovereignty. A government-wide approach and commitment to implementation would have helped. The search for compromise leading to mutual benefit might also have been facilitated by defining a set of principles that both countries could refer to in front of some dispute settling mechanism.

More explicit obligations were included in the NAFTA. Signatories must provide national treatment in the application of regulatory requirements, *i.e.* they must be applied in the same way to firms from all three nations. In addition, signatories may be required to demonstrate the need for regulatory requirements that may serve as barriers to trade, even if national treatment is provided.

All governments, of course, prefer to avoid limits on future actions, but the failure to limit actions can frustrate harmonization efforts. One of the technical working groups created under the CUSTA, for instance, spent a considerable amount of time examining nutritional labelling with a view to establishing similar regulations in Canada and the United States. During these discussions, the United States Congress passed the *Nutrition and Labelling Education Act,* which set out an approach significantly different from what was emerging from the negotiations.

Successful regulatory collaboration will sometimes require that all parties agree to specific restraints on future behaviour. Even if agreement is possible on objectives, benefit will not be obtained unless:

- **restraints on behaviour are identified and agreed to; and**
- **each party subsequently respects them.**

F) Progress may require new administrative control systems to ensure that obligations are met

Economic decisions take place within a wider context where political, legal, social, and attitudinal factors are very much in play. Institutional development at national and sub-national levels in the industrial world has been complex, often with little attention to intergovernmental issues. One result: intergovernmental collaboration in mature regulatory areas can be quite difficult. Pronouncing regulatory co-operation to be a government priority is necessary, but it is generally not sufficient to bring about results.

For instance, in trying to remove internal trade barriers in Canada, the federal government worked with the provinces for over 15 years. Despite commitments by provincial Premiers and the Prime Minister to avoid introducing new barriers, there has been only limited progress. This frustration led to adopting the GATT-like negotiation approach noted above.

Government commitments to co-operation must be more than words – actions are what matter. **Governments must recognise that implementation will not take care of itself. In some cases, new mechanisms may be needed to ensure that officials involved in harmonization efforts deliver the intended results.**

IV. An approach to regulatory co-operation

Based on the Canadian "lessons from the field" described above, the following appear to be important precursors to effective collaboration among governments:

- a positive attitude, patience, and mutual understanding and trust;
- realistic assessments of achievable goals;
- active political involvement in policy questions;
- clear obligations and restraints to meet stated objectives;
- administrative control systems; and
- industry and public interest group acceptance.

In this section, we draw on these precursors and the lessons discussed in previous sections to outline a strategy designed to help identify when co-operation is likely to succeed, and what can be done to make success more likely.

As noted in the other chapters in this report, regulatory co-operation is best understood as an arrangement among a loose network of partners, each with its own aspirations and agenda. To help decision-makers, we offer the following five-step strategy. Each step should be viewed as a task that each partner will need to carry out.

A. Define and balance the policy objectives and effects.
B. Examine the likelihood of success, in light of potential obstacles.
C. Set the stage for success: responsive laws and mutual trust.
D. Identify which approach to co-operation is best.
E. Seek practical and enduring agreements.

The remainder of this section presents guidelines for each step, as well as questions to pose when considering specific initiatives. These questions could, in fact, be considered as an informal "checklist" for decision-making on regulatory co-operation. Such a checklist, pulling together all the questions proposed below, is presented in Figure 1. The goal, as noted earlier, is a systematic approach that encourages the pursuit of mutual gain wherever it is possible to achieve.

A) *Defining and balancing policy objectives and effects*

Governments throughout the world are sometimes criticized for taking a narrow view of the public interest that is overly-focussed on abstract economic considerations rather than on a wider range of values and aspirations. But initiatives of regulatory co-operation will almost always involve non-economic values that must be factored into decisions. Before seeking partners for regulatory co-operation, it is necessary to give careful consideration to the wider policy objectives and secondary effects, keeping in mind that any policy decision rests on a careful balancing if there are competing values and objectives. In the end, the most important consideration will be the net effect that governments have on the lives of those whom they represent. The discussion below focusses on four sets of values that may either complement or compete with each other within a relationship of regulatory co-operation.

It is, of course, impossible to simultaneously achieve all objectives to the fullest extent. Achieving one may diminish another. There will often be tensions between improving welfare according to purely economic and purely social criteria, between increasing co-operation and preserving national sovereignty, between stability and responsiveness, and between democratic values and administrative efficiency. Trade-offs are inevitable. For that reason, it is important to take a broad look at all potential benefits and costs before entering a relationship of regulatory co-operation.

1. *Preserving National Values*

The very first task, when considering co-operation with other governments, is to determine what is not negotiable: governments must know the extent to which they are willing to cede sovereignty in order to gain more control over the actions of other governments. **All** participants will be frustrated if they **do** not know the boundaries of the negotiations – a frustration that could reduce the desire to enter future negotiations, to the long-run detriment of all parties concerned.

Relinquishing national sovereignty is always a difficult decision. Different jurisdictions, as was pointed out many times during the symposium, have chosen different approaches to regulating because of cultural differences. "Regulatory diversification" is a fact of life, and is very positive in many instances. But when does diversification cross the line into undue sentimentality and outright trade protectionism? Each jurisdiction is likely to have a somewhat different perspective on that issue, but decision-makers need to understand where they, and their potential partners, draw the line, and why.

√Q1 What fundamental communal values or preferences must be reflected in whatever agrccmcnt (formal or informal) emerges?

dQ2 Are there alternative non-regulatory approaches that, in conjunction with regulatory co-operation, could be used effectively to protect these non-negotiable values?

dQ3 Have the important costs and benefits, with respect to affected national values, been clearly identified? Are the benefit-cost trade-offs from regulatory co-operation acceptable to the public?

dQ4 Would regulatory co-operation contribute wider or longer-term social benefits, beyond the immediate policy objective, such as greater openness or better communication with other governments?

2. *Economic Welfare Objectives*

From a purely economic growth perspective, national (or sub-national) regulations that differ substantially from those of trading partners can be difficult to justify. A clear case must be made that the benefits of unique requirements outweigh all the costs. For example, welfare losses might arise from market distortions, or consumer choice may be restricted if it would be more difficult or expensive to import goods from other jurisdictions. To these potential costs of "non-rapprochement" should be added the potential benefits of rapprochement, including the potential for reducing administrative costs for governments carrying out regulatory programmes

√Q5 What are the likely "dynamic effects" on the economy of reduced trade barriers due to regulatory co-operation?

√Q6 Is there evidence that regulatory co-operation will increase the benefits or lower the costs associated with the specific regulatory programme under consideration?

dQ7 Will there be important redistributive effects from co-operation? If so, should disadvantaged parties be compensated to preserve the benefits of co-operation?

3. *Government Efficiency Objectives*

A common understanding among OECD member countries is that taxpayers are entitled to get value for money in the management of their regulatory programmes. In many cases, regulatory co-operation can save administrative costs. It is also the case, however, that maintaining a programme of regulatory co-operation can be costly. These costs, such as the cost of policy co-ordination or administrative delays, are often underestimated, and must be carefully considered before entering into arrangements with other governments.

dQ8 What arrangements will be needed to support the co-operative agreement so as to save money?

√Q9 What new negotiating fora and what new institutional objectives, roles, duties, and mechanisms will be required to put effective regulatory co-operative arrangements in place and maintain them? Will these be cost-effective?

√Q10 Will regulatory co-operation improve organizational learning within the bureaucracy? Has a strategy been developed to ensure that officials both understand the rationale for co-operation and are supportive about making it work?

4. Democratic Participation Goals

Public acceptance of regulatory co-operation, as noted, is fundamental to success. Governments can do a number of things to make acceptance more likely. Most importantly, they must provide interest groups and the public at large with information that demonstrates:

- the real risks of co-operation;
- the potential benefits of obtaining access to resources and markets in other jurisdictions, instead of relying exclusively on the home market;
- the benefits for consumers of greater standardization;[5]
- that contingency planning and monitoring systems are in place to minimise risks if the actions of other governments fall short of expectations;
- acceptance of co-operative practices by other jurisdictions; and
- that sovereignty is protected where necessary.

While governments can try to "bring the public along", they also have, in our view, the more fundamental responsibility to listen. **All** interested parties should be given the opportunity to communicate their concerns to officials involved in collaboration with other governments. Governments also have a responsibility to take these views into account as they negotiate, implement, and review intergovernmental arrangements.

√Q11 What new communication links and participation strategies **will** be required to ensure meaningful participation by affected and interested parties? In particular, have the potential costs and benefits of regulatory co-operation been adequately communicated to the public?

dQ12 Have procedures been developed to ensure an open and transparent decision-making process – a process characterized by "quality" information for citizens?

√Q13 Can citizens be guaranteed that if regulatory co-operation does not work in practice, it will be possible to disengage?

√Q14 Do potential network partners have in place procedures to ensure that **their** citizens accept regulatory co-operation?

B) Examining the likelihood of success, in light of potential obstacles

Even where governments are prepared to engage in significant harmonization, it may not be in the best interest of the country or region to do so, either because the costs of entering into co-operative arrangements arc cxcessive, or because developing a regulatory solution is not the best way to tackle the problem at hand. Governments need to apply clear criteria in making the latter determination. The OECD has developed an overview of the "checklists" used in several OECD countries to assess and design new regulations: This may provide a good starting point for examining whether a regulatory approach makes sense.

Many factors can discourage the move to more co-operation among governments. These include bureaucratic resistance, entrenched special interests which prefer the status quo to the uncertainty of a new environment, and simple ignorance about the advantages of working together. Given such problems, governments would do well to focus their

efforts on those areas that offer the greatest net benefits. Answering the following questions should help to identify promising areas:

√Q15 Where are the gains for all sides highest? Where are there few if any interest groups, entrenched bureaucracies or firms which have something to lose? To demonstrate the utility of co-operating with other governments in the development and management of regulatory programmes, early successes are needed. **A** demonstration of mutual benefit should increase the attractiveness of harmonization efforts in the eyes of interested and sometimes sceptical observers.

√Q16 Are there areas of immediate interest where other governments have significant experience and expertise? Governments should normally look first to international standards and regulatory approaches to see whether they can adopt what is already current practice elsewhere.

Generally speaking, the existence of long-established regulatory institutions makes it more difficult to pursue many forms of regulatory co-operation. Consequently, co-operation among governments is more likely to succeed in the regulation of new industries and/or product markets.

In the near future, biotechnology is one obvious candidate. In Canada at present, many departments are contemplating new regulatory requirements to deal with potential dangers. Work at the international level might lead both to more consumer protection and to more open markets for emerging product areas. Governments should **at** least get together to see whether agreement is possible on a set of objectives that can be used to guide the development of national regulatory programmes. In fact, the OECD is developing common principles for the hazard assessment of bio-engineered products.[7] In our view, Member countries should assign a high priority to such work.

Other areas to focus on in coming years include:

- all pre-approval regulatory programmes (drugs, food additives, pesticides, etc.) which are essentially science driven and which typically govern markets dominated by multi-national firms;
- any area where problems are clearly transborder in nature (global warming, ozone depletion, banking, etc.) and cannot be solved by individual governments;
- all health and occupational safety areas where governments can benefit from sharing information;* and
- transportation safety – much is being done now but more is possible to help shippers crossing borders.

C) Setting the stage for success

Co-operating with representatives of other jurisdictions can be a novel experience, especially since there are usually cultural differences. Representatives are paid by different governments, and have spent most of their time focused exclusively on the interests of their employers. And, as Metcalfe points out in Chapter Two, loyalty to one's own institution can easily erode commitment to the process of co-operation. In other words,

barriers must be overcome in order to identify and achieve mutual benefit. We will consider twn particular barriers, and what can be done to ovcrcomc them.

1. Establishing trust

The need for trust is obvious. We mention it because most Canadians participating in co-operative efforts emphasize it, and also because the issue was raised repeatedly at the OECD Symposium and by the authors represented in this report. Governments engaged in regulatory co-operation need both to establish and maintain openness and trust. Past attempts at regulatory co-operation have failed because participating governments were unable to achieve this.

To a great extent, of course, trust must be earned. Co-operative arrangements must he structured so that each participant is confident that all others will respect the terms of the agreement.

√Q17 Have rules of behaviour been clearly identified and agreed to by all partners?
√Q18 What procedures are available to verify compliance with the requirements of the co-operative arrangement?
√Q19 Have the pressures that have led or might lead to non-compliance of network partners been identified? Can anything be done to relieve or offset them?
√Q20 Should sanctions he applied for non-compliance? If not, how will non-compliance with norms be addressed?
√Q21 What contingency plans are needed to cope with a breakdown in co-operation?
√Q22 Will the approach chosen to ensure compliance appear credible to the public?

2. Promoting flexibility

The law itself can be a barrier to effective regulatory co-operation. Laws may create problems inadvertently (*e.g.* an access to information law may make public all information given to other governments); or they may prohibit the delegations of authority needed to make progress; or they may simply lack the flexibility needed to enter into or implement co-operative relationships.

The Treasury Board of Canada Secretariat is promoting a number of new approaches to regulation that may also be relevant to the pursuit of more effective co-operation between governments:

- more flexible laws, regulations, and administrative systems that allow for quicker responses to identified problems and opportunities;
- new approaches to consultation that focus on the government's objectives. Regulators will work with all interested parties to identify low-cost solutions agreeable to all participants. Experience to date suggests that a little creativity can protect the public interest and reconcile what may at first glance seem to be irreconcilable positions;
- ways to apply ISO-9000 quality management system standards that focus on how regulated goods are produced as much as on what is produced;[9]
- the application of third party certification of firms within regulatory systems; and

- ways to apply generally accepted quality management principles to the management of regulatory programmes themselves.

This thrust toward more flexibility and responsiveness is based on the belief that we must respond faster to changes in the environment, and that what matters most are policy essentials rather than technical details. A review of the examples presented in the previous section demonstrates that national rigidity can make it difficult or impossible to collaborate even in areas where mutual gain is recognised. Intergovernmental success is more likely if each participant's own regulatory regimes are sufficiently responsive.

In addition, three of these ideas can be applied directly to intergovernmental initiatives:

- the ISO-9000 series quality standards could be referenced in co-operative arrangements to serve **as** a platform for good manufacturing practice requirements in different countries, thereby reducing both compliance and enforcement costs. The co-operative arrangement would remain up-to-date as the quality standards are amended over time;
- third party certification could be used to satisfy regulatory authorities in different countries; and
- registration of regulatory agencies themselves to an ISO-9000 series standard could prove useful in overcoming doubts about the effectiveness of administrative systems employed by other governments, especially if third party registrars were used to certify compliance.

√Q23 Is the regulatory program flexible enough to permit harmonization or other forms of co-operation with other governments?
√Q24 Are there particular administrative practices (or administrators) in the way?
√Q25 Are there specific laws or delegated regulations that should be altered to facilitate co-operation where it makes good sense?
dQ26 Can more responsive solutions to regulatory problems be usefully incorporated into the co-operative arrangement?

D) Identifying which approach is best

Annex 1 to Chapter One identifies four types of regulatory relationships: co-operative, negotiated, delegated, and semi-governmental. Identifying which relationship is best suited to deal with a given programme area is important. Beluw, each kind of relationship is discussed briefly. Some general guidelines are offered regarding both where and how each might be applied. The problem of matching different kinds of relationships with opportunities is as complicated as it is important – the material that follows should be considered as a limited solution to only part of the problem. Nonetheless, these considerations may prove helpful when asking what type of regulatory rapprochement is desirable in a specific programme area.

Co-operative regulation: Sharing data and resources in pursuit **of** shared objectives is unambiguously good, and it is our view that this could and should be done considerably more than is presently the case. We would all benefit (and especially those of us who

represent comparatively small economies) from dividing up the work involved in the analysis of technical and scientific questions. **Such arrangements are feasible across virtually the entire spectrum of regulatory programmes,** and can be used to make many if not all aspects of programme management more cost-effective. Co-operation will inevitably progress slowly as partners come to understand and trust each other, but bureaucratic resistance to change or concern for job security should not be allowed as an excuse for not trying.

√Q27 What aspects of current regulatory programs duplicate efforts elsewhere? Where can more be accomplished by combining forces with other jurisdictions?

Negotiated regulation: The identification of mutually acceptable actions will increase in difficulty as the number of participating governments, that is, negotiators, increases. Obligations of participating governments will need to be clearly spelled out. To reach an accord, participants will have to define their objectives in relation to a collective interest that will not always be obvious. **As** a result of the time and effort required, the scope for negotiated regulation is much less than for co-operative regulation.

Responding to cross-border problems beyond the rapacity of individual governments to address would seem to require this approach. Potential areas of application include environmental problems, arms control, and the regulation of international and inter-regional transportation, communications, and finance.

√Q28 Where is it difficult to promote the public interest because of the behaviour of individuals, firms, or governments in other jurisdictions? Where are such problems likely to be reciprocal, that is, affecting all jurisdictions in the same way?

Delegated regulation: The formal granting of authority to an outside institution to define regulatory requirements is a difficult proposition for most governments, given the obvious restrictions on national sovereignty. In some cases, however, delegation can be accomplished without transferring authority. The example of the regulation of the transportation of dangerous goods in Canada has already been mentioned.[10] Ways can be found to share duties and responsibilities while maintaining sovereignty. Clarity with respect to rights, obligations, and limits, if any, placed on sovereignty is absolutely critical when making use of this approach to regulatory co-operation.

√Q29 Where does it make sense to have regulatory programs managed in whole or in part by other jurisdictions?

√Q30 What *quid pro quo* arrangements, if any, are needed to enter into administrative or formal legal arrangements to delegate authority?

Semi-governmental regulation: International standards are an alternative to national standards and other approaches to regulation. There are obvious benefits for world commerce from using international standards. Governments need to support the efforts of international standards writing bodies such as ISO and CENELEC, since all countries eventually benefit when trade is promoted. **Wherever governments now write their own standards, consideration should be given to simply adopting either international standards or those of their major trading partners.**

Two cautions are necessary. First, **mandatory** standards can restrict innovation if they are introduced too early, regardless of whether they are national or international.

Consequently, a thorough cost-benefit analysis is needed before making international standards mandatory. If such analysis is insufficient at the international level, individual governments will be more inclined to try and opt out. And second, there is a danger of cartelization as firms co-operate more internationally. Competition policy may become a global issue soon if it is not already – it may be a candidate for negotiated regulation.

√Q31 Do adequate international consensus standards already exist in the area of interest? If not, are trading partners willing to work together to develop them?

E) Seeking practical and enduring agreements

We emphasized in the discussion above that flexible and responsive laws and regulations are useful in their own right and make it easier to incorporate co-operative relationships with other governments. The terms of co-operative arrangements should also be flexible, for the same reasons outlined earlier. This is especially true if the goal is harmonization among the laws, regulations, or standards of different jurisdictions.

Harmonization offers advantages, but it can create problems if harmonized approaches cannot be amended easily to account for altered circumstances. In Canada, at least, it is hard enough to amend a single regulation even with established policies and procedures for doing so. Changing the terms of an international agreement would undoubtedly prove harder still. Ensuring that co-operative arrangements are adaptable should make them more useful and enduring; stability is useful in promoting investment and confidence, but at some point it leads to stagnation. This is an issue that each government needs to address before sitting down at the negotiating table.

√Q32 How can one achieve the needed balance between stability and responsiveness to change in arrangements for regulatory co-operation? Has a review and updating mechanism been built into the agreement?

√Q33 What conditions are needed to take into account changes in the future (*e.g.* from new technology)?

V. Conclusion

The preceding analysis indicates that regulatory co-operation is not easy – the reasons do not need to be repeated again. But co-operating with other governments addresses many of the highest priorities of the governments of OECD member countries, namely a lack of productivity growth and competitiveness, increased government debt and deficit problems, and excessive regulatory costs to the economy.

Given the potential for mutual benefits arising from regulatory co-operation, and the many factors that can interfere with realising these gains, governments should focus on ways to make success more likely:

- explore opportunities for mutual gain while being realistic about the limits of what can be achieved;

- give the negotiation and implementation of agreements a higher priority than has been the case, and recognise that a government-wide approach is needed;
- explain to the public the reasons why co-operating with other governments can benefit everyone;
- ensure that there are no statutory barriers to co-operation; and
- invest in building long-term relationships and in creating a positive climate favourable to collaboration (both inside government and with the public).

In addition, co-operation among supportive governments is needed to push the agenda forward. In this regard, the Symposium and this report are positive steps forward. The OECD, in our view, has an ongoing and important role to play in encouraging all of us to work together more co-operatively; it is in our own best interests to do so.

Figure 1. **A checklist for regulatory co-operation**

√Q1 What fundamental communal values or preferences must be reflected in whatever agreemcnt (formal or informal) emerges?

√Q2 Are there alternative non-regulatory approaches that, in conjunction with regulatory co-operation, could be used effectively to protect these non-negotiable values?

dQ3 Have the important costs and benefits, with respect to affected national values, been clearly identified? Are the benefit-cost trade-offs from regulatory co-operation acceptable to the public?

dQ4 Would regulatory co-operation contribute wider or longer-term social benefits, beyond the immediate policy objective, such as greater openness or better communication with other governments?

√Q5 What are the likely "dynamic effects" on the economy of reduced trade barriers due to regulatory co-operation?

dQ6 **Is** thcrc cvidcnce that regulatory co operation will increase the benefits or lower the costs associated with the specific regulatory programme under consideration?

dQ7 Will there be important redistributive effects from co-operation? If so, should disadvantaged parties be compensated to preserve the benefits of co-operation?

√Q8 What arrangements will be needed to support the co-operative agreement so as to save money?

√Q9 What new negotiating fora and what new institutional objectives, roles, duties, and mechanisms will be required to put effective regulatory co-operative arrangements in place and maintain them? Will these be cost-effective?

√Q10 Will regulatory co-operation improve organizational learning within the bureaucracy? Has a strategy been developed to ensure that officials both understand the rationale for co-operation and are supportive about making it work?

√Q11 What new communications links and participation strategies will be required to ensure meaningful participation by affected and interested parties? In particular, have the potential costs and benefits of regulatory co-operation been adequately rnmmnnicated to the public?

√Q12 Have procedures been developed to ensure an open and transparent decision-making process – a process characterized by "quality" information for citizens?

√Q13 Can citizens be guaranteed that if regulatory co-operation does not work in practice, it will **be** possible to disengage?

√Q14 Do potential network partners have in place procedures to ensure that **their** citizens accept regulatory co-operation?

√Q15 In identifying opportunities for co-operation, where are the gains for all sides highest? Where are there few if any interest groups, entrenched bureaucracies or firms which have something to lose? To demonstrate the utility of co-operating with other governments in the development and management of regulatory pro-

*(continued on **next page**)*

(continued)

grammes, early successes are needed. A demonstration of mutual benefit should increase the attractiveness of harmonization efforts in the eyes of interested and sometimes sceptical observers.

√Q16 Are there areas of immediate interest where other governments have significant experience and expertise? Governments should normally look first to international standards and regulatory approaches to see whether they can adopt what is already current practice elsewhere.

dQ17 Have rules of behaviour been clearly identified and agreed to by all partners?

√Q18 What procedures are available to verify compliance with the requirements of the co-operative arrangement?

√Q19 Have the pressures that have led or might lead to non-compliance of network partners been identified? Can anything be done to relieve or offset them?

dQ20 Should sanctions be applied for non-compliance? If not, how will non-compliance with norms be addressed?

√Q21 What contingency plans are needed to cope with a breakdown in co-operation?

√Q22 Will the approach chosen to ensure compliance appear credible to the public?

√Q23 Is the regulatory program flexible enough to permit harmonization or other forms of co-operation with other governments?

√Q24 Are there particular administrative practices (or administrators) in the way?

√Q25 Are there specific laws or delegated regulations that should be altered to facilitate co-operation where it makes good sense?

√Q26 Can more responsive solutions to regulatory problems be usefully incorporated into the co-operative arrangement?

√Q27 What aspects of current regulatory programs duplicate efforts elsewhere? Where can more be accomplished by combining forces with other jurisdictions?

√Q28 Where is it difficult to promote the public interest because of the behaviour of individuals, firms, or governments in other jurisdictions? Where are such problems likely to be reciprocal, that is, affecting all jurisdictions in the same way?

√Q29 Where does it make sense to have regulatory programs managed in whole or in part by other jurisdictions?

√Q30 What quid pro quo arrangements, if any, are needed to enter into administrative or formal legal arrangements to delegate authority?

dQ31 Do adequate international consensus standards already exist in the area of interest? If not, arc trading partners willing to work together to develop them?

dQ32 How can one achieve the needed balance between stability and responsiveness to change in arrangements for regulatory co-operation? Has a review and updating mechanism been built into the agreement?

√Q33 What conditions are needed to take into account changes in the future (*e.g.* from new technology)?

Notes

1. The Policy includes six requirements applicable to the review of existing regulations and proposals to regulate. Requirement 5 states: "the regulatory burden on Canadians has been minimized through such methods as cooperation with other governments."
2. The problem of duplication between federal and provincial regulations is dealt with in a different way under the ***Canadian Environmental Protection Act.*** Federal regulations do not apply if agreement can be reached on the adequacy of provincial regulations on a province-by-province basis.
3. The responsibilities of the federal Department of Consumer and Corporate Affairs have since been moved to the new Departments of Industry; Health; and Agriculture and Agri-food.
4. Determining whether a given concern on the part of industry is "legitimate" can be rather difficult, of course. Industry may fight against harmonization for three reasons: to preserve markets through trade barriers; to avoid unnecessary costs involved in meeting higher or different standards; and/or to avoid short run costs associated with change (the latter may be particularly important during recessions). The right response to concerns expressed by industry will depend on which factor predominates.
5. In practice, of course, individual consumers are unlikely to get involved, since they gain very little from each proposal. But since there are many proposals, and many consumers, the government may have a special responsibility to promote the interests of consumers as a group.
6. OECD, 1993. The OECD has also been asked to prepare, on the basis of existing checklists and for the consideration of Member countries, a summary "reference checklist" that may be used by governments seeking to improve the quality of regulatory decision processes.
7. The OECD expert group on biotechnology safety, involving 100 experts from 20 countries, has been working for over 10 years. See, among other reports, the recent "Preamble to Reports on Scientific Considerations Pertaining to the Environmental Safety of the Scale-up of Organisms Developed by Biotechnology", OECD, 1993, Paris [OCDE/GD(93)92].
8. Canadian officials report, however, that concerns about sovereignty tend to be raised especially in response to health and safety issues. In this respect, public resistance may be as important as the power of those groups which benefit under the existing system. **As** noted, care must be taken to explain to the public the benefits of greater co-operation.
9. The ISO-9000 series apply, not to product specifications, but to the systems that produce the product (or service). **A** registrar assesses and approves the methods the firm employs in a number of areas, including design, development, production, installation, service, inspection, and testing.
10. In fact, the federal Minister of Transportation can enter into agreements with individual provinces to deal with any disagreements that might arise. In this way, the provinces maintain some control, even though the regulations are primarily the responsibility of the federal government.

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Chapter 5

Regulatory co-operation through computer assisted solutions

by

Jon Bing

I. Introduction: using computerised information systems for regulatory co-operation

This chapter will discuss the use of legal information systems as a tool for improving co-operation between regulatory managers at different levels of government. ''Regulatory managers" include a range of persons in different roles. At the highest level are the decision-makers, including not only the members of parliament who enact statutes, but also officials of government, or of government agencies, who issue regulations on the basis of authority derived from the constitution or from specific statutes.' "Kegulatory managers'' also include the administrative officials and experts in regulatory departments who, in response to policy decisions, identify specific regulatory proposals and, perhaps on the basis of a hearing or public consultation process, draft regulations. Also included are the analysts who assess proposals for their impacts on society, and for their administrative or economic consequences. Finally, central reviewers who oversee the regulatory system and review regulatory proposals to evaluate whether regulations are optimal, and consistent with changes in policies, society or technology, are also potential users of legal information systems to improve regulatory co-operation.

This is a rather large group of persons. One may also include those outside the government who take an interest in regulations on a specific subject and who may wish to evaluate current regulations or review new proposals – this group may include organisations for trade, interest groups, political parties, and lobbyists.

"Regulatory managers", thus broadly defined, have one thing in common: they are not working with regulations to solve case-specific legal problems – as would be a lawyer, a judge or a case handler in a public agency. Rather, their interest is of a more general nature. They view regulations as tools for organising society, for stimulating or restraining certain activities, solving conflicts, and so forth. In a sense they are social engineers. In our context, it should also be emphasised that developing, maintaining, and updating regulations is a dynamic process. It does not end once a regulation has been adopted – it only enters a new phase in its life cycle.

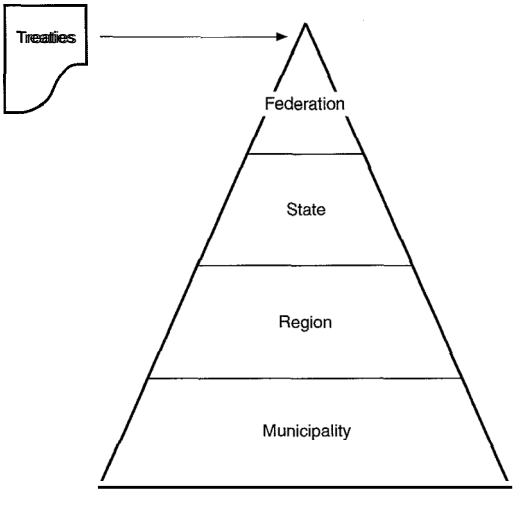
It is also the case that a regulatory manager is contained within a single *jurisdiction*, that is, a single legal system. The primary point of departure is the sovereign state, defined by its own constitution and recognised under public international law. But, for the regulatory manager, an emphasis on the single legal system of the sovereign state would be misleading. The state may itself have an internal, rather complex legal structure encompassing various levels of government, and it will be part of other structures through international agreements. The result will be a complex structure of interlocking legal systems, as suggested in Figure 1.

Internally, a state typically is divided geographically into smaller jurisdictions – regions and municipalities. These smaller jurisdictions will have authority to issue regulations for certain matters. A town, for example, will usually issue by-laws on its own affairs.[2] There are also federal states,[3] which are organised in many different ways (one may think of the constitutional basis for nations as different as the United States of America, the United Kingdom,[4] and Switzerland).

Externally, the state will be party to a number of agreements. One definition of a sovereign state is that, within its jurisdiction, other states and organisations cannot impose legally-binding regulations. The sovereign state can, howcvcr, frccly make an agreement with one or several other states and in this way accept obligations under international law.

In a sense, it may also be misleading to talk about public international law as "one legal system". Though there are international rules that are commonly held to apply to all

Figure 1. **A simple model of interlocking regulatory jurisdictions**



states, primarily of customary nature, the regulation applying to a certain state will depend on the agreements to which that state is party. The combinations of all these agreements constitute the international public law for that state, and this will probably – at least in detail – differ from the international public law affecting any other state.

Relations between the international agreements, treaties and conventions in force, on the one hand, and national legal systems on the other, fall into two categories. In some states, the national legal system incorporates these international legal instruments and makes their rules directly applicable within the jurisdiction, by, for instance, the national courts. This is called the *monistic principle.* In others, an explicit transformation has to take place, typically by drafting a national regulation containing the substantive rules of the international legal instrument. This is called the *dualistic principle.*

In the latter case, one must distinguish between the rules of public international law, which apply to the state, and the national regulations based on the international legal instruments. In this case, it is quite possible that there is a discrepancy between the two sets of rules; the state may have failed to comply with an obligation under international law and to transform the appropriate international legal instrument to national law, or an inappropriate interpretation may have occurred in the transformation process. This creates a rather complex situation, flowing from the fact that there does not exist a single, supranational regulatory authority.

In certain cases, nations have formed groups unions[5] – through treaties which have created supranational agencies whose authority and decisions the sovereign states have agreed to follow. A very strong version of such a union is the European Communities, in which the European Court of Justice in Luxembourg decides matters of Community law that will be applied by national courts. The union resulting from the European Economic Space Agreement will be similar, though somewhat weaker. But there are more limited examples of the same, such as the countries that have agreed to accept the dispute resolution mechanism of the International Court in the Hague, the decisions of the Human Rights Commission in Strasbourg, and so forth down to the rather weak forms of dispute resolution that are part of agreements such as the GATT.

This gives some indication of the complexities of interlocking jurisdictions, and why it is necessary for regulatory managers to co-operate with their counterparts in other jurisdictions. There are at least three distinct reasons for managers to co-operate to obtain information on regulations existing on different levels in the hierarchy of regulations:

Consistency and compliance. Regulations within a jurisdiction should be consistent. This requires that managers be aware of regulations existing on higher levels of the hierarchy and on the same level, A regulation issued under the authority of a statute should obviously not be in conflict with the statute itself – or with other statutes. And regulations issued by one agency should not be in conflict with those issued by other agencies. To ensure consistency and compliance with superior regulations, regulatory managers must have access to the stock of existing regulations. Systems should be set up to access the regulations in force (this is generally addressed by national legal information services), and there should be routines for notification when reform is being considered in certain areas so that efforts may be co-ordinated at the earliest stage (this is generally addressed within a jurisdiction by a regulatory agenda or similar system).

Learning from the experience of others. There are several reasons why different regulatory managers may be faced with the task of developing regulations of a similar nature. The most basic reason is that our societies – though contained in sovereign national states – nevertheless share many of the same characteristics, and develop under the influence of many of the same forces. Therefore regulatory managers in different countries may be faced with the task, for instance, of developing **a** regime for the protection of integrated circuits, or setting standards for traffic safety.

Another reason may be that a decision made on a higher level in the regulatory hierarchy must be implemented in parallel on the lower levels. For instance, a directive from the Council of the European Communities must be implemented in the national legislation of the member countries. The provisions of a new treaty to reduce the use of freon must be implemented in national environmental regulations – perhaps in a large number of regulations governing different industries in different states.

In such cases, the regulatory manager may want to look at existing regulations in other jurisdictions to facilitate developing and drafting the regulation. This may be combined with a comparison of regulatory strategies in different jurisdictions so that one is better able to choose the right strategy for one's own jurisdiction. Looked upon in this sense, the world becomes a laboratory of regulatory experiments, yielding information and results for the benefit of regulatory managers.

There are many obstacles to being able to benefit from this wealth of information: language barriers, differences in basic principles on which jurisdictions rest, and so forth. But clearly, without sharing information, none of these benefits can be reaped.

Control and audit. Finally, the issue of control should be mentioned. This also has several aspects. The loyal regulatory manager **needs** information to ensure that new regulations being developed actually comply with requirements from higher levels in the hierarchy, and are consistent with regulations both on higher levels and the same level in the hierarchy. The counterpart to this is the regulatory manager on a higher level checking that regulations on lower levels actually comply and are consistent with the higher-level requirements. Regulatory managers in international organisations, for example, would often like to keep track of the national implementation of an international agreement by the members of a union.

But there may also be a need for regulatory managers in one jurisdiction to check that regulations in a neighboring jurisdiction actually comply with mutually-accepted higher-level requirements. **A** nation will be concerned that a balance is kept in the international community. For instance, actions taken to improve environmental control may have a cost that increases the prices of goods or services offered on the international market. Regulatory managers loyally implementing measures which flow from an international agreement will – quite reasonably – have an interest in checking that the other members of the union likewise implement the provisions.

International co-operation and trade. It may be argued that a fourth reason for co-operation should be noted. Regulatory managers implement policies which in many cases emphasise international co-operation and trade. In developing national regulations that promote such policies, it would be desirable to have knowledge of the national regulations of trade partners and others. This is, however, an interest closely related to that of

compliance and consistency. This aspect will therefore not be singled out for discussion in this paper. But it is rather obvious that for government officials in charge of developing policies, or for lawyers advising clients, the main interest in national regulation in other countries will be that they are part of the legal framework in which international trade in goods and services takes place.

In this paper, we will briefly discuss some ways in which computerised information systems can help to satisfy the information needs of regulatory managers with respect to regulations at other levels of government, and provide a basis for regulatory co-operation, with an emphasis on the relations between national and the intra- or supranational obligations of this state. One will note that the two perspectives – access to international regulations for national managers, and access to the national implementation of such regulations for international managers – are but two sides of the same coin. In the following we will focus on these two main perspectives, and will mention two areas of law where international co-operation would seem to be rather strong.

11. National access to international regulations

A) Introduction: early initiatives

There are special problems with the documentation of international agreements. For instance, an agreement may have several formal versions, and a state may not be party to the treaty in its latest revision. Also, agreements often have an authentic language different from the official language of the nation. In this case, the agreements may be documented both in the official version and in translation – creating a situation of multilingualism similar to that discussed below.

The complexity of the problem of determining which agreements are in force between a state and any other state has been attractive to those concerned with legal information services, and in the late 1960s played a rather major role in supporting the exploration of computerised systems.

The major example may be Hugh Lawford's initiative at Queen's University in Kingston, Canada. Since 1961, the university has been engaged in a Treaty Project, collecting and annotating the treaties of the British Commonwealth. In 1967, word processing was introduced. The Treaty Project has been used in preparing the treaties of a number of developing countries. In 1968, the Queen's University Institute for Computers and Law (QUIC/IAW) was funded based on this project. The initiative is basic to what is today known as QL Systems Ltd, a computer and communication service offering legal information services for the whole of Canada. The initial relation to the Treaty Project has not, however, led to an emphasis on international legal instruments.

In 1968, the Committee of Experts on the Publication of National State Practices, located within the Field of Public International Law at the Council of Europe, recommended to the European Committee on Legal Co-Operation (CJJ) that a committee of experts should be appointed to study "the question of harmonisation of technical means of programming international treaties into computers", which led to the establishment in

1969 of the committee which today is known as the Committee on Legal Data Processing in Europe (CI-IJ). Again, in spite of the initial relation to treaties, the activities of the committee have not been especially concerned with the special challenges of international legal instruments, but rather with more general issues. Its activities led, however, to the computerisation of the Council of Europe Conventions (which are made available to interested member countries in computerised form), and to an interest in treaties among some of the member countries represented at the Committee. A prime example was the establishment of the now discontinued system RBERTRAT (1972) by the Spanish Ministry of Foreign Affairs (Bing *et al.*, 1984).

Today, treaties are included on data bases within a large number of national legal information services.[6] Some international organisations, such as the Council of Europe's activities mentioned above, have computerised the international agreements for which they are responsible. Generally, the volume is quite limited, and the organisation will ***not*** organise computerised services for outside users, though the treaties may be available to interested parties.

It is also often of interest to determine which other countries are party to a certain treaty. This is a task that is hardly appropriate for any national legal information service. Traditionally it is solved by the treaty itself designating a depository that is charged with the task of keeping track of the countries that are parties to the treaty. Such a depository may be an international organisation, which may again rely on a computerised system.

These continue, however, to be only partial solutions. A more general solution may emerge out of the United Nations register of treaties. At the 28th session of the General Assembly (1973) a proposal for the establishment of a United Nations Treaty System was adopted, although this system has apparently yet to be established.

B) Access to supranational regulation: the European Communities and the CELEX service

There is one major exception to the lack of organised access to international agreements. In 1967, the European Communities took the initiative to create a legal information service, known as the CELEX (from Communitatis Europaea! Lex), that first became operational in 1970. The CELEX is today a major service covering all aspects of Community law, and is a prime example of the value to regulatory managers of having on-line access to directives and other instruments to which their national regulations must conform.

The CELEX service is available on-line to subscribers and is a rather conventional service based on text retrieval.[7] The data bases are in English and French, and bases for the other languages of the Community are in preparation. CELEX offers its data base to other services and is quite happy to have such subcontractors distribute its material through their own networks. The British Context service has produced a version of CELEX in the form of CD-ROM. Several national information services[8] have had the whole CELEX data base transferred and offer this with national material and under their own softwares.[9]

The CELEX system not only documents community law as such, but also the international agreements to which the community is a party. The CELEX sector 1 documents treaties, and sector *2* international agreements. An example of an entry in the sector 2 data base follows:

Figure 2. **Example of CELEX document of international agreement**

DOC. NUM:	281AO122(01)
TITLE:	COMMUNITY-COST CONCENTRATION AGREEMENT ON A CONCERTED ACTION PROJECT IN THE FIELD OF TELEINFORMATICS (COST PROJECT 11 BIS)
PUB. REF.:	OFFICIAL JOURNAL NO. L 350, 23/12/80, P. 0046 GREEK SPECIAL EDITION...: **CHAPTER** 16, VOLUME 02, P. 46
AUTHOR:	EUROPEAN ECONOMIC COMMUNITY; FINLAND; SWEDEN
FORM:	AGREEMENT
TREATY:	EUROPEAN ECONOMIC COMMUNITY
DATES:	OF DOCUMENT...: 04/12/1980 OF END OF VALIDITY: 11/09/1983
PUB:	1980/12/23
DOC:	1980/12/04
LEG.CIT:	157E...
379DO783...	
380 D0317...	
TEXT:	++++

The text follows, but is excluded here.

The value of such a system for regulatory co-operation becomes especially evident if a country joins the Communities at a later stage. In 1981 Portugal requested entrance to the Communities. **At** the same time, the Gabinete de Documentação e Direito Comparado da Procuradoria-Geral da República started its operations. The Gabinete was linked to CELEX in 1984 and served as a consultant for the public administration, worlung for the Ministry of Justice, the Law Reform Commission, the Prime Minister's Office, the Prcsidcnt, and thc Parliament. Today, thc Gabinctc is spccialised in comparativc law and use of a variety of foreign information services which are consulted as **part** of the process of national regulatory management.

A similar situation exists today for countries that have negotiated the European Economic Space Agreement[10] that will, when (and if) the agreement takes effect, require that national legislation comply with Community regulations. Obviously, access to CELEX on-line, by purchase of the data base for integration in a national service, or by

the available CD-ROM, is very useful. However, a special solution to facilitate the work facing national regulatory managers has been implemented in Norway.

Here the CELEX data base has been imported into the national system, Lawdata. A secretariat within central government is responsible for national co-ordination of the amendments that have to be made to national regulations. This secretariat has developed a number of notes in which the necessary amendments are discussed. These notes are themselves documented as a data base in the Lawdata system, and citations of both national and community regulations are activated as hyperlinks. In this way, a regulatory manager may read the note, and consider the changes to be made. He or she may need only a simple keystroke to jump into the national regulation under discussion, then back to the note, and onwards to the cited Community regulation.

Figure 3. **Using CELEX in the Norwegian Lawdata system**

Most international agreements do not have associated case law on an international level. The exceptions are few, but one such exception is the Commission and Court of Justice created by the European Convention of Human Rights.[11] The Council of Europe has converted the decisions of the Commission and Court to computerised form, and it is expected that the data base will be made available on-line to outside users.

C) Access to International Regulations: Summing Up

Despite considerable interest in the 1960s and 1970s, information technology has not yet delivered on the hopes that it would provide easier access to international treaties. Yet, given the proliferation of international treaties and agreements since the 1980s and advances in information technologies, its potential for bringing order, openness, and accessibility to the international legal system is greater than ever.

111. Access to information on national implementation

A regulatory manager in one country may be greatly interested in how another country has implemented a certain international agreement. There may be several reasons for such interest. It may be useful to have models for drafting new national regulations, or it may be of interest to explore how another country interprets an international legal instrument, perhaps to determine whether that country complies with the international rules.

This interest is shared by regulatory managers in international organisations, who would like to keep track of national regulations implementing the agreements for which their organisations are responsible, as well as national decisions based on such regulations.

Traditionally this type of information has been collected and distributed through specialised journals such as the journal *Copyright* published by the World Intellectual Property Organisation, which is responsible for the Berne Convention on Copyright. In this journal, relevant developments within member countries are discussed, and through comparative studies, national differences are analysed. There may also be academic research centres for certain areas of law that attempt to keep track of developments in many countries and that may publish digests, analyses, encyclopaedias, etc. In this paper, we will not be further concerned with these conventional efforts, though we should note that they are still the main tools for informing those interested in national implementation.

Figure 4. **Example of CELEX document on national implementation**

DOC. NUM.	76111513GR
TITLE:	GREEK PROVISIONS RELATING TO: COUNCIL DIRECTIVE ON ADMINISTRATIVE PRACTICES AND PROCEDURES CONCERNING SETTLEMENT, EMPLOYMENT AND RESIDENCE IN A MEMBER STATE OF THE COMMUNITY OF WORKERS AND THEIR FAMILIES FROM ANOTHER MEMBER STATE
OFFICIAL JOURNAL NO.	P 080. 13/12/1961. PAGE 1513
AUTHOR:	GREECE
FORM:	NATIONAL IMPLEMENTATION MEASURE
TREATY:	EUROPEAN ECONOMIC COMMUNITY
TYP. DOC.:	7; NATIONAL MEASURES FOR IMPLEMENTING DIRECTIVES; 1961; L; GREECE
SUB:	FREE MOVEMENT OF WORKERS; FREEDOM OF ESTABLISHMENT AND SERVICES
REGISTER:	05100000

Some international organisations have supplemented their traditional systems with computerised facilities. For instance, the World Health Organisation at its regional office in Europe established in 1983 a data base containing records of national regulations implementing WHO directives or recommendations.

Again, the European Communities emerge as the major example of an international organisation tracking national implementation through a computerised system: Sector 7 of CELEX documents national implementation. An example can be found on the previous page. As will be evident from the example, only bibliographical data on the national legislation is recorded, and the national title of the legal instrument is not retained.

So far, only national regulations are included, but it is planned that the CELEX sector 8 data base will also contain national case law relating to the Community regulations.

IV. Examples of computerised systems in three areas

Above, we looked at computerised information systems from two perspectives: the perspective of the national regulatory manager who needs access to international regulation to ensure compliance and consistency when developing national regulation, and the perspective of the international regulatory manager who needs to track national implementation of international agreements. The capacity to track national implementation will at the same time serve the national regulatory manager who needs to ensure that international obligations have been properly observed in other countries. And such information systems also serve – within the area documented – the national regulatory manager who seeks to learn from the experiences of others, though this may be limited to the drafting of the text.

We see that international information systems can facilitate several different varieties of regulatory co-operation. There may therefore be something to be learned by briefly looking at information systems created within three areas where co-operation has been perceived as quite important – health law, environmental law, and labour law.

A) Health Legislation

The Regional Office for Europe[12] of the World Health Organisation launched in the early 1980s a programme for health legislation. **As** part of this programme, a system was set up that included indexed entries of the health legislation of member countries and a specially developed form document.[13] It was originally set up in co-operation with the Uppsala University (Sweden), using a rather powerful data base system.[14]

In our context, the more interesting aspects of this project are the arguments put forward by the WHO for stronger co-operation between national regulatory managers. As long ago as 1977 at the 13th World Health Assembly, the organisation expressed a concern for national health legislation, emphasizing that legislation itself was a strategy towards protecting and improving the health of the individual and of the community.[15] In 1981, the regional office established an advisory committee for Europe, which was to

provide guidance "on the major direction of development of the health legislation in the European Region".[16]

In a note to the committee, several issues were addressed, including the need for co-operation between regulatory managers:

> "...increased need of access at the national level to international exchange of information on health legislation.
>
> *Situation analysis*
> The solidarity and interdependence of European countries create a current need to obtain rapidly from other countries available information on health legislation for comparison and decision-making'' (Pinet, 1982).

Emphasis on communicating information on health legislation also leads to a certain re-defining of the role of the *International Digest of Health Legislation*, which is a conventional journal, but an obvious response to the increased need for co-operation on an international scale among regulatory managers in health law.

B) Environmental Law

Many kinds of environmental regulation, aimed at waste carried by a river through the territories of several countries, or at fumes from factories borne by the wind across boundaries, are by their nature international. There are therefore obvious reasons for taking an interest in establishing some sort of international base of legal information to make it possible to form a coherent and comprehensive understanding, on an international scale, of the law in force.

1. The United Nations Environment Programme

The major international organisation working to improve regulatory co-operation is the United Nations. Its Environmental Programme (UNEP) has a mandate from the Governing Council:

> ''To collect and disseminate information on national environmental legislation and maintain a register of International Treaties and Other Agreements in the Field of the Environment; to strengthen and co-ordinate the use of existing information sources and databases.''[17]

The long-term goal is to establish an "operational comprehensive database on national and international environmental law". Today, UNEP systematically collects information from countries, including information on legislation, for its Country Fact Sheets database and the Environmental Law and Institutions, Programme Activity Centre (ELI/PAC) in Nairobi[18] maintains country files for those countries assisted through its technical assistance programme. ELI/PAC also publishes the Register of International Treaties and Other Agreements[19] and has published two volumes of selected multilateral treaties.

It has been reported[20] that ELI/PAC is currently reviewing its policy. strategy and future work programme concerning a data base on environmental law, and is, moreover, considering possible co-operative partners.[21]

The UNEP's Regional Office for Latin America and the Caribbean (ROLAC)[22] has developed a regional data base containing considerable information on environmental law and institutions in the region. This data base also includes information on environmental conventions ratified by countries in the region.

2. *The Environmental Law Information System (ELIS)*

Though the United Nations has taken the initiative for regulatory co-operation in environmental law, two other major initiatives must also be noted.

The International Union for Conservation of Nature and Natural Resources – IUCN – is an organisation with consultative status with the United Nations, and whose members include 60 sovereign states and some 560 governmental and non-governmental organisations from approximately 120 countries. IUCN activities are planned and co-ordinated by a Secretariat and by commissions for ecology, species of plants and animals, protected areas, etc.

In 1968, the IUCN Commission on Legislation began to investigate computerised information services (Burhenne, 1968). In March 1972, the then new IBM retrieval program STAIRS (Storage and Information Retrieval System) was made the basis for the system, and this version was demonstrated in June 1972 at the United Nations Stockholm Conference and the Second International Parliamentary Conference on the Environment. The current system is based on a customised software known as ROMULUS (Retrieval Oriented Multilingual Updating System).

The system is today operated by the IUCN Environmental Law Centre (ELC), which is part of the IUCN secretariat in Bonn.[23] It co-operates closely with the IUCN Commissions, particularly the Commission on Environmental Policy Law and Administration (CEPLA).

The system is run in co-operation with the International Council of Environmental Law (ICEL), which is an international nongovernmental organisation with individuals and organisations as members (approximately 290 members from 60 nations). Its sole purpose is the promotion of contacts and exchange of information. ICEL shares facilities with the ELC.

The CEPLA and the ELC maintain a collection of legal provisions relating to environmental issues in different countries, as well as international instruments. Currently, regulatory information from more than 150 different states has been documented, with the addition of bilateral and multi-lateral agreements and binding international legal instruments. The collection contains currently some 32 000 documents. The annual increase is estimated at 1 500 documents.

ICEL maintains a collection of literature relating to environmental policy issues, law and administration (approximately 43 000 documents with an annual increase of 2 000-2 500 documents). A selection of court cases is also maintained, emphasizing

Germany, the United States, and France. The majority of the cases (approximately 2 300) are German.

The combined documentary resources of the two organisations are the basis of the joint information service, ELIS, which is organised in eight data bases: national legislation, international legal instruments, treaties, documents from the European Communities,[24] court decisions, literature, fauna species and flora species.

Abstracts are only prepared for special projects, including ENLEX (see below) and projects to index species mentioned in national regulations, protected areas of the Mediterranean and wetland legislation. Abstracts are developed mainly for helping the user to determine the relevance of a document. Relationships are specified, especially vertical relationships, such as between a statute and its subsidiary regulations.

This system is clearly more comprehensive than the WHO system on health law. There are also differences relative to CELEX. It may be fair to say that ELIS has been developed not only as a legal information system to support decisions in specific cases, but more as a policy information system. Its inclusion of case law and literature within its domain will make it possible to assess and compare different regulatory strategies. It would seem that the system is an indication of what can be achieved by conventional computerised systems in supporting regulatory co-operation.

3. The ENLEX system of ITALGIURE

In Paris in 1972, the European Communities decided at a summit meeting that its work to protect the environment should be emphasized (Meriggiola, 1992; Postiglione, 1992). In 1977, the EC decided to establish an information service for environment law, with the objective of supplying bibliographical material on legal sources relating to the protection of the environment.[25] In particular, the system would facilitate the operation of small and medium-sized businesses by furnishing them with comprehensive legal information. In December 1981, the Commission gave financial support to two organisations to develop the system, which was named ENLEX (ENvironment LEX) (Postiglione, 1992).[26]

The IUCN was charged with developing a data base for legislation and literature within the framework of ELIS (see above). Of the approximately 95 000 documents of the ELIS data base, approximately 9 000 have been made subject to the special analysis required for ENLEX. The Centro Elettronico di Documentazione (CED) of the Corte Suprema di Cassazione has developed a data base of court decisions.

Though the origin of the ENLEX project is closely associated to the European Communities, the project must be regarded as Italian, and since October 1991 it has operated as a part of the ITALGIURE system, the national legal information service of Italy, without any financial support from the European Communities. The CED has established co-operation with experts in other countries to ensure the correct translations of abstracts of decisions. It is estimated that the cost of preparing one document is approximately 100 000 Italian lire.

By mid-1991, 12 262 documents had been prepared which give a coherent view of the jurisprudence and doctrine of the law of the European communities. But the system is still incomplete, since the areas of energy, flora, fauna, pollution of the sea, and others

have not yet been documented. The system is currently in an experimental phase, and it is expected soon to have mastered the last difficulties for unification of the German and Italian material.

The material originating in Bonn is, as an experiment, made available under the ITALGIURE system as a separate data base, ROMSL. This included, by 1 June 1991, 6 290 documents. The unification makes it possible to inspect country by country all the legislation and the jurisprudence in an English version. Also the original language of the regulation or statute is available, and the two versions can be inspected and compared.[27]

C) Labour Law

Within the International Labour Organisation,[28] the Labour Law Information Branch follows national developments in labour, social security and related human rights legislation. It receives a large number of publications, consults national data bases, and has access to the information collected by the ILO regional offices and national correspondents. In addition, it maintains contacts with public agencies and research institutions.

From this material, a team of lawyers selects the documents that are to be included in the computerised service, called NATLEX.[29] Each national legislative text is represented by a record containing specific fields. Documents in more than 40 languages are included, and the analytical summaries for the indexes are carried out in the three working languages of the ILO (English, French, and Spanish). More than 26 000 records are now available, with an annual growth of approximately 3 000 records. Approximately one third of the records relates to social security legislation, and more than 500 legislative records deal with migrant workers.

NATLEX is part of LABORLEX, which is maintained by the Labour Law Information Branch (INFLEG) of the ILO International Labour Standard Department.[30] LABORLEX also includes the data base ILOLEX, which contains information on international labour standards, including the International Labour Conventions and Recommendations, the Reports of the supervisory bodies on the application of standards, and the ratification of member countries.

The tri-lingual data base of ILOLEX is also available as a CD-ROM,[31] and by way of illustration, the contents are listed below:

- ILO Conventions
- ILO Recommendations
- Triennial Report of the Committee on Freedom of Association (1985)
- Comments of the Committee of Experts on the Application of Conventions and Recommendations (1987)
- Annual Report of the Conference Committee on the Application of Standards (1987)
- Reports of Committees and Commissions established under Arts 24 and 26 of the ILO Constitution to investigate representations and complaints
- Ratification lists by Convention and by country
- ILO Constitution

This example illustrates a computerised service that is used to monitor national implementation. Obviously, with respect to labour law, not only national regulatory managers in the narrow sense take an interest, but also interest organisations in the private sector which in many countries have a strong policy interaction with the government. With many controversial policy issues in the area, it is easy to imagine that the ILO systems contribute to various aspects of regulatory co-operation: comparison of regulatory strategies, monitoring implementation of international obligations, and so forth.

D) Other examples

Above, examples have been selected from three areas – health, environment, and labour – to illustrate some of the reasons for using computerised systems to promote regulatory co-operation. These areas are all of an international character, and they share a need for international co-operation.

But there are many other possible examples. For example, the OECD itself maintains an information system under the regulations on genetic modified organisms that monitors the organisms released into the environment in Member countries. The European Patent Office maintains an information system on decisions of its Board of Appeal,[32] Convention, Treaties and Guidelines,[33] and forms.[34] It should be noted, however, that no survey in existence lists the computerised legal information services of international organisations. A compilation describing them would be welcome. But that is not the purpose of this paper, though it is with some regret that we limit the discussion to the examples already offered. And – as mentioned in the introduction to this chapter – no supranational organisation has emerged that offers a truly international service.

V. Coping with multilingualism

A) Introduction

There are a surprisingly large number of states that have more than one official language. Among them are:

Belgium	Dutch. French
Canada	English, French
Finland	Finnish, Swedish
Ireland	English, Gaelic
Switzerland	French, German, Italian

The European Communities does, of course, have almost as many official languages as there are official languages in their member countries – at the moment, nine languages (Danish, Dutch, English, French, German, Greek, Italian, Portuguese, Spanish).[35] In some states, there are also distinct versions of the same language in use at the same time, for instance Greece (Demotic, Katharevousa) and Norway (Bokmål,

Nynorsk). In addition, minority languages are recognised, spoken and used, for instance, in court proceedings in a large number of countries.[36]

B) Drafting

In jurisdictions with more than one official language, drafting becomes even more complex, but one may look to computerised systems for assistance. The dream of machine translation has yet to be realised, though sophisticated knowledge-based methods may possibly be developed in future. But different methods for computer-assisted translation (CAT) are already in use.

In Canada, officially bilingual, the government has had experience with different computer-assisted methods since 1977. In the early 1980s, the Translation Bureau of the Department of the Secretary of State set up a project to determine whether current technology meets the demand for translations. Test sites established in different translation sections have available the Logos translation software, specialised tools including LOTUS 1-2-3 for data collection, WordPerfect for checking of spelling and for word processing, Kurzweil for entry of texts on machine-readable media, and Keyword and Pride Local for converting word processing documents.

The work is divided into four main steps: 1) Pre-editing: The translator eliminates any difficulties in the text that the system will not be able to handle; 2) Terminology research: The system produces a list of new words not found in its automated dictionary. When the translator has manually found equivalents, they are added to the terminology data base, coded by subject matter, and the necessary semantic rules are added to the data base; 3) Translation: This is completely automatic, and results in the form of a word processing document; 4) Post-editing: The translator revises the raw translation on the screen before it is delivered to the client.[37]

It would, however, seem that the accuracy necessary for the translation of regulation is rather far beyond the capabilities of current systems. A "raw translation" is perhaps not too helpful for the drafter, though it may indeed be very helpful for a translator of a lengthy report. Perhaps computer-assisted translations may prove more useful for access to case law in the short term, but these possibilities will not be pursued here.

One should mention that it is possible to draft a regulation in a language-independent formal notation and have a system that uses the information provided by this form to construct texts in several languages. An early example of what is called "canonic input formalism" is provided by Hélène Bauer-Bernet, who was very influential within the CELEX system for a long period (Bauer-Bernet, 1980). In the example, a half-legible canonic English or French input format is automatically translated into proper English or French.

The European Communities have invested significant resources to develop means for machine translation. For the drafting of regulation, it is understood, however, that a canonic form is still used when computer-assisted methods are applied, in addition to such methods exemplified above on the basis of Canadian experiences.

Figure 5. **Canonic input formalism and translation**

INPUT

ESIMC
*HARMONISATION
*LEGISLATION+ /MEMBER+ STATE+
E TURNOVERTAX+
FBUT STRUCTURE & PROCEDURE+,
APPLICATION/
SYSTEME COMMUN
F TAXE SUR LA VALEUR AJOUTEE
FCHM TAXE SUR LA VALEUK AJUUTEE, (A Si Al) ET B
F SIM **(A)** LIVRAISON+ /BIEN & PRESTATION+ /SERVICE
F PAR (Al) EFFECTUE+,, ASSUJETTI, A TITRE

OUTPUT FRENCH

Harmonisation des législations des Etats membres concernant les taxes sur le chiffre d'affaires – Structure et procédure pour l'application du système commun de taxe sur la valeur ajoutée. Sont soumises à la taxe sur la valeur ajoutée :

(A) les livraisons de **biens** et **les** prestations de services **si** (Al) elles sont effectuées par un assujetti à titre onéreux à l'intérieur du pays ;

(B) les importations de biens.

OUTPUT ENGLISH

Harmonisation of legislations of the Member States concerning turnover taxes – Structure and procedures for the application of the common system of value added tax. The following shall be subject to value added tax:

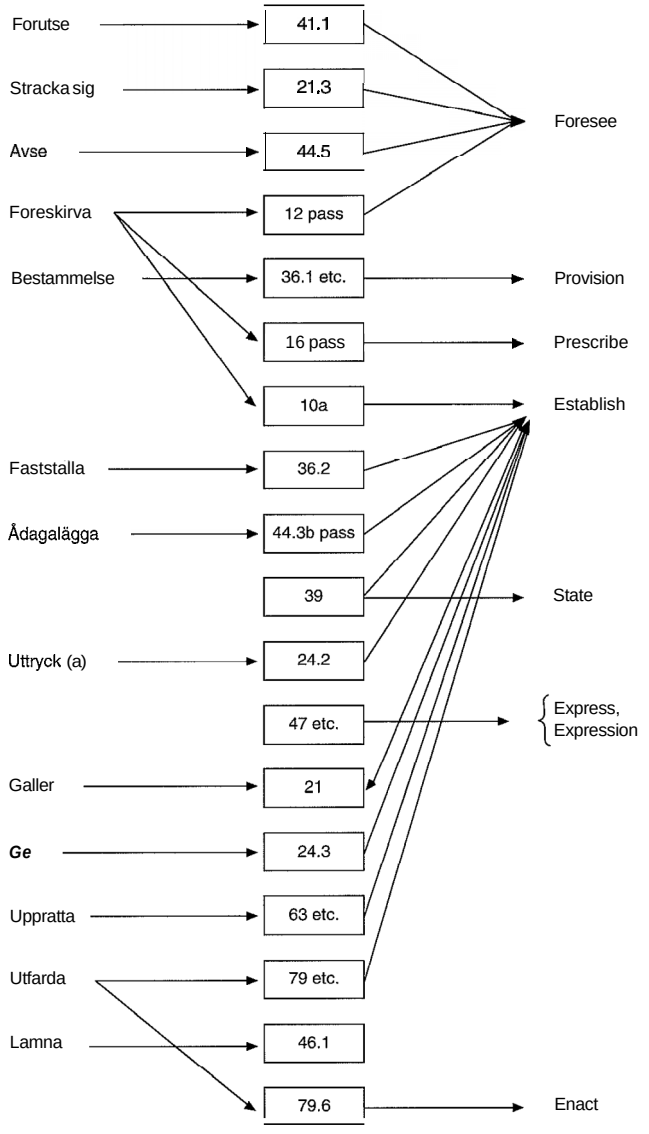
(A) the supply of goods and the provision of services if they are carried out (Al) by a taxable person for payment within the territory of the country;

(B) the importation of goods.

There are, however, other ways in which computerised systems may be used to assist the drafting of bi- or multilingual regulations. One interesting possibility, for example, is turning multilingualism to advantage by using it to check consistency – using the terms of one language as some sort of control of the other to assure that there are no undesired deviations.

The Finnish project of **term-tuning** may serve as an example (Council of Europe, 1977). The computer system is designed to check and evaluate the translation, direct the attention of the translator to possible inadequate passages, offer a range of term translations to a translator or drafter, and uncover incongruities or vagueness in the formulation or the logical structure of the text. The last function is seen as the most important.

Figure **6. Example of output from term-tuning**



The first assumption is that there is a 1:1 correspondence between term occurrences in one text and those in a parallel text, though "term" is often interpreted so that a few consecutive typographical words make up one unit. This justifies the approach of studying congruency between the parallel texts.[38]

The second assumption is that one term should have the same meaning every time it occurs in the text, though it is emphasized that its "empirical incorrectness is conspicuous to anybody with some experience of analysis of actual texts in any field or language". It assumes, for example, that the regulation does not contain homonyms or synonyms. Nevertheless, the assumption is generally useful.

The system assigns term occurrences in one text to those in the parallel text, finding all cases where there is not a 1:1 correspondence, and presents these results to the drafter.

C) Access to Documents in Another Language

Within a multilingual jurisdiction, the regulatory manager may want to access documents that are in another language than the one most familiar to him or her. This represents problems, from the rather trivial but troublesome problems of national characters not supported by the system available to the user, to the problems of formulating a search request or understanding a retrieved document in another language.

There have been some efforts in trying to extend help supported by information technology though the solutions adopted are frequently based on a language-independent indexing scheme. Search requests can be formulated in the formal language of the index and will retrieve documents in any natural language. This does, of course, presume an intellectual indexing of all documents and require that the user have knowledge of the indexing scheme, or is offered help by the system in using this scheme.

The oldest European legal information service,[39] the Belgian CREDOC system, created by the notaries in 1966, provides an example of this approach. The main component of the indexing language is the descriptors, defined by a four digit numeric code in a bi-lingual thesaurus. These may be modified by ante- and post-descriptors (''*facettes*'' and ''*specificateurs*''). There are also defined hierarchical structures between indexing terms. Combining these elements, it is maintained that more than 60 000 concepts can be specified.

There have also been attempts to provide tools for specifying a search request in one language so that the system will transform this into a request in another language and retrieve documents in both languages. This could have been realised if a sufficiently efficient general method for machine translation had been available. However there are, to the knowledge of the author, no such systems in operation, though there have been attempts to achieve such functionality using simpler methods.

The major example is the Canadian DATUM system, based on a project initiated in 1970 in the French-speaking province of Quebec. To support retrieval, a novel thesaurus structure was designed. Two thesauri were developed, the g-thesaurus and the s-thesaurus. The g-thesaurus supplied grammatical expansions of words included in a search request. The s-thesaurus was developed to expand a certain word into a series of

equivalent words or phrases, in both English and French[40] Selected passages from the documents to become parts of the data base were examined, and important words were replaced by a synonym in the context where the word occurred. A great number of "source lists" was produced, consisting of the original word and the assigned synonyms. These were processed by a statistical programme that decided when words were synonyms or homonyms. In this way, lists of synonymity in each language were produced. The source words were translated into the other language, and the translations were included in the first list, creating a unified thesaurus with entries in both languages, and synonyms in both languages for any entry.

The user could specify a search word and, using the thesaurus, would retrieve documents in both languages. The system provided controls for the search that are not detailed above. The DATUM service was discontinued in 1979, but the bilingual thesaurus remains a major example of a rather innovative attempt to solve the problem of retrieving documents from a multilingual data base.

A simpler support is the generation of language-relative templates for displaying documents. Documents such as those above from the European Communities CELEX system have a large number of terms defining what data are found in the field. These terms may easily be provided in the language of the user, though the content of the field still will be identical for all users. Often the content has a form that is not very language sensitive (typically dates, citations, names of authors, etc.), and the help provided by such a language-sensitive template is considerable.

VI. Communication between regulatory managers

The exchange of information on regulations is not only a question of access to data bases, but also of communication between regulatory managers. This small section of the papers emphasizes this traditional and indispensable aspect of regulatory co-operation: learning of and from others' experiences.

To improve the exchange of information on national regulations, the International Legal Information Network was initiated in 1991. The institutions behind this initiative are, among others, Centre d'information juridique internationale, Computer Center for Information Dissemination of the European Communities, Council of Europe, Harvard Law School, International Labour Organisation, Library of Congress **(USA),** Pan American Health Organisation, and World Health Organisation. The objective of this initiative is to improve the availability of national legislation. **A** conference system (ILIN) is under preparation under the administration of Cornell Law School in the United States, and a data base documenting regulations, supported by libraries in different countries, will be established by Harvard Law School.[41] This is, however, only one of many initiatives where regulatory managers have set up some sort of information system among themselves.

Computer-assisted communication systems allow several forms of exchange of information. There are electronic mail systems based on list servers: the subscriber to a list will have a copy of any message mailed to the list. This makes it possible to

"broadcast" requests for information. **As** the list may have many thousand subscribers, this can be compared to asking an oracle for an answer. A list will be specialised to some extent to make its domain appropriate for users.

There are also bulletin boards where notices are pinned, and where comments may be attached. This allows for a communication similar to conferences in which discussions are proceeding. Bulletin board systems (BBS) are also generally specified concerning interests, and some are designed to attract lawyers and regulatory managers.

Obviously, brief messages are not the only communications that may be conveyed in this manner. The text of a regulation may be communicated through a computer-communication network, often more easily than transferring files by a physical medium like a diskette as the communication protocol provides some sort of compatible format.

Regulatory managers rely on communication, and computer-assisted communication methods are efficient and convenient. One therefore expects regulatory managers to be a user group that will increasingly appreciate the potential for improved performance, and demand more services.

VII. Conclusion

This paper has looked at some aspects of communication and information-sharing between regulatory managers facilitated by information technology. Access to the regulations of international organisations and countries is today facilitated by computerised systems. But these systems have not really been designed to meet the requirements of regulatory managers; rather, the end user is seen as a lawyer advising a client on a legal problem, or a librarian locating a certain document.

The regulatory manager has different needs. Perhaps there are two aspects related to a certain regulation on which the regulatory manager would like to have information: 1) the policy issue addressed when the regulation was developed – its objective, the comments expressed by those involved in reviewing the regulation, etc. This may be of interest to a regulatory manager within another jurisdiction trying to develop regulations within the same domain; 2) evaluations of a regulation – all types of evaluations in the form of statistics, legal literature or other items of information that will help a regulatory manager to learn whether a certain regulation achieved its objective – or, if it failed, the probable cause.

One may easily see the possibility that initiatives – like the ILIN mentioned above – will grow into an international service for regulatory managers, exploiting the powerful tools of information technology to improve communication and co-operation. It way be possible to experiment with different types of regulations, run simulations of the different types against a model of the society in which the manager works, etc. Without pursuing this perspective, one may – perhaps – see the outlines of a new and exciting way in which regulatory managers can profit from the experience of others, and virtually turn the world into a regulatory experimental laboratory.

Notes

1. In this paper, "regulations" will be used to mean both acts of parliament and lower-level regulations issued by the government. Within jurisdictions, regulations may be further classified into different categories – presidential decrees, guidelines, norms, statutory instruments, resolutions, etc. In OECD countries, the categories vary quite a lot, though the distinction between acts of parliament and regulations issued by the government seems to be universal. It will be sufficient in our context to use one term – regulations – though the context may require the term to be qualified.
2. Actually, "by-law'' literally means "the law of the town", the prefix "by" originating from the Norse word for town, still used in the Nordic languages, and part of the name of many British towns (for instance, Grimsby).
3. In Figure 1, "federation" is pictured as the top of an implied hierarchy of regulations within the nation. But such a hierarchy does not necessary hold, as the federation can be created by states, and derive its authority from the states – rather than the states deriving their authority from federal law.
4. It may be contested that the UK can be properly classified as a federal state, though in our context it shares some of the same characteristics.
5. In this context, "union" is used as a technical term, and is not meant to refer to the policy issues related to the reformation of the European Communities into a more integrated, political organisation. It is quite common to name those countries that are parties to the same treaty as a "union" under that treaty, cf for instance the Berne Union based on the Berne Convention on Copyrights.
6. A rather special example was the Bulgarian service offered as part of the NORMA system. This is developed as a stand-alone system for PRAVETZ-16 computers under MS-DOS. The data base is developed on the basis of the work of Committee for Mutual Economic Assistance, established in 1987 for multi- and bilateral agreements between socialist countries as a preparation for economic integration and joint ventures with Western countries. Documents from Bulgaria, Hungary, Poland, Romania, the Soviet Union, and Czechoslovakia were included with bilateral agreements with Cuba, Mongolia, Vietnam, etc. The data base was distributed to subscribers every three month as diskettes, key words in the original language, Russian and English. In 1988 the work of translating all texts to Russian was begun. (This example is from Alexander Manov "Computer Technology and Legal Information Processing'', 6th Student Pugwash USA International Conference, University of Colorado at Boulder, 1990.) The NORMA system is still offered to the market in Bulgaria, but obviously the international part of the service now only has historical interest – though the example still is valid as an illustration of a straightforward application of information technology to the problem of distributing information on international agreements.

7 The Communities are, however, in a process of evaluating the service, and it may he re-designed as a result.

8. At least, the German JURIS system and the Norwegian Lawdata service.

9. The examples of CELEX documents given below have been downloaded from the data bases of Lawdata.

10. Austria, Finland, Sweden, and Norway.

11. Another is, of course, the European Communities. The case law of the European Court of Justice in Luxembourg is documented through the CELEX system, sector 6.

12. This office is situated in Copenhagen (8, Scherfigsvej, DK-2100 Copenhagen).

13. "Euro-Health Legislation: Notification of new legislation", printed as Annex IV to ICP/HLE 002, WHO, Copenhagen 1982.

14. The system MIMER-IR. This was also developed by UDAC at Uppsala University.

15. *Cf.* resolution WHA30.44.

16. *Cf. Health Legislation: European Programme,* ICP/HLE 002, WHO, Copenhagen 1982: 3.

17. GC 16/25.

18. PO Box 30552, NAIROBI, Kenya.

19. Grotius Publications Ltd, Cambridge, United Kingdom.

20. Letter of March 29, 1993, from Sun Lin, director for the ELI/PAC as a response to a request from the author.

21. Confirmed in letter of April 23, 1993 from Sun Lin, director for the ELVPAC.

22. Boulevard de los Virreyes No. 155, Lomas Virreyes, 1000 MEXICO DF, Mexico.

23. 214 Adenauerallee, 53 BONN, Federal Kepublic ot Germany.

24. These seem to be termed "soft laws".

25. 30 *cf.* Official Journal series C 139, June 13, 1977.

26. The project was also known as "Project 80'', referring to the date of the important decision by the Communities.

27. Belgium is given special consideration, as both the equally-authentic French and Flemish languages of the original regulations are available.

28. Routes des Morillons 4, CH-1211 Genève 22, Switzerland.

29. The system is based on a Hewlett-Packard 3 000 computer using the MINISIS, a data base management system designed by the International Development Research Centre, Canada. NATLEX is accessible on-line through the International Labour Information System, Referral System, which includes a program for user support for those not familiar with the MINISIS search language.

30. This Branch also publishes the *Labour Law Documents* three times annually, and the bulletin *Legislative Information* on a monthly basis.

31. Published by Martinus Nijhoff Publishers, PO Box 163, NL-3300 AD Dordrecht, Holland (US$850).

32. All decisions from 1980.

33. European Patent Convention, Patent Cooperating Treaty, Harmonisation Treaty, and Guidelines for Examination.

34. Standard EPO forms that can be displayed, but not printed.

35. The Gaelic of Ireland **is not** an official language of the Communities; neither is the Luxembourgois of Luxembourg.
36. The most complex situation may have been in the former federal republic of Yugoslavia, where as many as 14 different languages were recognised for use in the courts.
37. The description is mainly based on material made available by the CAT Project of the Department of the Secretary of State of Canada, enclosed in a letter of December 5, 1990. It seems likely that a new technological platform will emerge, combining the translator's work station with a terminology bank and translation software.
38. The project was carried out in Finnish and Swedish, which, in contrast to English (or French), rely heavily on compounded words, making this assumption perhaps less of a problem. One should note, however, that Finnish and Swedish belong to widely different language traditions and much are less related than, for instance, English and French.
39. There may actually be an Estonian service that is as **old,** or older, but this did not become operational.
40. It adopted a method suggested by Irving Keyton (1966).
41. ILIN-91 **is** already available in **hook** form from UN-IFO Publishers, Sarasota, US, and Legal Library Publicising Service, Yeovil, UK. The ILIN-92 is under publication, and it is reported that **a** conference (ILIN-93) is planned for France.

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Chapter 6

Lessons for regulatory co-operation: the case of the OECD test guidelines programme

by

the OECD Secretariat

I. Introduction

In the Convention of the OECD, Member countries agree to "co-operate closely and where appropriate take co-ordinated action" in order to, among other goals, use economic resources efficiently and abolish obstacles to the trade of good and services.' Mutual acceptance of scientific, technical and financial data on goods and services ranging from chemicals to food stuffs to securities exchanges has become a common strategy to these ends.

11. Why mutual recognition of data?

Data on goods and services (and, tor that matter, human resource) characteristics are important primarily because they are used as indicators of quality.[2] The free flow of goods and services depends on assurances – to regulatory officials and to consumers – that these products meet applicable quality standards as they travel through regulatory jurisdictions. Quality assurances backed up by reliable data, therefore, are important to the efficient functioning of both free and regulated markets.

Measuring quality can be a costly matter involving extensive data collection and analysis, testing, control groups, and other techniques that rcquirc timc and moncy.[3] For that reason, quality data are in themselves valuable economic resources, and can be traded across borders just as any other good.

There can be barriers to the free flow of data. One of the major barriers is simple differences in methods of data collection and analysis, which leads to non-comparability of data across regulatory borders. Another barrier may result from the fact that quality standards differ. Even slight differences may render sets of quality data mutually useless.

These problems magnify a more serious problem: it is difficult to establish confidence in data generated by a third party over whom one has no control, and hence there is a natural reflex for regulators to reject data not generated in accord with agreed practices. Data reliability is based not only on methodology, but on working relationships between regulators who establish and monitor quality standards in separate regulatory jurisdictions. That is to say, when multiple jurisdictions are involved, reliability is an institutional as well as a technical issue. Institutional co-operation can improve reliability of data flowing across borders.

Differing methodologies and standards have led to repetitive data collection and analysis in different markets, with accompanying costs in economic resources and time. At their worst, these barriers can reduce competition in goods and services. Consumers ultimately pay the price.

111. The OECD Test Guidelines Programme

In May 1981, OECD countries adopted the ***Decision of the Council Concerning the Mutual Acceptance of Data in the Assessment of Chemicals*** (OECD, 1981). The Decision, which is binding on Member countries, requires that data generated in the testing of chemicals in an OECD country in accordance with OECD Test Guidelines and Principles of Good Laboratory Practice be accepted in other OECD countries for purposes of health, safety and environmental assessment.

The Council referred to several reasons why mutual acceptance of data on chemical assessment was needed. Among them were: the importance of international production and trade in chemicals, the trade advantages from harmonization of policies for chemicals control, the cost burdens associated with testing chemicals. the need to utilise more effectively scarce test facilities and skills in Member countries, and the need to encourage generation of valid and high quality test data.

In this Decision, the Council aimed at two important goals: reducing barriers to the free flow of data in trade, and increasing the over-all quality of data on chemicals. The first goal, by reducing the costs of producing acceptable data, strongly supported, and may even have been a pre-condition of, realising the investments required for the second goal.

The strategy adopted by the Council struck directly at the problem of differing methodologies and, more importantly, at the reluctance of regulators to accept data of unknown quality from other regulatory jurisdictions. At its heart is the development, under the auspices of the OECD's Environment Policy Committee, of a common set of test methods for chemicals. These harmonised tests are called "Test Guidelines''. Since 1981, 84 test guidelines have been adopted, laying out methodologies by which chemicals can be tested for interesting characteristics such as genetic toxicity, biodegradability, toxicity to fish, and other qualities.

While OECD countries are not bound to use the Test Guidelines, an OECD country that requires that chemicals be tested for any of the characteristics addressed by the Test Guidelines must accept data from other OECD countries if the data were generated using

Test Guideline metholodogies A national regulator cannot, for example, require additional testing if a chemical importer submits data based on the Test Guidelines. In practice, this means that any of the 84 tests must be conducted only once: the resulting data will flow freely into all markets in the OECD area.

IV. How the test guidelines programme works

Many of the issues dealt with in the Test Guidelines Programme fall at the interface of science and policy. While scientific consensus settles some issues, on other issues, such as the degree to which animal testing should be used, political and policy interests may take precedence Moreover, there can he substantial disagreement among scientists regarding technical issues. **Consequently, the programme is structured around a process designed to achieve a step-by-step consensus, with ample informal and formal opportunities for discussion and response.**

The structure of the programme, the responsibilities of those involved, and the procedures to be followed are laid out in some detail in the 25-page "Guidance Document for the Development of OECD Guidelines for Testing of Chemicals". The Summary to the Guidance Document is contained in the Annex to this chapter, together with the flow diagram for the programme.

Briefly, the central position in the programme is held by a network of National Co-ordinators, one in each OECD country, who co-ordinate teams of experts from regulatory authorities, academia, and industry in their countries. The National Co-ordinators prepare country positions, channel information to and from national experts, oversee the functioning of the programme, and seek consensus among themselves on draft Guidelines. No views from country experts are considered unless they pass through the National Co-ordinators. This provides some accountability for decisions. However, in order to achieve "broad acceptance" of the Test Guidelines, experts from the international scientific community also participate upon the request of the Secretariat and with approval of the National Co-ordinators. The views of the Business and Industry Advisory Committee (BIAC) to the OECD are also solicited.

Proposals for new guidelines or revision of existing guidelines, usually originating with National Co-ordinators or the OECD Secretariat, are assessed to determine if a basis for consensus exists, that is, if the "issue is ripe", before the process begins. Depending on the state of consensus, the process can move through a variety of informal and formal settings – workshops, consultations of experts, expert meetings, and so forth – before an official consensus position is drafted and presented to Members for adoption. At the final stage, the OECD Council must agree to adopt a Test Guideline.

No schedule is set for agreement. The process moves on to more formal stages only when ''sufficient consensus has been reached". On average, this process requires two years to produce a final Test Guideline.

Each meeting is followed by a report prepared by the OECD Secretariat discussing the issues on which consensus was reached, and those on which views diverge. Importantly, the reports also describe why certain decisions were taken, and other options

rejected. These reports make up the informal "history" of the process, and help to ensure that agreement, once made, is preserved, that the stage of the discussion is clear to all participants, and that the rationale for decisions is transparent.

Once adopted, the Test Guidelines are binding on Member countries. No monitoring capacity has been set up to oversee compliance: rather, enforcement works through a complaint process. If a ministry or agency in a Member country refuses to accept data produced through Test Guideline methodologies, the affected party, usually a private company, may file a complaint with the OECD Environment Directorate.[4] The OECD determines the validity of the complaint, and asks that violations be corrected. Only a few complaints – most accompanied by requests for anonymity – are received each year. So far, all formal complaints have been quickly resolved.

V. Some lessons for regulatory co-operation

Over 12 years, the structure of the OECD Test Guidelines Programme has evolved into a pragmatic and flexible approach to consensus-building. This approach – in which communication and step-by-step agreement take precedence over a rigid schedule for harmonization – seems particularly suited to the delicate task of finding common ground on issues as sensitive as those in chemical assessment.

Moreover, harmonization of tests takes place within an institutional setting in which regulators with similar concerns can establish continuing working relationships. Such an established network has a value that extends beyond the harmonization of any particular test or set of tests because it emphasizes common interests, opens channels of communication, and thereby increases confidence in the reliability of data developed in other countries.

The experience of this programme suggests other conclusions that may be relevant more broadly to activities of regulatory co-operation.

- **Advantages of personal contacts over time.** The programme centers around 25 key people – one in each OECD country and the Commission of the EC – who form a stable and accessible network. These people meet together on a regular basis, often over a period of years. Professionally, too, many of them are mutually acquainted in the specialised field of chemicals assessment. These linkages have two important effects. Professional and personal contacts help to reduce mistrust and barriers to communication, while longer-term participation and responsibility gives individuals a stake in the success of the project as a whole.
- **Advantages of a deliberate process.** The process of developing a Test Guideline is full of hurdles, each one permitting another level of review, analysis, and debate. These steps are deliberate; they ensure that for Member countries there will be no surprises and no loss of control of the development process. The cost of deliberation may be a loss of time,[5] but the benefit is a willingness to open and engage in debate without fear of being trapped in the dynamic of the process itself.

In addition, the Secretariat's reports of each meeting ensure that all participants recognise "the state of play" the progress that has been made, the rationale underlying decisions, and the issues that remain unresolved. These reports are a device to prevent confusion and back-sliding, and therefore protect the orderliness of the process.

Another aspect of deliberation is the opportunity to revise previous decisions. Fifteen of the 84 Test Guidelines now in place are updated versions of earlier guidelines, and in fact it is no more difficult to revise existing guidelines than to create new ones. The capacity for revision reduces the pressure for perfection, and permits debates to continue as new data emerge.

- **Advantages of a clear and transparent process.** For its first ten years, the programme operated without an explicit description of duties and processes. This occasionally caused confusion, enough so that by 1990 several countries called for a "more precise allocation of tasks...'' The result was the detailed 1993 Guidance Document mentioned earlier that, by detailing steps and duties, was intended to contribute to a better understanding of the programme and to encourage and stimulate participation. This document has averted arguments about the status of the process, and reassured participants about its predictability and deliberativeness.

  Outsiders have access for the first time to details of how Test Guidelines are made and who is involved. Just as for insiders, the improved transparency of the process is likely to contribute to confidence by non-participants in its outputs.

- **Advantages of a flexible process.** As mentioned, one of the notable characteristics of the Test Guidelines Programme is its pragmatic approach to consensus-building. There are many paths for guideline development. Some proceed quickly to a final proposal, while others spend a great deal of time assessing the state-of-the-art and piecing together the foundation for consensus. Review by Members is successive; each step proceeds from the former. There is plenty of opportunity for debate. There is no imposed schedule for agreement.

  This flexibility is important in adjusting the process to the case under discussion. For example, selection of the setting for discussion is critical: moving to a formal setting too soon can rigidify country positions, and polarize the debate. For this reason, National Co-ordinators are encouraged to include in their early comments all dissenting views of national experts, so that the discussion can include the full range of scientific views. The distinction between "expert" consultations and national positions is explicit. Countries are not forced to take a position too soon, but are able to explore options and ideas to clarify the path to consensus before "freezing" their views in national position papers.

- **Advantages of a bottom-up process.** As the preceding point suggests, the Test Guidelines Programme is driven from the bottom. Proposals are made and proceed on the basis of what is possible, given the views of the experts at each stage. Although priorities are established each year, there is no set of fixed targets and schedules from the top with which the process must comply.

The bottom-up approach gives maximum emphasis to the credibility and integrity of the process by which consensus is reached, and less to the production of outputs. This approach seems particularly suited to the mutual recognition of data. Reliability and confidence in each other's data and regulatory institutions stem more from communication than from mandate. Moreover, a sense that the process itself must give way to outside pressures, regardless of the case-by-case situation at hand, would weaken participants' willingness to negotiate and freely debate, and hence increase confrontation at the expense of consensus.

Notes

1. Articles 2 and 3, Convention of the OECD, 14th December 1960.
2. "Quality" should be broadly understood here to mean product characteristics demanded by consumers or of such social import that regulators mandate that they be measured. These characteristics may include pesticide residues in apple juice, corporate assets supporting securities, safety of children's toys, and so forth.
3. Moreover, a central determinant of cost is reliability – data costs ascend rapidly as more reliability is demanded. It is much more costly to reduce the risk of error to one percent than to reduce the risk of error to five percent. In fact, while reliability increases linearly, costs often seem to increase geometrically.
4. Using a form called "Notification of Incomplete Implementation of the OECD Decision on Mutual Acceptance of Data."
5. However, a rarely-used "fast-track" process is available to respond to any urgencies.

Annex

Excerpts from Environment Monograph No. 76

"Guidance Document for the Development of OECD Guidelines for Testing of Chemicals"

Summary

During the 17th Joint Meeting it was agreed that the responsibilities and various procedures for OECD Test Guideline development and updating should be set out in a single policy document. The present document describes the structure of the Test Guidelines Programme, the various responsibilities and, in detail, the procedures that could be followed during the development of new, or updating of existing, Test Guidelines.

Structure and responsibilities

The *National Co-ordinators* (NCs) have a central position in the structure. They submit national proposals for new Guidelines or revised Guidelines and provide nationally agreed comments on proposals circulated by the Secretariat. In order to be efficient, NCs need a well-built network of experts and thus should be aware of developments in their country with regard to test methods. **A** meeting of NCs is convened by the Secretariat at least once a year. Collectively, NCs oversee the programme and work towards consensus on draft Guidelines.

The *Secretariat's* main duty is to give the structural support to the Programme. It develops a proposal for the annual work programme and directs various activities, including drafting of documents and organisation of meetings. Where necessary, the Secretariat takes initiatives in the development of new and updated Test Guidelines. It has the responsibility of revising periodically the compendium of Guidelines, and to this end, launches and/or oversees the production of Detailed Review Papers (DRPs).

The *Joint Meeting* provides general oversight of the implementation of the Programme, reviews and endorses draft Test Guidelines, and builds consensus to overcome policy differences that would otherwise jeopardise progress in Test Guideline development. The Joint Meeting also ensures that the allocation of resources is sufficient to enable the agreed work programme to be carried out.

Procedures for test guideline development

Proposals

Proposals for the development of new or updated Test Guidelines can be made **by** the NCs, by the international scientific community via a National Co-ordinator, and by the Secretariat. A proposal for a new Test Guideline or the revision of an existing Guideline should have undergone a critical appraisal concerning its scientific justification, its sensitivity and reproducibility.

DRPs

A DRP should be prepared when it is considered essential that the "state-of-the-art" in the area under review first be assessed. A DRP should be extensive and include: a description of scientific progress: an inventory **and** appreciation of existing methods and current (inter)national data requirements; the identification of gaps in the current set of OECD Test Guidelines and of Guidelines that need updating; proposals as to the development/updating of Guidelines; and an indication of the relationship between the proposed and existing tests and of their possibilities and limitations of use.

Review

In order to achieve a broad acceptance, the opinion of recognised experts from Member countries and views **of** the NCs are requested by the Secretariat at various stages **of** Test Guideline development. Depending on the Member country's preference, documents for review are sent either to the NC and to Nominated National Experts, a list of which is made available to the Secretariat, or to the NC only, who subsequently circulates the documents for comment to selected national experts. Whichever option is chosen, national **experts** should always send their comment to their NC for his/her review. NCs should prepare a ***National Position Paper (NPP)*** on DRPs and Draft Test Guideline Proposals. NPPs should preferably contain a consensus view on the issues raised in the document. When consensus is not possible, they should contain a compilation of alternative views. In addition to the review by Member countries, the Secretariat will also request comment, drafted as a Position Paper, from the Business and Industry Advisory Committee to the OECD (BIAC) and, when relevant, from international scientific societies and/or other recognised organisations.

Consultations, OECD Workshops and Expert Meetings

Depending on the extent and nature of comments received on documents circulated, the Secretariat will either circulate a revised draft, or propose that a ***Consultation of Experts,*** an ***OECD Workshop*** or an ***ad hoc Expert Meeting*** be held. The decision to organise an OECD Workshop or an ***ad hoc*** Expert Meeting will be made in consultation with the NCs and will require both their prior approval and that of the Joint Meeting.

A ***Consultation of Experts*** will be arranged by the Secretariat when there are considerable differences of opinion concerning the technical/scientific content of the proposal. The number of invited experts to a Consultation Meeting should preferably be small. Experts will participate in Consultation Meetings only in their personal capacity.

An ***OECD Workshop*** will be organised when it is considered desirable to exchange views on basic aspects, to discuss various concepts of testing and/or to acquire insight into current scientific progress in a particular area of testing. OECD Workshops are normally open to interested scientists from both Member and non-Member countries.

An *ad hoc* ***Expert Meeting*** will be arranged when, on the basis of comments received on a Draft Test Guideline Proposal, it is anticipated that consensus among Member countries on the proposal can be reached. Experts will be nominated by their respective NC and will formally represent their Member country's viewpoint on the subjects discussed. In addition, BIAC will also be invited to nominate experts for these meetings.

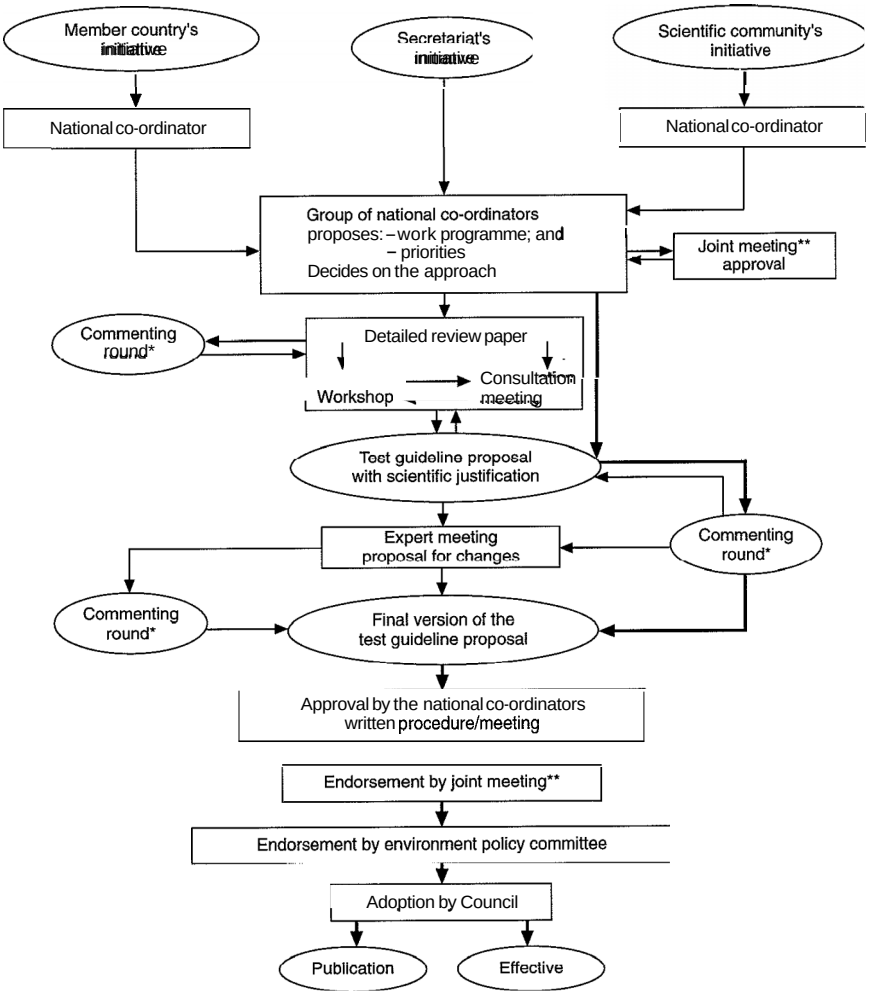
Approval, endorsement and adoption

After sufficient consensus has been reached, a Draft Test Guideline is submitted to the NCs for their approval, either at the NCM or **by** written procedure. Once approved by the NCs, the **Draft** Test Guideline is forwarded to the Joint Meeting for their review and endorsement. A Draft Test Guideline rejected by the Joint Meeting will be referred back to the NCs, together with the reason for its rejection. After endorsement by the Joint Meeting, the Secretariat submits the proposal to the Environment Policy Committee (EPOC). Under **a** written procedure, EPOC is invited to agree to the submission of the proposal to the Council for formal adoption.

Deletion of Test Guidelines

The procedures for review, approval and endorsement of the proposed deletion of (an) existing Test Guideline(s) will be the same as those described for the development of new, or the update of existing, Test Guidelines.

Figure 1. **OECD test guideline development flow diagram**



* Commenting rounds would include Member countries, BIAC, and scientific societies, as appropriate.
** Joint Meeting of the Chemicals Group and Management Committee of the Special Programme on the Control of Chemicals.

→ = Fast track procedure.

References

OECD (1981), *Decision of the Council Concerning the Mutual Acceptance of Data in the Assessment of Chemicals,* **12 May** 1981 [C(81)30].

OECD (1993), *Environment Monograph* ***No.*** *76* [OCDE/GD(93)110].

Part III

REGULATORY RAPPROCHEMENT: HARMONIZATION, MUTUAL RECOGNITION, CO-ORDINATION

Chapter 7

Comparing strategies of regulatory rapprochement

by

Giandomenico Majone

I. Introduction: Regulatory co-operation in an interdependent world

One of the great paradoxes of modern science, philosophers tell us, is that logic shows that all scientific knowledge is tentative and subject to constant revision, while history testifies to the possibility of achieving genuine scientific knowledge. Economists and political scientists have discovered a similar paradox in the field of international relations. There are compelling theoretical reasons for supposing that international co-operation will. not develop or that co-operative agreements, even if they are reached, will not persist. Experience shows, however, that co-operation *does* take place and is actually growing in most fields of policy-malung.

The theoretical reason for supposing that co-operation among sovereign states is impossible or unstable is the assumption of self-interested behaviour in an environment unstructured by binding rules. International co-operation is necessary to produce collective goods such as protection of the global environment or free trade. However, a collective good, if it is produced at all, will be enjoyed by all countries, whether they contribute to its provision or not. Hence governments have a strong temptation to be "free riders". More precisely, when each country's contribution to the cost of the collective good is small as a proportion of its total cost, countries are individually better off by not contributing, since their contributions are costly to them but have a negligible effect on whether the good is produced. As a consequence, the good will be produced in insufficient quantity or not at all. The same pessimistic conclusion is reached if the problem of international co-operation is formulated in terms of the "Prisoners' Dilemma", a famous game-theoretic model, rather than in the logic of collective action. In the game-theoretic formulation, the optimal strategy for each player is not to co-operate, even though the players could achieve a *collectively* superior solution by co-operating.

Against these theoretical conclusions we have the historical fact that "international co-operation among the advanced industrialized countries since the end of World War II has probably been more extensive than international co-operation among major states

during any period of comparable length in history" (Keohane, 1984: 5). Co-operation not only takes place but is often codified in international agreements. Some of these are woefully ineffective, but others do appear to have achieved a good deal (see below). The implication of the paradox of co-operation is not that logic is refuted by history, but rather that our theoretical models can hardly be complete. At least in their simplest formulation, these models leave out precisely those factors – values, morality, ideas, trust – which make civilised life possible. Yet it would be a serious mistake to reject such theoretical analyses as practically irrelevant. Even if the theory is incomplete, it does capture dimensions of human behaviour which must be kept constantly in mind when designing institutions to promote international co-operation.

11. The internationalisation of regulation: some examples

It may be useful to introduce the general themes of this paper by means of several examples. As was noted above, international agreements differ considerably in their effectiveness. There is general agreement among experts that the International Convention for the Regulation of Whaling (1946) can hardly be considered a success. The convention established the International Whaling Commission (IWC), consisting of one member for each contracting government with one vote for each member. A code for the whaling industry was formulated and the commission was empowered to amend it without the necessity of further formal conferences. Ordinary decisions were to be taken by simple majority. The commission was authorised to administer regulations regarding open and closed waters, periods, methods, and intensity of whaling, including the maximum catch in any one season. Despite these considerable formal powers, the record of the IWC since its creation has been largely the history of its inability to overcome the short-range interests of the whaling industry. The weakness of the IWC as a regulatory agency was that its voting members represented in most instances the industry it was intended to police – a textbook example of international "regulatory capture". The commission's ineffectiveness was compounded by its frequent disregard of the findings and recommendations of its scientific advisors (Caldwell, 1984, p. 32).

Although it deals with a much more complex problem than the regulation of whaling, the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) is widely regarded as the most successful case of international environmental agreement to date. The protocol required its signatories to cut the production of ozone depleting chlorofluorocarbons (CFCs) by 50 per cent, while the 1990 amendments to the protocol phase out CFCs and other chemicals, and provide financial help for developing countries willing to comply. More than 70 countries have joined the agreement, and world use of CFCs is down by more than 20 per cent, far ahead of the control schedule. Among the important reasons for this success story are the quality of the scientific data correlating emissions of CFCs and ozone depletion, the strong leadership of some countries, and the provision of financial incentives to subsidise investments in CFC alternatives by developing countries.

In the field of international economic relations, policy co-ordination became a buzzword in the 1980s. At the Tokyo Economic Summit of 1986, the heads of govern-

ment of the Group of Seven (G-7) decided to establish a process for co-ordinating their macroeconomic policies. The process involved finance ministers and their deputies, central bank governors, and officials of the International Monetary Fund. However, macroeconomic policy turned out to be an unfruitful field for co-ordination since countries disagreed on objectives, on the choice of instruments, and on the distribution of benefits and costs. Today interest has shifted in the direction of microeconomic co-ordination – agriculture and labour market policies, tax reform, non-tariff barriers, deregulation. These developments suggest that despite its intuitive appeal, policy co-ordination is not always possible or even desirable. Doubts are also cast on the value of the top-down model of co-ordination symbolised by economic summitry. At least in the field of regulation, the best examples of successful co-ordination are provided by the bottom-up approach, where national regulators are involved directly rather through their political **busses.**

Thus, an effective mechanism for international co-ordination of banking supervision exists in the Basle Supervisors Committee which meets under the auspices of the Bank for International Settlements and whose members are bank supervisors from eleven major industrial countries. Similar committees of bank supervisors have been formed on the Basle model in various regions of the world. The Committee strives to accomplish a gradual convergence of bank supervisory practices and to close gaps in international supervisory coverage It does not attempt detailed harmonization of member countries' regulations, but in actual practice all the member countries have reformulated their approaches to prudential supervision of international banking activities to follow the principles stated by the Basle group in the *Concordat on the Supervision of Banks' **Foreign** Establishments* (which was issued in 1975 and revised in 1983 and again in 1992 in the wake of the BCCI scandal, see below) and in the *Capital Adequacy Accord* of 1988 (Laudati, 1993).

It has even been argued that as a result of the far-reaching co-ordination already achieved, banking is the only industry subject to protective regulation on a worldwide basis. However, the recent case of the Bank for Credit and Commerce International (BCCI) shows that serious regulatory gaps still exist. By the time BCCI was shut down in July 1991 in an unprecedented action by banking authorities in more than 60 countries, hundreds of millions of dollars had been lost by unwary depositors in as many countries. The basic problem was that no one supervisor or "lead regulator" was responsible for supervising all of BCCI's worldwide operations. It remains to be seen whether the 1992 amendments to the *Concordat,* and greater public awareness of the serious consequences of gaps in the international regulatory network, will be sufficient to prevent the repetition of similar cases of world-wide fraud. At any rate, the achievements of the Basle Committee are truly remarkable, in spite of (or perhaps because of) its limited formal powers: its rules and standards are not legally binding and allow considerable national discretion in implementation.

While multilateral co-ordination is well advanced in the international banking sector, work has just begun on co-ordinating supervision in the securities business. And yet, the danger that cross-national differences can open up opportunities for "regulatory arbitrage" (that is, participants undertaking activities in one market to escape restrictions in another) is especially acute in the case of internationally traded securities. Without a

co-ordinated multilateral approach to securities supervision, at least among countries possessing the largest securities markets, such destabilising activity could be encouraged (Allen, 1989, p. 60).

The International Organization of Securities Commissioners (IOSCO), formed in 1987, is beginning to address the need for more compatibility and convergence in the regulation and supervision of all aspects of securities trading: clearing and settlement systems, capital adequacy, margin requirements, insider trading, derivative instruments, disclosure, and the regulation of international financial conglomerates. Like the Basle Commission, IOSCO supports the establishment of similar organizations in different parts of the world. We have here another interesting example of the bottom-up approach to international regulatory convergence.

In sum, the need for more compatibility and convergence is felt in every significant area of regulation. Efforts to achieve regulatory rapprochement are reported with increasing frequency by the international press. Two striking examples of this general trend appear in the same issue of ***The Economist*** (November 9th, 1991). The first is a bilateral agreement concluded hy the United States and the European Community (EC) to co-ordinate enforcement of antitrust policies. The agreement commits both sides to consult more, to meet regularly, to exchange information and, most crucially, to take each other's "important interests" into account with the aim of avoiding or at least reducing the chances of working at cross purposes.

The second example is a meeting in Brussels of over 1 000 drug-industry representatives and their regulators from America, Europe and Japan to finalise a draft of international standards on the data which drug firms must produce to get their new pharmaceuticals approved. International standards would drastically reduce R&D costs since drug firms could avoid needless repetition of testing to get their products approved by different national authorities, but they could also favour the international diffusion of the best laboratory and clinical practices, thus improving consumer protection.

The trend toward the internationalisation of economic and social regulation is a response to the growing interdependence – economic, financial, ecological, social and political – of the international system. However, our brief discussion of macroeconomic policy co-ordination in the 1980s suggests that intcrdcpendence is not a sufficient condition for the success of international co-operation. Macroeconomic co-ordination failed because of fundamental national differences about policy objectives, about the distribution of gains and costs, and even about the modelling of the economy and forecasts of economic conditions. This sobering lesson must be always remembered a5 we discuss the possibilities and limits of regulatory rapprochement. Before entering into a detailed evaluation of different strategies, however, it is important to understand why governments wish to regulate in the first place, and how regulation can fail.

111. Regulation and market failures

At any level of government, the rationale for regulation is the existence of market failures, that is, conditions under which the market does not produce socially optimal

outcomes. Among the most important types of market failure are failure of competition, public goods, incomplete markets, negative externalities and failures of information. For the purpose of the present discussion the last two categories are especially important.

A negative externality exists when the actions of one individual, one firm, or one government impose uncompensated costs on other individuals, firms, or governments. Probably the most discussed example in recent years has been air and water pollution. Environmental externalities can be one-directional or reciprocal. An externality is one-directional when the polluter(s) are in one jurisdiction and the victims of pollution in one or more jurisdictions, as when pollution travels by river downstream into one country from a site upstream in another. The simplest case is when only two jurisdictions are involved, the effects are acknowledged to be one-directional by all parties, ownership of the transmitting medium is not in question, and damage and control costs are easily measured and relatively insignificant. These were the conditions when, in 1935, the Trail Smelter metal refinery in British Columbia, Canada, was found to have discharged sulphurous gases that damaged farm crops across the border in the state of Washington, **USA.** Despite the relative simplicity of this case, it still took many years before the International Court of Justice in the Hague resolved it by finding the Canadian government liable for $350 000. This established an important precedent for international environmental law.

Note that one-directional hazards, in addition to being transmitted through natural environmental media, can also be exported through trade. Thus, hazardous substances may cross national borders as ingredients or additives in a large number of internationally traded articles such as agricultural products, pesticides, pharmaceuticals, or fabrics that have been treated with carcinogenic substances. International trade in hazardous substances may be regarded as a form of one-directional risk when the trade flows from a producer in a heavily regulated country to countries that control neither imports nor domestic sale of such substances. In such a situation, the level of risk imposed on the citizens of the importing countries is largely determined by the regulatory policy of the exporting country.

We find an analogous situation in international banking. Because parent banks are generally obliged to meet the financial liabilities of their foreign subsidiaries and branches (principle of "parental responsibility''), deposits placed with a loosely regulated foreign banking establishment can be no more risky, in a credit sense, than deposits placed with its more tightly regulated parent bank. Financial centres that adopt permissive regulatory standards in order to attract banking business are thus able to free-ride at the expense of more tightly regulated centres, since they do not bear any prudential cost in the form of a risk premium payable on locally placed deposits (Dale, 1984, p. 181). Without some harmonization of prudential standards, such as the Basle group attempts to achieve, one-directional financial risks of this type can lead to a "competition in laxity".

In case of a reciprocal externality, several jurisdictions are both producers and receivers of environmental pollution. While in the one-directional situation the jurisdiction causing the externality has strong incentives to ignore the damages its activities impose on other jurisdictions, in the reciprocal externality case there is an incentive to take unilateral action even in the absence of a binding agreement. In fact, the historical

record shows that the most productive international arrangements have been worked out in situations of reciprocal externalities.

The category of information failures is at least as complex as that of negative externalities. Many government activities are motivated by imperfect information on the part of consumers, together with the assumption that court remedies and competitive pressures are not sufficient to provide the consumer with adequate information. For example, drug manufacturers may be required to print the generic as well as the brand name of their product on the label, so that the buyer can see that a host of competitors in fact sell the same product. **Again, a** seller of securities may lie about the assets of a company. False statements may be grounds for rescinding a contract or suing for damages, yet the cost of court action is often high enough to seriously weaken it as a deterrent. For similar reasons, information failures provide an important rationale for the regulation of the professions.

Information failures are a serious problem also for international co-operation. **As** we saw above, one of the obstacles to macroeconomic policy co-ordination is the uncertainty on the part of policy-makers about which **is** the correct model of the economy or about the likely effects of different policy instruments. Hence the parties to a negotiation may feel that a policy designed by many countries, several of whom hold conflicting theories of the economy, will be inferior to one designed by a single country with a broadly correct theory. **Such** informational imperfections have been among the chief obstacles not only to policy co-ordination among the ***G-7*** countries but also to European co-operation in the field of industrial policy (Gatsios and Seabright, 1989).

IV. Regulatory failures

Market failures provide only a *prima facie* case for government intervention since the costs of public intervention may exceed its benefits. In such a case we speak of *regulatory failure*. Students of regulation have been more successful in categorising various types of market failure than in classifying regulatory failures. This is because our theories of government and public administration are not as well developed as theories of market behaviour, but also because of the complexity of the phenomenon.

Regulatory failure may result from mistakes on the part of the enacting legislature; from poor policy analysis leading to the adoption of measures that are not cost-effective; to capture of the regulators by the regulated interests; to the obsolescence of regulatory instruments such as standards: to failures of co-ordination and implementation. While such problems exist at any level of government, special cases of regulatory failure appear at the international level. In fact, I shall argue that at this level regulatory failures are even more important than the market failures which regulation is supposed to correct. The greater relative significance of regulatory failure is what distinguishes international from national regulation.

Absent international regulatory failures there would be no need to harmonise national rules or to delegate regulatory powers to supranational or international bodies. If national regulators were willing and able to take into account the external effects of their

decisions; if they were well-informed about one another's intentions; and if the costs of organizing and monitoring policy co-ordination were negligible, market failures could be managed by a series of bilateral agreements, or even by means of non-co-operative mechanisms such as retaliation or tit-for-tat strategies (see below).

International regulatory failure occurs when one or more of these conditions are not satisfied. Note that even purely local market failures can give rise to international regulatory failure. For example, problems of safety regulation for construction of local buildings create no transboundary externalities and thus, according to the principle of subsidiarity, should be left to the local authorities. However, if safety regulations specify a particular material only produced in that locality, they amount to a trade barrier and thus have negative external effects. Hence, local regulation of a local market failure may create an international regulatory failure

Similarly, local authorities have sometimes controlled air pollution by requiring extremely tall smokestacks on industrial facilities. With tall stacks, by the time the emissions descend to ground level they are usually in the next city, state, or country, and so of no concern to the jurisdiction where they were emitted. Within a federation or a supranational system like the EC, centralisation of regulatory authority at a higher level of government can correct such transboundary externalities. This solution is seldom available at the international level and for this reason international regulatory failure remains a serious problem even when we assume that the market failure in question is in principle capable of being ameliorated.

In the two previous examples, domestic regulation was used strategically, that is, to gain advantages with respect to other countries or jurisdictions. Strategic behaviour in the enforcement of co-operative agreements gives rise to problems of *credibility*, another important cause of international regulatory failure. Agreements are not credible when implementation is uncertain. There are several reasons why it is difficult to observe whether international regulatory agreements are kept or not. First, measurement problems are quite severe in some areas of regulation, like pollution control. Because of quickly changing atmospheric conditions, for example, it may be difficult to know whether a given standard has been exceeded, and for how long. This is particularly likely to happen if ambient quality standards rather than effluent standards are used.

Regulatory discretion is another important factor. Because regulators lack information that only regulated firms have, and because governments are reluctant for political reasons to impose excessive costs on industry, regulators and regulated constantly bargain over the precise obligations of the latter. Bargaining being such a pervasive feature of regulatory enforcement, it may be extremely difficult for an outside observer to determine whether the spirit of an international agreement has been violated.

Sometimes governments subscribing to an agreement have problems of credibility not just in the eyes of each other but in the eyes of third parties such as regulated firms and governments who have not subscribed to the agreement. Thus, where pollution has international effects and fines impose significant competitive disadvantages on firms that compete internationally, firms are likely to believe that national regulators will be unwilling to prosecute them as rigorously if they determine the level of enforcement unilaterally rather than under international supervision (Gatsios and Seabright, 1989).

It is also important to recognize that credibility is not uniformly distributed. Some countries suffer low credibility because they lack, or are perceived as lacking, the scientific knowledge, technical expertise, or administrative instruments to regulate effectively in certain areas. For example, there is reason to believe that the disappointing results of the multi-state procedure for the approval of new medical drugs introduced by the EC some years ago are due, in no small part, to such credibility problems (Majone, 1992*a*).

To conclude. regulatory failure is the main obstacle to international co-operation in the regulatory field. Hence in evaluating different strategies of regulatory rapprochement it will be necessary to examine the robustness of the strategies with respect to various lunds of regulatory failure.

V. Strategies of regulatory rapprochement

If one takes the autonomy of the national regulators as the underlying parameter, it is possible to arrange the different strategies of regulatory rapprochement along a continuum. Moving from the least constraining to the most constraining option we find: tacit co-operation; mutual recognition and regulatory competition; delegation to non-governmental bodies; partial harmonisation; total harmonization. It must be emphasised that this is only an approximate ordering in as much as reduction to a single dimension is only possible at the cost of heroic simplification. Also, the parametrisation chosen here is not the only, or even the most important one; it is, however, heuristically useful and will serve to organise our discussion and subsequent evaluation of the various alternatives.

a) Tacit co-operation

In discussing the possibility of international co-operation, it is important to distinguish between one-shot situations and situations where countries are unavoidably locked in a continuing relationship. In the latter case, the theory of infinitely repeated games (Axelrod, 1984; Rasmusen, 1989) shows that an agreement between several countries can be sustained by the threat that, if one country breaks the agreement, the others will retaliate by reverting to the previous situation of non-co-operation. The continuing nature of the relationship makes the threat credible. A tit-for-tat strategy also entails co-operation, but the co-operation is tacit and is enforced by means of a non-co-operative mechanism, retaliation: there is no explicit agreement, no open negotiation (Barrett, 1990).

Tacit co-operation can also be explained on other grounds. For example, countries may wish to keep an agreement even if there is no threat of retaliation, in order to cultivate a reputation for being reliable. Before September 1992, some members of the European Monetary System refused to devalue their currency even when economic conditions seemed to demand such an action. This behaviour has been interpreted as an attempt to cultivate a reputation as responsible members of the system.

There are, however, two serious practical problems with the claim that mechanisms of tacit co-operation can sustain international co-operative agreements for a substantial period of time. First, the game-theoretic argument assumes that governments have a sufficiently low discount rate, so that the future costs of retaliation outweigh the immediate gains from defection. However, democratic governments tend to have short time horizons and hence strong incentives to breach agreements for short-term advantage. Secondly, as noted in the preceding section, the complexity of regulation can make it difficult to determine whether agreements are being properly kept or not; and without reliable monitoring of compliance the retaliation that sustains co-operation cannot be invoked. We conclude with Gatsios and Seabright (1989, p. 48) that for many kinds of international regulatory agreements, more than tacit co-operation is needed to ensure credibility.

b) Mutual recognition and regulatory competition

This strategy has received a good deal of attention in connection with the EC internal market (Europe '92) programme. In the 1985 White Paper on *Completing the Internal Market* (COM(85)310 final), the EC Commission proposed a conceptual distinction between matters where harmonization is essential, and those where it is sufficient that there be mutual recognition of basic requirements of health and safety laid down under national law, based on the assumption that the requirements were ''equivalent". The distinction was anticipated by the European Court of Justice (ECJ) in the famous *Cassis de Dijon* case of 1979. The Court stated that a member state may not in principle prohibit the sale in its territory of a good lawfully produced and marketed in another member state, even if the good is produced according to technical or quality requirements which differ from those imposed on its domestic products. Exceptions to this rule are justified only by the need to protect public health and the environment, to ensure effective fiscal supervision, or to ensure the fairness of financial transactions. The Commission generalised the Court's reasoning by extending it to the free movement of people and services.

The principle of mutual recognition rests on the assumption that "the objectives of national legislation, such as the protection of human health and life and of the environment, are more often than not identical" (COM(85), p. 17). From this assumption it follows that ''the rules and controls developed to achieve those objectives, although they may take different forms, essentially come down to the same thing, and so should normally be accorded recognition in all Member States" (*ib.*). The same philosophy inspires the Australian *Mutual Recognition Act 1992;* but if it is reasonable to assume that in a mature federal system the health and safety requirements of the member states are essentially equivalent, the same cannot be taken for granted in a community where legal traditions, administrative cultures, and regulatory philosophies still differ considerably. The hypothesis of essential equivalence is *a fortiori* doubtful in an international context.

A judgement of the ECJ in the so-called "wood-working machines" case (1986) reveals the problem quite clearly. In this case the Court was confronted with two different national approaches to safety: German regulation was less strict and relied more on an

adequate training of the users of this type of machinery, while French regulation required additional protective devices on the machines. The Court ruled against the Commission which had argued that both regulations were essentially equivalent, and found that in the absence of harmonised Community standards a member state could insist on the full respect of its national safety rules, and thus restrict the importation of certain goods. In fact, mutual recognition cannot work in an integrated market unless essential requirements of health and safety are suitably harmonised. The key words here are "essential requirements". In the past, the Community attempted to harmonise national regulations by setting a multitude of specification standards. The new approach replaces all these specifications by a few performance standards that a product must satisfy in order to secure the right of free movement throughout the common market.

The distinction bctwccn csscntial requirements and technical specifications is not merely quantitative, but also qualitative: it corresponds to the basic distinction between *performance* standards and *specification* standards. A regulation prescribing that ladders must have rungs at least one inch in diameter is using a specification standard, while a performance standard would say that the rungs must be capable of withstanding a certain minimum weight. It is well known that specification standards tend to stultify innovation, while performance standards foster flexibility and innovation, cut down red tape, and thus reduce cost. A new type of ladder made out of lighter but stronger material might be impermissible under the specification standard, but acceptable under the performance standards. For these reasons it has been rightly said that the first victories for the economic approach to regulation have been in the replacement of many government specification standards by performance standards.

In the EC, the essential requirements are harmonised according to the so-called total method, that is, the original national provisions are replaced by the new approximated provisions: Community rules become the sole regulation governing the area. **A** manufacturer may, however, choose between two different ways to demonstrate that his products satisfy the essential requirements: he may apply European or international standards or, during a transitional period, national standards; or he may apply his own standards, but in this case he must be able to demonstrate to an approved certification body that his products conform to the essential requirements defined in the relevant directive.

For example, the Toy Safety Directive (COM(88)378), does not tell the toy manufacturers how they should produce their toys. Rather, Annex II of the directive sets out broad performance standards concerning matters like the flammability and toxicity of the toy. Here again there are two methods of meeting the essential safety requirements. First, a toy can be made in accordance with European (CEN) standards. Alternatively, the manufacturer can seek approval for a toy which does not conform to CEN standards, but which nonetheless is claimed to meet the overall performance level. Specifications worked out by the experts at the CEN normally provide the easiest way of proving conformity with the performance standards defined in the directive. Innovation remains possible even if one relies on such specifications since *a)* the specifications are non-binding, and *b)* given the non-governmental nature of the CEN, they can be easily adapted to technical progress. Moreover, since harmonization is limited to the safety

aspects of the product, national diversity is successfully preserved in the framework of a Community regulation.

Another impressive application of the philosophy of mutual recognition is Directive 89/646 on credit institutions, often referred to as the Second Banking Directive. The basic regulatory framework applying to EC banks as of January 1993 is provided by this directive and by three narrower directives concerned with the definition of a bank's capital, with capital adequacy ratios that follow the Basle guidelines mentioned above, and with procedures for winding up credit institutions. These three technical directives aim to harmonise prudential standards in key areas, rather than to provide mutual recognition. They establish a firm basis on which mutual recognition can take place. As such they show that, as in the previous example, harmonization and mutual recognition are not simply alternatives but are, in fact, complementary. The principle is always the same: *ex ante* harmonization only of basic prudential rules and of institutional and organisational conditions essential for the protection of consumers and of the public interest; all other conditions are defined and controlled by the home country, and must be accepted by the other member states.

In addition to focusing the attention of regulators on a few essential requirements and performance Standards, mutual recognition replaces centralised by decentralised decision-making, thus introducing competition among different regulatory approaches. Competition is an efficient way of assessing the costs and benefits not only of goods and services but also of rules. By providing opportunities for experimentation and social learning, competition among regulators can raise the standard of all regulation and drive out rules which offer protection that consumers do not, in fact, require (Kay and Vickers, 1990). The advantages of competition are clearest in the case of products which consumers are competent to evaluate. For example, if German TV standards are less costly than French standards but consumers regard German TV sets as essentially equivalent to the more expensive French sets, French producers will lose business to their German competitors. Hence they will bring pressure on their government to modify national TV standards. If other countries find themselves in a similar situation, competition among rules will eventually lead to convergence to the most cost-effective standard or to a limited number of standards with varying price-quality characteristics (it is unlikely that more than a few standards would survive in equilibrium, since this would entail high information costs for consumers and loss of economies of scale for producers). The end result is *ex post* or bottom-up harmonization, achieved through market processes rather than by public authorities as in the case of *ex ante*, or top-down, harmonization. As we have seen, *ex ante* harmonization, limited to a few essential requirements, is still needed in order to avoid "excessive competition" among rules, or a race to the bottom leading to a general deterioration of health, safety and quality standards. The notion of *ex post*, market-driven harmonization is intuitively attractive, but leaves open a number of questions which we examine in section 6.

c) Delegation to non-governmental bodies

In all industrialised countries, much of the work of setting technical standards is done by private or semi-private bodies such as DIN in Germany, CSA in Canada, BSI in

the United Kingdom and by organisations accredited by ANSI in the United States. Some authors argue that this delegation to private organisations of responsibility for the safety of the citizens and the quality of the products they use is not acceptable either legally or politically. However, these arguments seem to assume a distinction between the private and the public sector, which in the area of standard setting is far from being clear or unambiguous. Many technical standards are set through a consensus process which often requires that government officials as well as industry representatives be made party to any consensus. With the exception of proprietary or "de facto" standards developed by a particular firm, govcrnmcnts usually are an integral part of the process leading to what is eventually considered a private standard. Thus, CSA requires government officials to take part in the standard-setting process, while the ANSI requires accredited standards organizations to follow a process that gives ample opportunity to government departments and others to become involved in any eventual consensus (Salter, 1990). In Germany, the federal government regulates its relationship with DIN on a contractual basis, as does the EC with the three official European standardisation bodies (see below).

The important distinction, therefore, is not between public and private, but between mandatory and voluntary standards. Even in sensitive areas like occupational safety and health, the superiority of mandatory standards is far from clear. As John Mendeloff has shown in the context of American regulation of the work place, federal standards are usually too strict and costly to justify the benefits they confer. At the same time the slow pace of standard setting means that many serious hazards are never addressed at all: over-regulation causes under-regulation. Thus, under the terms of the 1970 Occupational Safety and Health Act, Congress told the Occupational Safety and Health Administration (OSHA) to use the list produced in 1968 by the American Conference of Governmental Industrial Hygienists (ACGIH, a *private* organization) as its initial set of toxic substance standards. The 1968 ACGIH list included roughly 400 chemicals. In the following twenty years OSHA has reduced the exposure limits for ten substances while the ACGIH has reduced the exposure limits for approximately 100 substances and has added exposure limits for about 200 more (Mendeloff, 1988, p. 82).

The European Community provides another striking example of the paradoxical consequences of over-regulation or, in this case, over-harmonization. Under the approach used until 1985, the Council produced directives providing detailed technical specifications for single products or groups of products. This approach to technical harmonization failed completely. It took ten years to pass a single directive on gas containers made of unalloyed steel, while the average time for processing the 15 directives that were passed as a package in 1984 was 9.5 years (Eichener, 1992). In the meanwhile, the member states were producing thousands of technical standards each year.

Realising that over-harmonization was causing under-harmonization, the Council in 1985 approved a ''New Approach to Technical Harmonisation and Standardisation". Under the new approach, Community regulation is restricted to essential safety and health requirements (see above), while general requirements are specified by European standards issued by European standardisation bodies: the Comité Européen de la Normalisation (CEN), the Comité Européen de la Normalisation Electrotechnique (CENELEC), and the European Telecommunications Standards Institute (ETSI) created in 1992. These

three official organisations are private-law associations of the EC and EFTA member states' national standardisation bodies.

International standards, like European standards, are only voluntary, but the experience with mandatory standards in the US and the EC shows that this is not necessarily a disadvantage. On the contrary, voluntary standards tend to be more flexible, innovative and cost-effective than mandatory ones. They are also less risky since firms can ignore them if they are obviously absurd. In terms of effective implementation, the main problems of voluntary standards is not their legal status but their credibility. The standards of prudential supervision of international banking issued by the Basle Committee are not legally binding, yet they have been implemented by all the member states, and even by many non-member countries. On the other hand, many other international standards are simply ignored. It all depends on the credibility of the regulators, and this cannot be established by treaty.

d) Co-ordination

Policy co-ordination has been defined as ''a process whereby policy-malung officials of a number of countries take external influences into account when they make their decisions" (Solomon, 1990). This broad definition covers a wide range of strategies, from tacit co-operation to the formulation of common policies. In the context of EC institutions, co-ordination usually means joint and interdependent actions without legal force: renegers cannot be taken to the European Court of Justice. The most important example is the European Monetary System in which participants behave according to rules which are not enforceable in European law. In this sense, co-ordination is a species of ''soft law" – rules which, in principle, have no legally binding force but which nevertheless may have practical effects (Snyder, 1993, p. 32).

For clarity of exposition it is convenient to stick to the meaning of co-ordination as joint action without legal force. Perhaps the mildest form of such action consists of exchanges of information among officials about current policies and future plans. Often such exchanges of information take place in established forums like the **IMF** or the OECD. The significance of this strategy of policy convergence should not be underestimated. Growing interdependence among nations has the effect of weakening the impact of policy actions on the home country and strengthening their impact on other countries. Exchanges of information can be extremely useful for assessing the extent of such externalities, understanding the mechanism through which they are transmitted, and planning remedial action.

A strategy of exchanging information is sometimes advisable even when stronger forms of policy co-ordination are available. Thus, although the Treaty of Rome assigns to the EC Commission the task of promoting close co-operation between member states in the field of social policy, it has been suggested that it would be better for the members of the EC to work within the framework offered by the Social Charter of the Council of Europe, the organization of European states created in 1949 for the purpose of protecting human rights and facilitating economic and social progress. **A** more flexible and less constraining approach than is possible in the framework of EC institutions, it should

facilitate gradual policy convergence by providing an opportunity to learn from the best national experiences.

The provision of information is an important regulatory instrument, since, as already mentioned, failure of information is one of the major causes of market failure. Indeed, in some cases "regulation by publication" may be seen as a viable alternative to statutory regulation. Charles Francis Adams, one of the "prophets of regulation" in America (McCraw, 1984) was a strong believer in the effectiveness of information, analysis, and publicity as regulatory tools. According to his biographer, Adams' ''pointed emphasis on what may be called regulation by publication ... also reflected the state's policy concerning the proper function of a railroad commission. Above all, the Massachussets agency [the Board of Railroad Commissioners] must shun coercion. Legal process could nnt he employed merely as a matter of course" (*ib.*, **p. 23).** Unlike many modern regulators, Adams and his colleagues ''exhibited a thoroughgoing and persistent aversion to the use of force, a determination to avoid tests of strength. The board might win such showdowns ... [but Adams sensed that victories of this sort would be pyrrhic. They would so poison the atmosphere that further influence, beyond the narrow boundaries of the commission's legal authority, might be forever compromised" (*ib.*, p. 24). International regulatory bodies can draw inspiration and intellectual support from Adams' strategy and from his theory of the "sunshine commission".

Stronger forms of co-operation can be achieved if information exchange is supplemented by some form of bargaining. Country **A** will do more of what country B (and maybe C, D, E, and so on) wants it to do if country B does more of what country A wishes. **As** we saw in section ***2,*** one reason for the success of the Montreal Protocol, the international agreement which sets ceilings on production of ozone depleting gases, was the provision of financial incentives to subsidise investments in CFC alternatives by developing countries. Issue linkage and package deals – trading off issues from different policy areas – are used quite frequently in the EC. Among the many examples, we mention the negotiations over the creation of the European Monetary System in 1979. Member states disagreed not only over the details of the system, but even more over the arrangements for compensating the less prosperous countries – at the time Britain, Ireland and Italy. Eventually Ireland and Italy joined the system on the promise of a sufficient transfer of resources in their favour. Britain remained outside, however, since its demand that the Common Agriculture Policy be reformed, was rejected by the French and other governments. The results of the negotiation show that the effectiveness of bargaining and issue linkage as negotiating tools is more limited than it is often assumed. Even when full co-operation is achieved, it may not be sustainable in the face of incentives to renege on policy agreements or of unanticipated developments. In this respect, too, the EMS is an instructive example.

As was noted above, there has been a resurgence of interest in co-ordination during the 1980s among policy-makers as well as in the academic community. As a result, studies on the costs and benefits of policy co-ordination, especially in the area of macroeconomics, have proliferated. What lessons may be drawn from the extensive body of research now available? To quote from an authoritative survey of policy co-ordination since 1945 (Currie, Holtham and Hallet, 1989, **p.** 7):

One lesson highlighted **hy** our discussion **is** the potential value of information exchange among international policy-makers. An appreciable part of the benefits of discussions among national policy-makers derives not from explicit co-ordination, but rather from making governments aware of the consequences of their actions for other countries. Information exchange improves the quality and efficiency of the non-co-ordinated outcome, even if co-ordination over actual policy actions is not forthcoming.

e) Harmonization

All the strategies discussed in the preceding pages are methods for approximating or harmonizing national laws, rules or regulations. In particular, we saw that competition among different regulatory approaches can, under conditions to be discussed in the next section, lead to ***ex post*** or market-driven harmonization. Here, however, we are referring to ***ex ante*** approximation of national measures by means of instruments such as EC directives or international agreements.

The directive is a flexible instrument of harmonization since it is binding as to the results to be achieved, but leaves national authorities the choice of the form and methods of implementation. This means that a directive is not (normally) directly applicable, that is, it does not produce immediate legal effects in the member states. Rather, it is addressed to governments and requires them to produce appropriate legislation at the national level which will ensure compliance with the objectives set out in the directive.

Ex *ante* harmonization can take two main forms: total and optional. Harmonization is said to be total when a directive imposes rules that replace pre-existing national regulation of a certain domain. For example, the very first directive adopted by the EC Council on October 23, 1962, was "on the approximation of the rules of the Member States concerning the colouring matters authorised for use in foodstuffs intended for human consumption". The directive lists a number of colouring matters which are the only authorised ones and which cannot be prohibited by member states. It further gives indications as to the purity criteria for the matters listed and contains rules on questions of presentation, packaging, and labelling. Such harmonization leaves the member states little leeway since the text determines in very precise terms the products which are the only ones authorised and which cannot be prohibited. The practical effect of this method is to deprive the member states of their competences in the areas regulated in this way at Community level.

For the sake of completeness, mention should also be made of a situation where national rules are totally harmonised, except for some particular aspects left to national law. **A** good example in the EC context is the Directive on Product Liability (85/374 EEC). This directive establishes uniform liability rules for the entire Community, but contains a provision allowing member states to choose whether or not to include in their legislation the "development risks defence", that is, the defence that the defect contained in the product was one which could not have been discovered, given the state of scientific and technical knowledge at the time when the product was supplied. About half of the members of the Community have taken advantage of this option. The conse-

quence is that the laws on product liability differ between different member states. The political reason for this untidy state of affairs is that a number of member states felt that the very strict type of liability originally proposed by the Commission would unduly hinder product innovation. Eventually, consumers' preferences should decide which of the two systems – with or without the defence – represents the best balance between the benefits of faster product innovation and lower costs, on the one hand, and greater risks, on the other (McGee and Weatherill, 1990).

Optional harmonization is the second basic method of ***ex ante*** approximation. Under optional harmonization each member state is given the possibility of offering producers the option between its own rules and the new harmonised provisions. Thus, a good produced in country **A** can be sold in country B if it satisfies either the harmonised Community rules or the norms of country B. This method is less constraining that the first one since it allows national rules to co-exist (or "co-habit") with Community rules. However, this flexibility has a cost for both producers and consumers. For example, in liability cases judges may give preference to national standards, thus creating a competitive disadvantage for producers who opted for Community standards. On the other hand, consumers may be confused by the co-existence of two different regulatory regimes in the same country and for the same product. Moreover, such a dual system creates incentives for "regulatory arbitrage".

Despite these shortcomings, the method of optional harmonization has found wide application in the EC. It is the prevalent method for the regulation of industrial products, with the exception of dangerous substances, pharmaceuticals, and cosmetics for which total harmonization is used. Total harmonization is the general rule also for foodstuffs. The choice between the two methods is obviously influenced by substantive considerations about the nature of the risks to be controlled, but also by the desire of the member states to preserve as much as possible their autonomy in regulatory matters.

VI. An assessment

The approximation of national laws and regulations is not, of course, an end in itself. It serves two basic purposes: to increase economic efficiency by facilitating the free movement of goods, capitals, services, and people – the facilitative function; and to improve the protection of the natural environment and of the economic and health interests of consumers – the protective function. Unfortunately, these two functions are not always compatible. Like all values, economic efficiency and environmental or consumer protection are sometimes in conflict and sometimes mutually supportive. What is relevant to the choice among modes of regulatory rapprochement, as to all policy choices, are increments and decrements – "marginal" values – rather than "total" abstractions such as perfect competition, zero risk, or a pristine environment. All rational expressions of preference presuppose that other values are satisfied to a degree.

Another point, not unrelated to the first one, must also be kept firmly in mind. Although it is analytically useful to identify different strategies of regulatory approximation, in practice various approaches are often used together, albeit in variable proportions

according to the particular circumstances of the case. Regulatory practice within the EC provides a clear example of this: as discussed above, mutual recognition is never used in isolation, but always in conjunction with other methods – *ex ante* harmonization of essential requirements and the delegation of certain regulatory functions to non-governmental standardisation bodies.

Finally, a balanced assessment of different strategies, or combinations of strategies, should consider political factors such as public accountability, the legitimation of technocratic decision-making, and the implications for the national and sub-national political systems of the delegation of regulatory powers to international bodies. Although political factors are often disregarded in policy evaluations, I would argue that they are crucially important for the public acceptance of international rules.

To these three general principles I add a more specific one which is as relevant to the choice of rules as to consumer choice: as much competition as possible, as little harmonization as necessary. Starting from this principle it is natural to focus the analysis on the strategy of mutual recognition and to discuss other methods only in their relation to it. The main advantages of mutual recognition have already been mentioned: it favours diversity, simplifies procedures, reduces the danger of over-regulation and over-harmonization, focuses attention on performance rather than input or process criteria. Above all, by stimulating competition among national rules and regulators, it expands consumer choice, increases efficiency, and makes social learning possible. The competitive process, it is claimed, will eliminate inefficient rules, leading in the end to *ex post* or market driven harmonization. Also the fear that regulatory competition could turn into a ''race to the bottom" as standards are bidden down everywhere, is not always justified. As Kay and Vickers point out, if an investor is deciding whether to execute a transaction in London or New York, one consideration is which of the two affords better investor protection. If a financial market was thought to have inadequate regulation, its members would soon suffer if investors could take their business elsewhere (Kay and Vickers, 1990, p. 243).

Still, regulatory competition is not a panacea for regulatory failure, just as product market competition is not a universal remedy for market failure. It has already been noted that the advantages of competition are clearest when consumers are competent to evaluate goods produced under different regulatory regimes, as in the example of the German and French TV standards. In such cases, competition can raise the standards of all regulation and drive out rules which offer protection that consumers do not, in fact, require. However, for many products and services it is not realistic to assume that the consumer is able to evaluate the relevant cost-quality or cost-safety trade-offs. Unless international standards have been adopted, not the consumers but national authorities will decide whether certain price-risk combinations are acccptablc. This means that free competition among many producers is replaced by oligopolistic competition among a few state regulators who will be tempted to use their discretion for protectionist purposes.

The time dimension is also important in evaluating the efficiency of competitive processes. Assume a situation where it is reasonable to think that competition among national rules will eventually eliminate the less efficient forms of regulation, leading to *ex post* harmonization. Unfortunately, it is usually impossible to estimate the speed of

convergence toward the superior method. If convergence to the most efficient type of regulation is slow, producers in different countries may become committed to a particular system of standards which it would be too costly or difficult to change at a later state. This is more than a theoretical possibility. In a very interesting paper titled "Clio and the Economics of QWERTY", Paul David (1985) has shown how the QWERTY typewriter keyboard, developed in the 1870s when typing had to proceed slowly to avoid jamming, became standardized and fixed, even in the face of more efficient alternatives. For example, although a US Navy study found in the 1940s that the faster speed possible with **the** Dvorak keyboard would amortisc the cost of retraining full-time typists within ten days, QWERTY remained the standard and large companies chose not to retrain their typists.

Uniform technical standards are often needed in order to enable interconnection of specialised equipment, as in the case of telecommunications. Hence mutual recognition of technical standards may be least satisfactory in precisely those areas where the potential gains from free trade and market integration are highest. Again, legal scholars have suggested that in case of a product liability suit, the courts will tend to make reference to the technical standards of their own country, and hence to decide against the producer who has not satisfied those standards. Thus, in the absence of some form of international harmonization, the foreign producer who has not met the standards of the importing country will be in a **less** favourablc position then domestic producers with respect to product liability.

Finally, it will be recalled that the introduction of mutual recognition in the EC was based on the assumption of the essential equivalence of national regulations of health and safety. Strictly speaking, ''mutual recognition" means ''mutual recognition of equivalent laws and regulations". It has also been pointed out that such essential equivalence cannot always be assumed even within the EC and, a *fortiori,* in a less homogeneous international community. Hence, before mutual recognition and competition among rules and regulators can produce their positive effects, a good deal of regulatory rapprochement must already have taken place.

This conclusion only strengthens the point made above that harmonization can only be achieved by a combination of methods and approaches. To say something more precise, we must go back to the initial rationale for regulation, see section **3.** Mutual recognition and rule competition will be most appropriate when regulation is justified by information failure. This is because competition, as Friedrich Hayek has argued, is essentially a discovery procedure. Mutual recognition facilitates the discovery of efficient regulatory regimes in two ways: by reducing non-tariff barriers to trade, thus expanding consumer choice; and by providing incentives for national regulators to discover and make available the kind of information which consumers will find most useful. Thus, in the face of information problems, rule competition is an appropriate methods for ensuring that the costs and benefits of regulation are properly assessed.

Competition is *not* desirable when regulation is justified by reference to negative externalities problems, since in these cases everyone has an incentive to move to jurisdictions with lower levels of regulation, or to be a free rider. Co-operation and co-ordination among regulators are then indispensable for effective regulation. However, the interna-

tionalisation of regulation raises the political and institutional problems mentioned above. A full discussion of these problems would require a separate paper; we can only offer a few observations based largely on the experience of the European Community.

The process of implementation of EC regulations at the national level has led to an increase in the rule-making powers of the member states' executives and a corresponding weakening of the role played by national parliaments in the Community policy-making process. This is because the incorporation of Community directives into national law is usually left to the executive authorities. Even when a parliament's vote is required, there is hardly any possibility for the national legislators to influence the regulatory content.

Also the relationship between central and subnational governments is significantly affected by Community regulations, especially in countries with federal or regional structure such as Germany, Belgium, Italy, and Spain. Subnational governments are understandably reluctant to comply with European regulations on whose substance they had no influence, even when the regulations concern matters such as education or the environment that me reserved to the state or regional governments by the national constitutions (Siedentopf and Hausschild, 1988). Hence the representation of subnational interests and points of view is today one of the key issues of regulatory federalism in Europe (Majone, 1992*b*).

Because of these developments, and because the European Parliament still plays a modest role in EC policy-making, the issue of the "democratic deficit" of the Community is raised with increasing frequency. The issue has become especially salient in the debate over ratification of the Maastricht Treaty. Similar concerns have been voiced in the American and Canadian discussions of the North American Free Trade Agreement. Yet, it is not obvious that making supranational regulatory bodies more political is the best answer to the problem of the democratic deficit.

The comparative advantage of EC (and international) regulation lies in large measure in the relative insulation of supranational regulators from the political considerations and pressures which tend to dominate national policy-making. For example, the fact that the EC Commission regulates a large number of firms throughout the Community makes it less likely to be captured by a particular firm or industry than a national regulator. Any proposal to improve the political accountability of Community institutions should not overlook the fact that also at the national level, non-majoritanan institutions such as courts, independent regulatory commissions, and central banks, play an important role as countervailing powers against some of the less attractive tendencies of modern democracies such as the focus on short-term considerations induced by the electoral cycle. This does not mean, of course, that accountability is not a serious problem for Community or international regulators, but only that we should not look for the same solutions that have been worked out at the national level: world government is not around the corner. Lack of direct control by the electorate should be compensated by greater transparency of decision making, more openness to public participation, especially by NGOs and representatives of regional and local government, and especially by greater reliance on the power of information, analysis, and publicity than is customary at the national level. By taking their role as ''sunshine commissions" seriously, international

regulatory bodies can do more than make a virtue out of necessity; they may be able to pioneer the use of regulatory instruments adapted to the information age.

VII. Policy conclusions

The growing internationalisation of regulation, a direct consequence of the internationalisation of the economy, presents risks as well as opportunities. What can governments do to reduce the risks and exploit the opportunities? Our assessment of the main strategies of regulatory rapprochement suggests some concrete steps. Take again the case of mutual recognition. The method is so attractive because it promises to facilitate free trade and economic integration while preserving national and regional characteristics; to reduce the rigidity of uniform regulation without sacrificing essential safety requirements; and to promote experimentation and learning without allowing unrestricted *laissez-faire*.

However, mutual recognition is a very delicate instrument; used without care or under the wrong conditions it could do more harm than good. We have identified four main conditions for a successful application. First, recognition of the laws and regulations of one state by other states can be reasonably expected only if all countries pursue very similar public-interest goals, albeit by different means – a condition that must be empirically verified rather than assumed ***a priori***. In practice, this means that national regulators should be well informed about the regulatory philosophies and practices of other countries. The decisions of private managers are shaped by knowledge of the strategies and resources of their competitors. Public managers must get accustomed to the idea that they, too, operate in an increasingly competitive legal and regulatory environment. Exchanges of information and experience are greatly facilitated by specialised organisations such as the Basle Supervisors Committee and the International Organisation of Securities Commissioners. There is an urgent need for such networks in all fields of regulation, from public utilities and the environment to occupational health and safety. The internationalisation of regulation necessarily implies the internationalisation of the regulators. **A** purely national frame of reference is no longer sufficient, even for the largest or most advanced countries.

Consider now the second condition for successful application of the strategy: mutual recognition must be supported by far-reaching harmonization of health and safety requirements in order to avoid competitive deregulation. Here international and supranational standardisation bodies like ISO, CEN and ETSI already play an important role, but their effectiveness should be improved. We stressed the fact that harmonization and mutual recognition are complementary rather than alternative strategies. Hence the relationship between the technical standardisation bodies and national regulators ought to be much closer than it is at present. In particular, the procedure created by the EC Information Directive for Standards and Technical Specifications (83/189 EEC) should be imitated at the international level. This directive requires the member states and the national standardisation bodies to inform the Commission about planned standardisation activities. It also requires a standstill of national standardisation when European standardisation or legislation starts, and sets up a Standing Committee for dealing with questions arising in the relationship between legislation and standardisation. Closer relations with the national

authorities. as well as with NGOs and public-interest groups, would also help alleviate the problem of political accountability which is especially severe in the case of international standardisation bodies.

Third, competition among regulators, like competition among goods and producers, must be protected and disciplined by general rules if it is to produce optimal results. We do not yet know enough about the nature of processes of regulatory competition to be able to specify what the rules of the game should be. It is clear, however, that all participants must be given the opportunity to compete on fair terms. It was already pointed out that some states have low credibility as regulators because they lack the scientific knowledge, financial resources, or policy infrastructure necessary to deal effectively with technically complex issues. Thus, international assistance may be necessary in order to help all interested members of the international community achieve a level of competence sufficient to ensure the credibility of their regulatory policies.

This brings us to our fourth and last point. A system based on mutual recognition cannot work satisfactorily without mutual trust, even supposing that all other conditions are met. But mutual trust among national regulators cannot bc assumed any more than the essential equivalence of the health and safety goals pursued by different national legislations. On the contrary, the theoretical models mentioned at the beginning of this paper imply that trust is a losing strategy for self-interested actors engaged in a single transaction. However, if the transaction is repeated many times, co-operation and trust can emerge even under the hypothesis of self-interested behaviour. The close linkages that now exist among the world's economies mean that some international co-operation is practically unavoidable. An important task of organisations like OECD is to provide a forum where such contacts can expand and intensify to the point that mutual trust becomes a winning strategy.

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Chapter 8

Towards a European Community regulatory strategy: lessons from "learning-by-doing"

by

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I. Introduction

Although the 1957 Treaty of Rome aimed to create a common European market, by the early 1980s it was clear that the EC was little more than a customs union for industrial products, with sketchy positive integration and many exceptions. The EC-1992 programme adopted in 1985 moved the Community beyond this in a span of only seven years.

The programme was qualitatively different than earlier European integration because it focused on the removal of non-tariff barriers, the bulk of which are *regulatory* in nature. However, by concentrating on the removal of regulatory barriers, the success of EC-1992 would crucially depend upon the achievement of an appropriate balance between *liberalisation* (the removal of barriers to intra-EC trade and production) and *harmonization* (the centralisation of regulation at the EC level of government, when such regulation is justified by the existence of certain types of market failures).

This paper tries to illustrate, in concrete terms, how the Community has worked to strike such a balance, and in the process, "complete" its internal market. Section II presents and analyses five guiding regulatory principles that emerged over the course of the 1992 programme; section 111 explains the emergence of regulatory competition from the so-called regulatory quintet and the interaction of its component principles; section IV examines the dynamics of regulatory competition based on business-government interaction; section V provides a brief assessment of the practical limits and merits of regulatory competition in a Community context; section VI discusses the need for horizontal and vertical co-operation between regulatory authorities in order to ensure the proper functioning of the internal market; finally, section VII provides policy conclusions.

11. The regulatory quintet after EC-1992

Now that EC-1992 is virtually "complete", it is possible to speak of a set of five principles that emerged over the course of the programme to guide the integrative process. In the following, we provide a stylised explanation of the five guiding principles and their interaction. It is important to underscore, however, that these principles evolved only gradually; they are as much a result of experience and of trial and error as they are **a** reflection of precise concepts that existed at the outset of the 1992 programme.

A) Free movement

The cornerstone of an internal market is the ability (both *de jure* and *de facto*) of goods, services, capital and labour to move freely within the internal market area. In the Treaty of Rome, the free movement principle is expressed in the form of prohibitions on national regulation that would unduly limit free movement. In the 1974 landmark *Dassonville* ruling – which applied to industrial products, but not necessarily to services or factors of production – the European Court of Justice laid down that free movement should not be unduly limited or ''more costly" than intra-national mobility.

B) Minimum harmonization

In the early years of the European Community, total *ex ante* (or prior) harmonization of member state national regulations, via EC directives and regulations, was the means by which integration was progressively achieved. In other words, the objective was to replace national regulations with common regulations so that all member states would have the same regulations in a given policy area.

However, when agreement on prior harmonization was not reached as a result, for example, of deadlocks in the Council of Ministers, free movement was simply blocked. Moreover, in those cases where agreement was eventually reached, total harmonization was costly both in terms of time and of the quality of resulting legislation. As a strategy, it was often disproportional (usually excessive) relative to the market failures it was designed to overcome. Finally, it was only applied to goods; services and markets for factors were left largely untouched.

It is therefore unsurprising that relatively straightforward "harmonization cases" remained stuck in the Council for long periods of time. For instance, agreement on the so-called "mineral water" directive took 11 years, even though the substance of the directive is very basic.' With such delay and inefficiency, the EC's internal market would have taken centuries to achieve, and even then, its ''accomplishments'' would have been open to debate.

The notion of minimum harmonization was therefore introduced as a way to harmonize only the ''essential requirements" of regulations, namely those safeguarding inviolable interests such as ''public morality, public policy, or public security...''.[2]

C) Mutual recognition

The practical use of minimum harmonization beginning from the mid-1980s opened the way for the application of a complementary principle, that of mutual recognition. The origins of mutual recognition as a principle in judicial review lie in the famous 1979 ruling of the European Court of Justice in the so-called *Cassis de Dijon* case. One breakthrough provision of this ruling held that the importation of goods lawfully produced and markctcd in one member state could not be prevented by another member state if such goods fulfilled the essential requirements enumerated in article 36 EEC. Rather, member state regulations would have to be "mutually recognised" and hence free movement within the EC would be guaranteed.

Although mutual recognition, upheld by the Court as a *judicial principle*, is far from sufficient to ensure free movement, the case law of the European Court following *Cassis de Dijon* did help to expand the scope and application of mutual recognition. Essentially, this cast: law held that, *even if* article 36-type essential requirements apply:

- mutual recognition is compulsory if the essential requirements are deemed to be ''equivalent" among member states. This means that the detailed harmonization of the past is no longer required. but, rather, is replaced by judicial review, rescuing free movement;
- and if national requirements are maintained, measures must be proportional to the objective sought, and the least restrictive for free movement. This criterion **also** considerably reduces distortions in the internal market.

The refinement of mutual recognition as a principle in judicial review helped to pave the way for free movement, but constraints were still very considerable. The result was that mutual recognition as a general *regulatory* (rather than as a judicial) principle was gradually developed. However, one cannot "observe" the application of this principle in practice. Instead, it operates against the background of the Court's doctrine of judicial review, as the Court has clarified it:

- once member states have agreed on a harmonization of the "essential requirements", article 36 EEC can no longer be invoked by member states to hinder free movement;
- because harmonization of essential requirements would, by definition, make those requirements ''equivalent", mutual recognition can be applied; and
- therefore, minimum harmonization is a faster route than case by case *ex post* judicial review to ascertain whether essential requirements are actually "cquivalent" . This route also carries greater political legitimacy in the sense that it is the Council that agrees on common levels of minimum harmonization, without waiting for the Court to determine the equivalence of essential requirements in individual cases.

Two further extensions of mutual recognition as a regulatory principle have been applied, with tremendous impact:

- in the standards area, the "new approach" to technical harmonization and standardisation, and the ''global approach" to testing and certification[3] expedited the practical implementation of mutual recognition; and
- in services, EC-1992 adapted the mutual recognition-cum-minimum-harmonization idea to the financial services sector (with the Second Banking Directive as the breakthrough), and to telecommunications (with an original combination of the standards and the services approaches).

D) Subsidiarity

Although subsidiarity is now a "buzz-word" in European Community affairs. its emergence has been fairly recent. This is because subsidiarity can only be meaningful once significant economic interdependence or market integration has developed, or is desired as a high-priority political objective, as manifested by the EC-1992 programme.

The application of subsidiarity requires the following question to be tackled: for a given set of objectives, to what level of government should various public economic and regulatory functions be assigned? The subsidiarity principle is based on the premise that problems of information and preference-revelation, as well as regional and local differences in preferences between voters, prevents central government from supplying an optimal set of public goods, including regulation. As a rule, therefore, policy-making powers should be assigned to local government, except when this would likely be ineffective, inefficient, inimical to others, or demonstrably unnecessary. This assessment can be made according to various criteria.[4]

Applied in conjunction with harmonization in the EC, subsidiarity raises the following issues:

- Is it appropriate to regulate at the EC level?
- If not, or not clearly, can member states deal with the matter (perhaps with inter-member state co-operation, but *without* harmonization)?
- If yes, what and how much should be harmonized, and in what details can member states still differ (justifiably)?

E) No internal frontiers

The fifth component of the quintet is the no-internal-frontiers principle. Although today this is almost taken for granted, it should be remembered that achieving free movement (as set out in the Treaty of Rome) did not require a complete dismantling of internal frontiers. Indeed, it was only in the 1986 Single European Act that the principle of no internal frontiers was explicitly written into the Treaty (in article 8A).

There are three broad categories of frontiers – fiscal, physical and regulatory. EC-1992 tackles all three, albeit in different ways.[5] However, the EC's approach to the removal of regulatory barriers is arguably the most significant innovation of the internal market programme because it paved the road for the emergence of beneficial regulatory

competition among the member states. In the next two sections, we focus on regulatory competition as a strategy for regulatory rapprochement in the Community.

111. The emergence of regulatory competition

Before examining the actual process of regulatory competition in more detail, it is crucial to understand that the potential for regulatory competition derives directly from the five guiding principles discussed above, and their complex interactions.

For instance, the goal of assuringfree *movement* within the internal market is much more secure today as a result of the progressive *removal* of *all internal frontiers*. Moreover, free movement has been further buttressed by the case law of the European Court of Justice and the widespread practical application of the *minimum harmonization* and *mutual recognition* principles. These last two principles are complementary since, by definition, anything less than total harmonization would require member states to mutually recognise remaining differences in one another's national regulations if free movement is to be upheld.

Further, the combination of the free movement imperative and reliance on mutual recognition provides much greater room to apply the *subsidiarity* principle in a functional way. Given that the four economic freedoms of movement in the internal market are much more secure as a result of ''1992'', and taking comfort from the Court's consistent protection of the single market's integrity, the European Community can be much more relaxed than in the 1970s about the "remaining" regulatory powers of member states. At the same time, mutual recognition provides member states with a degree of regulatory autonomy that might have been impossible under the old ''all-or-nothing" perspective.

Further, the relationship between subsidiarity, free movement, no-internal-frontiers, and mutual recognition is also interesting from a domestic political perspective. The EC's failure to complete its internal market prior to the 1992 programme can be explained in large part by the success of national industries in persuading their governments to erect all sorts of protective non-tariff barriers. Post-1992, however, the incentives for national industry to "capture" its national regulators are severely reduced (or, in the extreme, eliminated).

Since regulators no longer have the power to limit or block competitive imports, it becomes futile for national industry to capture them – *for this purpose*. Rather. the imperative of remaining internationally competitive now dictates the reverse: industry should "capture'' or otherwise pressure its national regulators to enact regulations which favour domestic competitiveness. If such pressure results in "deregulation" (*i.e.* the removal of here-to-fore protective regulation), the political influence of the regulated industry should also decline: entry into the domestic market by foreign producers will dilute the power of the domestic industry *vis-u-vis* national regulators.

Ultimately, the interaction of the five principles leads to a situation in which national regulatory systems become exposed to one another. As a result, *regulatory competition* becomes possible. Note, however, that mutual recognition does not necessarily lead to regulatory competition; whereas the former is a static notion, the latter is

dynamic. In order for regulatory competition actually to take place, a series of business-government interactions must occur at national level. It is to these interactions that we now turn.

IV. The role of business-government interactions

In this section, we stylise the EC process of regulatory competition, post-1985, as we believe it operates. Within this iterative process, we identify the "moments" where business-government interactions can be expected to occur, thereby fuelling the process. These moments, however, are not uniform; rather, they are opportunities for business behaviour, government behaviour, and their interaction. Whether these opportunities will actually be exploited is a function of a number of factors including: the cost differentials implied by differences in national regulations, the underlying competitiveness of the industry in question relative to its competitors in the internal market, the industry's ability and willingness to lobby national regulators to change national regulations, and the national regulatory authority's incentive to actually change national regulations.

While the characterisation is a preliminary one, it may serve as a useful framework within which to examine detailed case studies of actual business-government interactions in the Community. It is only by conducting such investigations that policy-makers will gradually be able to learn whether regulatory competition does indeed lead to the desired degree of *ex post* regulatory convergence.

Beginning with **a** situation in which national regulations diverge, there are three possible ways in which regulatory competition could be introduced. In the first case, mutual recognition is applied without any prior harmonization in the Council. Therefore, free movement is recognised, differences in national regulations are exposed, and regulatory competition becomes possible.

In the second case, barriers to intra-EC free movement exist, blocking mutual recognition. Such barriers would be the result of ostensible "health or safety" requirements that national regulators impose in the absence of EC legislation harmonizing these "essential" requirements. A firm trying to export to the member state that has imposed these restrictions faces three possible strategies:

1. It could decide that the export market in question is of marginal business significance and cease attempting to penetrate it. Alternatively, it may actually conform to the national regulations of the export market, thereby incurring additional production costs, and defeating the purpose of mutual recognition.

Assuming that the firm estimates that the export market is worth exploiting, it could also:

2. lobby the European Commission and/or its home government to begin infringement procedures against the offending member state. This is the first instance of business-government interaction that one can identify.

The outcome of these interactions could be: *a)* the removal of the barrier that originally blocked mutual recognition; *b)* an attempt in the Council to establish harmo-

nized minimum essential requirements for the good/service in question; or *c)* an adaptation of the offending national regulation in conformity with the Treaty (*i.e.* the regulation is adjusted so that it allows free movement and is more "proportional" to the market failure it seeks to combat). At this stage, business located in the offending regulatory jurisdiction will similarly have an incentive to interact with its national regulatory authority, presumably with a view to persuading the authority to retain the protective regulation.

If none of these three solutions [*i.e. a), b),* or *c)*] is ultimately adopted, the firm/industry will have no choice but to take the case to the European Court of Justice (assuming that the former still believes the export market is worth pursuing).[6] This is the third possible way in which regulatory competition can be introduced.

At the Court, the defendant member state will naturally argue that its regulation addresses justifiable health and safety concerns, while the Commission or prosecuting member state will argue that the national regulation unacceptably violates free movement. If the Court rules in favour of the Commission/prosecuting member state, the offending national regulation will have to be altered so that imports from other member states are permitted free access.[7] On the other hand, if the Court upholds the national regulation, the Council may choose to seek a harmonized level of essential requirements based upon a proposal by the Commission.

3. While the exporting firm could begin infringement procedures, it could equally, from the onset, pressure its national government to persuade the Council to adopt harmonized essential requirements. At this stage, a second instance of business-government interaction will occur as the exporting firm/industry lobbies its member state to go for minimum harmonization (or whatever level is most favourable for the national industry), while industry in the country that originally blocked mutual recognition will normally press its government to argue for a higher, more restrictive interpretation of the minimum essential requirements. The level of harmonization ultimately established will manifest itself in the form of a Directive.

At this stage, mutual recognition will be applied, free movement will be recognised, and diiierences in national regulations will be exposed. How do business-government interactions now fuel the process of regulatory competition?

While mutual recognition, the actual possibility of free movement, and differences in national regulations set the stage for regulatory competition, such competition will not actually occur unless economic agents *react to* these differences. There are two ways in which the expected reactions can be understood, both of which rely on the concept of arbitrage.

In the first case, mobile factors of production (capital, and, to a much lower degree, labour) can relocate to the jurisdiction whose regulations are most favourable for the factor. Alternatively, arbitrage can occur even if factors of production are immobile. In this scenario, it would be goods and services that, through free movement, could be sold freely across the EC. Consumers and firms would then respond by purchasing the bundle of goods and services that most closely approximates preferences for cost and quality. The scope or "margin" for either type of arbitrage is a function of the degree to which

national regulations diverge. Therefore, if regulatory competition is introduced via a directive that establishes a certain level of harmonization, the scope for arbitrage is correspondingly lower than if free movement had been recognised *without* any prior harmonization.

By engaging in arbitrage, consumers, firms, and capital are in effect signalling their preferences for regulation to the businesses involved in producing these goods and services, and to national authorities that formulate and implement national regulations. We argue that business will respond in either of two ways.

Within the internal market, it could either relocate to another member state whose regulations are more favourable for the firm's operations, or it could "adjust" by trying to cut costs, or by otherwise restructuring its activities so that it can overcome (at least to a certain extent) the immediate competitive disadvantages it faces relative to other firms operating under a lighter regulatory burden.

However, if industry has incurred large sunk costs to establish itself within a member state, or if restructuring would involve large reductions in employment, it would probably attempt (first) to lobby its national government. Because barriers to free movement can no longer be imposed, the purpose of such lobbying efforts could only be either of two things. Business could either pressure its national government to find a "legal loophole" which would effectively limit free movement, without, however, completely blocking it.[8] On the other hand, business could accept that free movement is now a fact of life, and press its national government to adapt national regulations that reduce regulatory discrepancies, and therefore, the competitive disadvantage faced by national business.

The end result of these cumulative business-government interactions will be "new" national regulatory regimes across the EC. At one end of the spectrum, a given new regime may be strongly convergent with those of other member states. The likelihood of this outcome is greater if no prior harmonization was initially adopted (*i.e.* regulatory competition was either introduced by an initial application of mutual recognition, or by a Court ruling). At the other end of the spectrum, new national regimes may now only be slightly different if the level of minimum harmonization established via a directive is high, and therefore the scope for arbitrage, and the need for a defensive business response, is low. In this case, national regulators would have little incentive to alter national regulations since the competitive threat to national business would be commensurately lower.

In order to derive some preliminary indications about the robustness of this representation, we applied it to one case study in the banking sector. It is not "complete" in the sense that it does not illustrate the great complications and variety that characterise a process of regulatory competition from start to finish. The difficulty stems from the fact that the process takes time, is open-ended, and is not easy to observe first hand. Therefore, the following should be seen only as a provisional attempt to fit the above framework to actual EC practice?

The Case of the European Banking Industry: the Second Banking Directive[10]

The present example begins with a situation in which mutual recognition and free movement prevail at the onset, and therefore allow for the possibility that regulatory competition could take place.

The creation of an internal market for banking services from 1 January 1993 is primarily the result of the principle of "home country control" espoused in the so-called Second Banking Directive (89/646 EEC, 17 December 1989). The principle stipulates that branches of credit institutions established outside the home country, in another EC member state (the "host" country) will be subject to the regulations of the home country. In other words, the host country must "mutually recognise" the regulations of the home country, beyond the harmonized essential requirements.[1]

Given a situation of mutual recognition and free movement, how are differences in national banking regulations currently being arbitraged by consumers and firms?

One example is given by the case of the French bank Credit Lyonnais which introduced a high interest deposit account in Belgium before the Second Banking Directive came into effect. Because this type of account is not permitted in Belgium, but can be very advantageous for depositors, Credit Lyonnais attracted a substantial amount of business, to the loss of Belgian banks. Faced with such a competitive disadvantage (*i.e.* more favourable treatment of foreign banks in Belgium than that of domestic banks), Belgian banks according to our framework should have pressured Belgian bank regulators to alter Belgian law and reduce the regulatory discrepancy.[12] However, Belgian banks have thus far not exerted such pressure on the Belgian authorities. This highlights the difficulty of predicting exactly if, when, and to what degree, business-government interactions will take place.

In a separate, but similar case, Barclays Bank of the United Kingdom attempted to introduce interest-bearing current accounts through its subsidiaries in France. However, this effort was blocked by French authorities on the grounds that it would be against the interest of consumers, as it would result in higher fees on deposits for bank customers. The French government consequently enacted legislation banning similar banking products. While our framework predicts (or at least allows for the possibility) that Barclays should have pressured the United Kingdom or the European Commission to take France to the European Court of Justice, Barclays chose not to do this. Rather, it felt that such a confrontational approach could potentially damage Barclays' future relations with French authorities, and therefore accepted the French ban on their product.

Both of these banking examples therefore demonstrate the limitations of our framework, especially in connection with the willingness of business to invest resources to uphold mutual recognition and free movement.[13] Even more fundamentally, however, these examples underscore the unpredictable and complex nature of business behaviour in a context of regulatory competition. In order to understand with more certainty when business will exploit the opportunity for business-government interaction, and what form such interactions will take, one would require a robust theory of business lobbying, supported and empirically verified by a variety of case studies. All of these difficulties

serve to illustrate that the process of regulatory competition in the EC cannot be generalised by way of simplified models.

V. Assessing regulatory competition

While it *is* difficult to track the process of regulatory competition, this does not mean that it should be abandoned as a strategy for regulatory rapprochement. On the contrary, the practical limits of regulatory competition should be evaluated both against the rigidities of the EC's previous reliance on total prior harmonization *and* in light of its current use in conjunction with the minimum harmonization principle. Seen in this way, the EC "brand" of regulatory competition stands up to its critics fairly well. We should like to point out just one of the most common objections to regulatory competition, and the way in which EC-1992 has addressed it.[14]

It is often argued that regulatory competition will lead to a progressive lowering of national regulation, with the risk that sub-optimal – or in the extreme, "zero" regulation – will result. This fear, when relevant, is both exaggerated and erroneous, because the Community has never aspired to complete regulatory competition – that is, regulatory competition without *any* prior harmonization.[15] The only exceptions would involve trade in markets where there is no need for any – EC, or even national – regulation (for instance, the market for pencils). In most areas/sectors, however, there is a need for some prior harmonization. Member states would simply not be willing to mutually recognise others' regulations without first being confident that public policy objectives would adequately be guaranteed (*e.g.* in the areas of health, safety, the environment, and consumer protection). For political reasons, therefore, regulatory competition in the EC's internal market will only be permitted to occur beyond the so-called essential requirements.[16]

Moreover, to the extent that preferences for regulation *beyond the harmonized essential requirements* actually differ across the Community, the process of regulatory competition will be rather limited, and convergence around a unique set of regulations will not occur. If each national market exhibits strong, distinct regulatory preferences, an entrant to that market (via local production or exports) may have an economic incentive to produce according to these longstanding national regulatory traditions, rather than to exercise the right – upheld by mutual recognition – of operating according to home-country regulations. This, however, may be beneficial on the grounds that different preferences are respected.[17]

Further, from an institutional perspective, the minimum harmonization-cum-regulatory competition strategy is much more flexible than its predecessor – total prior harmonization. This is in large part due to the Single European Act's extension of qualified majority voting (QMV) to all internal market legislation (except in fiscal matters, the free movement of persons, and the rights and interests of employed persons). The previous general requirement of unanimity in the Council had proved extremely cumbersome, particularly where some minimum harmonization is indispensable (*e.g.* product safety requirements).[18]

With QMV, on the other hand, (minimum) harmonization is not only *politically more feasible*, but also becomes *less costly.* Specifically, QMV has a potential to make it difficult for one or a few recalcitrant member states to "extend" minimum harmonization by detailing the ''essential requirements" beyond ''essentials". Moreover, QMV makes it more difficult for one or a few member states to veto a proposed EC directive, as this requires a blocking minority. If it proves impossible to achieve such a minority (which, on essential requirements, is much harder than with total harmonization), the minority countries are forced to innovate, find alternatives that are attractive or superior, or be overruled. This is likely to upgrade the quality of legislation and lower the costs of harmonization.

Finally, harmonization itself has evolved beyond the old, "total" approach. Today, it is a multi-faceted policy tool: its scope. intensity. and modes are typically varied according to the issue at hand, and this is predominantly a result of the learning process the EC has experienced throughout the course of the 1992 programme. Minimum harmonization of the essential requirements, framework directives, sunset legislation, and the provision of derogations are examples of the different ways in which harmonization can successfully be pursued in practice.

With the above, it should be apparent that the overall regulatory flexibility of the Community has dramatically improved as a result of EC-1992. Regulatory competition, however, should be seen as only one of several reasons for this achievement; the regulatory quintet, and the interaction of its five component principles, were also decisive.

VI. Making regulatory co-operation effective

Regulatory flexibility, however, is not an end in itself. Rather, the primary objective of EC-1992 is to establish an internal market, *and* to ensure that it *functions* effectively in practice. Beyond the Community's strategy of combining minimum harmonization with mutual recognition, it is absolutely imperative that member state regulations are indeed mutually recognised, and free movement permitted. However, as the European Commission has recently acknowledged:

> Mutual recognition is not automatic; the natural tendency is for the national department responsible to check that a product entering the domestic market complies with its own rules, unless it can be shown that it complies with the rules of another member state providing equivalent protection.
>
> (CEC, 1993, p. 21).

Therefore, differences in national administrative practices may thwart mutual recognition. The solution is more intense co-operation, and on a wide scope of issues, among the member states themselves, and between the member states and the European Commission. This serves to build mutual trust and confidence, and thereby avoid the risk of distortions in the internal market. However, as with the regulatory quintet, co-operation only emerged over time. In the following, we discuss in turn each of the two types of co-operation – horizontal and vertical.

Horizontal co-operation in the Community does not have a long tradition: before 1985, co-operation either occurred on a vertical basis, or not at all (apart from customs co-operation). Even in the White Paper on completing the internal market, co-operation issues do not figure very prominently. Therefore, the instances of horizontal co-operation that one observes today (see below) are very much a result of the "learning-by-doing'' the Community has undergone in the 1992 programme. Even so, the effects of this learning are only manifested in select areas, where regulators have perceived a direct need for co-operation.

Vertical co-operation, on the other hand, did exist before 1985, but its character has radically changed over the course of EC-1992. In the past, the Commission's role was almost entirely supervisory and dominated by its function as "guardian of the Treaty". The Commission would begin infringement proceedings against member states who had violated the Treaty, and member states would react to these allegations. The relationship was hierarchical and, at times, adversarial. Today, however, there is a much greater spirit of co-operation between the Commission and member states, because, again, they have ***learned*** that they must genuinely and actively work together on implementation questions. The member states have their own role in guarding EC law, and the Commission actively co-operates with the member states on implementation in a variety of practical ways.

Over the past year, efforts to promote regulatory co-operation in the Community have become even more prominent, as the formal deadline for the "completion" of the internal market approached. At the moment, the Community is working towards the elaboration of a "strategic programme for the internal market", that will, to a large degree, address the co-operation issue.

It is instructive to examine a few concrete examples of the way in which the Commission envisages the future evolution of partnership among the member states, and between the member states and the Commission (CEC, 1993, pp. 15-30):

- *foodstuffs:* In this field, the member states are required to identify, and notify to the Commission, their respective monitoring departments. Monitoring arrangements must occur at both the production stage as well as on the market, and must be co-ordinated on an inter-member state level. In addition, these current arrangements are being further improved: quality standards in official control laboratories are being established, and general criteria for methods of analysis and the fields of training of national inspectors are being unified.
- *banking:* The Banking Advisory Committee, composed of banking supervisors from the member states and chaired by the Commission, ensures that the "home country control" principle actually works in practice. This entails regular verification to ensure that prudential rules are being respected, and that "host country" regulations – where justified – are not abused to the detriment of free movement. On a daily basis, moreover, the Committee exchanges information on difficult cases. An ombudsman responsible for facilitating the settlement of disputes arising from cross-border transfers has also been appointed. Note that if co-operation in the above manner fails, this would necessitate centralisation of supervision at the EC level – which no member state desires.

- *abolition of tax frontiers:* This has necessitated the establishment of bodies for co-operation between national authorities within the Standing Committee for Administrative Co-operation, and by the designation of liaison offices in each member state. This structure will permit mutual assistance in carrying out checks in one member state on behalf of another. In addition, a data transmission network (called ''VIES'') has been established to provide on-line information on indirect taxation. With this network, it is possible to exchange – on an immediate and continuing basis – information relating to individual tax cases, with a view to fraud prcvcntion.
- *abolition of customs frontiers:* In 1993, the Community can reflect on twelve years of ever-increasing co-operation in the framework of the emerging Common Customs Code. Since work began in 1981, numerous regulations have been adopted both to establish co-operation and to prevent certaiii iiatioiial intervention (such as "double" customs checks, which were routine before internal frontiers were destined to be removed by EC-1992). Exchanges and the training of customs officials in the framework of the ''MATTAEUS'' programme is another innovative factor which helped customs administrations in the member states to adapt to the single market with no internal frontiers. This year, the programme will also aim to ensure the uniform application of customs regulation at external frontiers, so as to prevent fraud and the illicit traffic of drugs and arms.
- *controls on persons:* The Schengen Information System, expected to be operational by the end of this year, will provide the basis for member state administrative co-operation in persons controls. Even though the Schengen Accords have always been "intergovernmental", and thus outside the realm of EC law, they are nonetheless complementary with EC integration efforts.
- *testing and certification:* The Commission is currently carrying out a study on all testing, inspection, and certification departments in the Community in order to assess the situation, and in light of the findings, draw up a programme to strengthen administrative infrastructure in co-operation with the member states. In order to assure the credibility of certification bodies and mutual trust between iiatioiial control systems, it is necessary to cstablish nctworks of mutual accreditation agreements. In addition, the Community may provide financial support to the establishment of test and calibration laboratories, and testing and certification bodies, under the auspices of the "Prisma" programme (in force until the end of this yearj.

While these efforts seem rather impressive, they raise two related questions: First, what incentives do EC member states have to co-operate among each other? Second, can such co-operation be replicated in other regional groupings (*e.g.* NAFTA, CER, AFTA), in an OECD framework, and/or at the global level)? This last question is of obvious importance for OECD member governments, which might hope to be able to adapt some of these methods of co-operation **to** their own specific circumstances.

It is our contention that the incentives to *co-operate* – especially on a horizontal basis, among member states – are much stronger in an *integrative* environment like the

EC, than among "sovereign" states, which have no legal or political obligation to remove their national frontiers and permit free movement. A subtle, but robust, explanation for this can be provided by recalling the role of subsidiarity in the regulatory quintet.

The principle of subsidiarity has the great virtue of respecting local values and preferences as much as possible, and thereby avoiding superfluous centralisation. However, this does not mean that subsidiarity – in an integrative context – permits just any deviation in the implementation of directives without regard to the functioning of the internal market. It is the ineffectiveness of decentralised measures at regional or national levels which constitute precisely the argument for shifting their decision-making and, if necessary, even their implementation, to the Community level. It is therefore up to the member states to ensure a level of implementation *such that* subsidiarity *does not* lead to a shift of implementation to the EC level. A failure to do this would either undermine subsidiarity by necessitating further centralisation, or negatively affect the emerging Single Market.

VII. Policy conclusions

1. The EC's regulatory strategy, both in realising a single market as well as making it function properly, has gradually crystallised around a quintet of five regulatory guiding principles: free movement, minimum harmonization, mutual recognition, subsidiarity, and no internal frontiers.
2. The combination and interaction of these five guiding principles permit a strategy with great flexibility that:
   - allows both the member state and EC levels to play complementary roles;
   - can (and does) build in several regulatory flexibilities.
3. An interesting result of strategically combining these five guiding principles is regulatory (and fiscal) competition among the member states. In EC regulatory strategy, however, regulatory (and fiscal) competition is carefully circumscribed.
4. The nature, scope and flexibility of harmonization has drastically changed since 1984. The consequences of qualified majority voting, the focus on "essential requirements" only, the use of framework directives, sunset legislation and temporary or other derogations, as well as the reference to standards and to intra-member state co-operation, make for a totally different style of harmonization in 1993 than before 1984.
5. A critical by-product of EC-1992 and, more fundamentally, of the Community's regulatory strategy is *regulatory co-operation,* both vertically and horizontally. Learning-by-doing has also worked here: co-operation between the member states and the EC Commission has changed from a single emphasis on the EC's supervisory role, to one of more genuine co-operation for the common goal of a properly functioning single market. Member States are also learning to co-operate with one another, with or without the active involvement of the EC level.

6. Apart from inter-member state regulatory co-operation *as a derivative of integration,* member states have also begun to co-operate actively *outside* the strict realm of EC law. Such co-operation is greatly stimulated by the integrative environment and by member state familiarity with one another, and national preferences and European diversity may be better respected with this type of co-operation.
7. Carrying over the regulatory strategy of the Community to other regional groupings, to OECD co-operation, or to global fora makes little sense, given the ambitious guiding principles at the core of the EC strategy. This point **is** clearly substantiated by EFTA's dramatic turn-around after its so-called "Luxembourg" process (1984-89) was replaced by the so-called "Oslo" process, which entailed an almost wholesale adoption of EC regulatory strategy and substance. Not only has this radically changed **EFTA** as a regional grouping – both in terms of ambitions and instruments – it may actually lead to the ultimate extinction of the grouping, as its members join the European Community.
8. However, partial applications of the various policy innovations and experiences (and avoidance of the serious mistakes the EC made before 1985) may be useful for regional blocs, to the OECD in its various co-operative efforts, and to the GATT, IMF or other world fora. Indeed, some elements of EC-1992 have been carried to "Geneva" (the Uruguay Round) by the EC itself since 1988-89. In adopting such an approach, however, it would be necessary to strategically choose precisely those "low-key" areas of international co-operation that *would not* ***require*** a full and deep application of the regulatory quintet. The nature of the integration accomplished thereby will similarly be less far-reaching.
9. One positive externality of the EC's learning-by-doing in developing an effective regulatory strategy is that learning costs for other groupings, for the OECD, and for global organisations might significantly decrease. Whether these costs will *actually* be reduced depends, of course, on domestic political and economic interest group configurations, and on the capacities of several (or many) governments to *simultaneously* overcome the inevitable resistance. Passive learning – that is without first going through a process of trial and error (with the associated political pain and economic costs of these errors) – might be a necessary but insufficient condition. Indeed, the history of the EC suggests that only the prospect of overriding gains from international co-operation, or the inevitability of globalisation, would be sufficient to convince the relevant players to adapt to new regulatory strategies.

Notes

1. See Pelkmans and Vollebergh (1986) for additional examples of such failures.
2. Article 36 EEC. The full text continues: "public security ... the protection ot health and life of humans, animals, or plants, the protection of national treasures possessing artistic, historic, or archaeological value, or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states."
3. For further analyses of technical barriers in the EC, see: Centre for European Policy Studies (1992) *The European Community Without Technical Barriers.* CEPS Standards Programme Paper No. 1; Niall Bohan (1991) *The Annual Review of European Community Affairs 1991.* London, Brassey's for CEPS; and Michelle Egan (1993). *The Annual Review of European Community Affairs 1992.* London, Brassey's for CEPS (forthcoming).
4. Ineffective local policies can result from positive "externalities" ("spillovers" to or from an adjacent jurisdiction); inimical measures such as those of a beggar-thy-neighbour character – in effect, negative externalities; efficiencies may be gained from economies of scale which make supra-national regulation more cost-efficient than separate national systems of regulation; local regulation would be unnecessary if voter preferences for public policy were, in fact, sufficiently congruent across the entire internal market. These familiar criteria are applicable to decisions about responsibilities at each level of government, that is, whether regulation should be developed at subnational, national, international, or supra-national levels.
5. Removing physical controls (other than for persons) may be seen as politically less ambitious as long as fiscal aspects can he avoided However, this does not mean that a ranking by political ambition implies a similar ranking from "easy" to "difficult". Indeed, matters such as removing technical barriers, or improving access to service markets, require sophisticated regulatory strategies in order to be successful. Some activities, moreover, create additional problems because they require total harmonization before mutual recognition of approvals becomes possible, and even that requires harmonization (for example, veterinary/phytosanitary measures). Fiscal frontiers are so sensitive that they require unanimity for (any) harmonisation.
6. From a practical point of view, it is important to bear in mind that approaching the Court or pressing for a directive takes time, money, and other resources that a firm acting alone (or even with its industry) may not be willing to expend. Adopting a ''confrontational'' strategy *vis-à-vis* the offending member state may also be risky for the firm in the long term, because of the hostility engendered between the two sides. It may thus be less costly for a firm to abandon its efforts to penetrate the market in question, or to conform to the latter's existing national regulations. Of course, if most firms in such situations will not press for mutual recognition, there is no prospect of regulatory competition, and thus no movement towards regulatory rapprochement.

7. Note that the national regulation will still apply to the domestic industry, until or unless it is changed in response to domestic lobbying efforts (in the face of competitive disadvantages). Therefore, after the Court ruled in 1987 that the German "beer purity" law could not be used to block imports of beer from other member states, German beer producers continued to face the purity law (and still do). However, because the demand for beer is not purely a function of price, German beer producers have not been greatly disadvantaged by the ruling.

8. The most prominent example of such a "loophole" is the famous Danish beer bottle case. Denmark introduced a law in 1981 requiring that beer and soft drinks be sold only in returnable bottles, with a compulsory deposit. Brewers from other EC member states protested because the costs of recycling bottles reduced profits. The European Commission took the case to court arguing that the Danes were imposing a disproportionate level of environmental protection. In September 1988, the Court sided with Denmark, invoking the environmental provisions of the Single European Act.

9. We wish to stress, however, that evidence of regulatory competition in its broader, more generic (as opposed to rigorous, academic) sense is not at all hard to find. Thus, in sectors where regulatory restrictiveness is very costly, and a systemic overhaul is required in order to meet the challenges of global or even EC competition, it is inevitable that economic agents will arbitrage differences in national regulation. This, for instance, was the situation which faced the Italian banking sector at the onset of the 1992 programme.

10. The following is adapted from Karel Lannoo and Jorgen Mortensen (1993). Towards a European Financial **Area:** Achievements, Implementation, and Remaining Hurdles. CEPS Research Report No. 13, Brussels: Centre for European Policy Studies.

11. These essential requirements are in turn set out in the following supplementary directives: the directive on solvency ratios for credit institutions (89/647 EEC, 18 December 1989) and the directive on own funds for credit institutions (89/299 EEC, 17 April 1989). The only allowable restrictions on mutual recognition in banking services are a "general good" clause, which permits host country regulators to impose additional regulations on banks, if this is deemed to be in the general interest. A second potential restriction is the right of host country authorities to impose additional conditions relating to the implementation of host country monetary policy and for the supervision of liquidity.

12. For instance, Belgian banks could have lobbied the Belgian Banking Supervisory Commission to impose additional constraints on Credit Lyonnais, on the grounds that the latter's high interest bearing accounts endangered the solvency of Belgian banks, arid thus the "general good".

13. Note that because the bank was a subsidiary rather than a branch, the French authorities were not strictly required to mutually recognise British regulations. Therefore, in this case, Barclays faced an additional option: it could have altered the status of its subsidiaries, making them branches instead, though this would presumably have entailed costs that Barclays was not willing to incur.

14. This section is limited to a few points only, which complement the approach take by Majone in Chapter 7, "Comparing Strategies of Regulatory Rapprochement".

15. The analogous fear in fiscal matters – *i.e.* that fiscal competition will result in a progressive reduction to zero in tax revenue – is similarly misplaced. For example, in corporate taxation, the mobility of firms across tax jurisdictions is determined hy a multitude of factors in addition to tax rates, tax breaks, and tax bases. In any case, the responsiveness of firms to tax differences is rather low given the sunk costs involved in relocating existing investments. On the expenditure side, empirical economic literature suggests that firms also demand a certain

level and quality of public goods that can only be financed by tax revenues (*e.g.* sound educational system, high environmental quality).

16. Once again, an analogous situation prevails in fiscal matters. Pre-1985 proposals on VAT, for instance, were clearly governed by the idea that fiscal competition would create or add distortions. Ultimately, however, with blockage in the Council on far-reaching harmonization, the Council finally accepted a measured form of fiscal competition in VAT beyond a minimum harmonization of rates in two categories: a lower bracket (with derogations for zero rating), and a minimum rate for all higher VAT rates.

17. It should be emphasised that the term ***preference*** as it is used in the preceding paragraph refers to preferences for regulation only, and not to the broader meaning of preference (*e.g.* for colour, size, shape, etc.). In its more generic sense, there is an almost infinite spectrum of consumer preferences for any given product or service, and rarely do these fully and uniquely coincide with a given regulation or standard (be it voluntary or mandatory). Indeed, any one regulation or standard will allow scope for a wide degree of product differentiation; the multitude of consumer preferences is not translated into an equal number of regulations. Therefore, the nature of competition between regulatory regimes will be much less subtle than that between individual goods and services. Only when consumers have preferences for certain regulations (such as environmental qualities in goods), and when these preferences are the overriding determinant of their final consumption decision, would a preference for regulation be signalled in the marketplace. It is to these specific cases of regulatory preference that we refer here.

18. This statement must, however, be further qualified in two respects. First, although the Treary of Rome lays down a number of areas in which qualified majority voting is to be used, QMV was usually *not* used in practice for political reasons (*i.e.* the so-called 1966 "Luxembourg Compromise"). Second, there *is* one area in which QMV was frequently applied before 1985; this is in EC budget matters.

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Chapter 9

Prospects for win-win international rapprochement of regulation

by

John Braithwaite

I. Introduction

This paper argues that opportunities can be seized at many levels: ***a)*** to harmonize between governments on minimum regulatory outcomes; *b)* to harmonize privately specification standards (here called "default input standards''); *c)* to nurture a proliferation of competing optional input standards; *d)* to increase levels of mutual recognition of input standards; and ***e)*** to strengthen parliamentary oversight and NGO participation in all of these international activities. It will be argued that bargaining forums such as the OECD, the EC, APEC, and the GATT can be used to nurture rapprochement toward regulation that is simultaneously more efficient, more effective and more democratic. Certain ironies of internationalising regulation lead to the conclusion that there is no inevitability about having to trade off a more effective international regulatory order and a more costly one, a more harmonized order and a less democratic one.

11. Race to the bottom or race to the top?

Most of the time, most nations in the modern world do not write their own business regulatory **laws.** Increasingly, the parliaments of the contemporary world are law takers rather than law makers. Europeans have given this feature of modernity a name – "the democratic deficit". But the democratic deficit is not a just a European phenomenon. Indeed, the peoples of Europe have a capacity for democratic control over regulation that is second only to that of the United States. Other OECD nations such as Australia and even Japan are much more law takers compared to the European law makers.

By this I mean, for example, that Australia does not really write the laws that regulate the safety of commercial airlines in Australia. Mostly, it takes standards devised in the North, perhaps by the US Federal Aviation Administration after the FAA has engaged in processes of consultation with firms like Boeing and some major international players. Sometimes the law taking occurs because smaller nations simply are not big

Glossary of terms and acronyms for Chapter 9

APEC: Asia Pacific Economic Cooperation.

ASEAN: Association of South East Asian Nations.

Default Standards: When the precise input standards required to achieve regulatory outcomes are optional, default standards are those which apply when none of the other input options are chosen. The default input standards are a safe harbour for anyone who wants to be sure that they meet agreed regulatory outcomes.

Harmonization: Standardization of regulation in identical form.

ICH International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use.

Input Standards: Specification standards; standards that specify inputs required to achieve regulatory outcomes.

ISO: International Standards Organisation.

Mutual Recognition: Acceptance of diverse regulatory inputs as means of meeting common goals or outcomes.

NGO: Non-Government Organisation.

Rapprochement: Reduction of regulatory differences between levels of government.

Outcome Standards: Performance standards for regulation.

TRIPS: Trade-Related Aspects of Intellectual Property Rights.

WHO; World Health Organisation.

enough markets to dictate in any realistic way the terms of its imports. Often, even if they could, they choose not to put up their costs by imposing special requirements at odds with those settled in the centres of economic power. Often they model their regulatory laws on those of the centre simply because they can't be bothered with the transaction costs of even finding out if they might be better off with different laws. Or they don't have the analytic skills to **manage** this with any but a selected few ***of*** the regulatory standards that flow from the centre of the world economy. In areas such as food, telecommunications and intellectual property, standard setting by international organisations is well accepted. In these areas, governments voluntarily cede a lot of their law-making capacity to international deliberative forums in which they have some small voice.

The traditional national adversaries in business regulatory debates tend to have strong views about an internationalisation that they see as progressively eroding their influence at home. National environmental or consumer groups may complain about how internationalisation tends to drag national standards down to a lowest common denominator. Their story is that consumers and the environment will lose out in a race to the bottom, with international competition that delivers most jobs to the locales where

regulation is weakest. National business groups, in contrast, tend to argue that if you put a bunch of national business regulators together, the most likely view to prevail is the most risk averse, since regulators are not rewarded for being risk takers, only punished for it when a crisis occurs somewhere in the world. So they say you will get a race to the top, rather than a race to the bottom. Often the fear of national business associations outside the United States is that internationalisation will foster highly legalistic or formal styles of regulation that they characterise as American.

Such views of traditional national regulatory adversaries about the inevitability of either a race to the bottom or a race to the top are simplistic and wrong. There are regulatory domains in the world system where one can discern a tendency for an international race to the bottom, others where one can see something of a race to the top, others where one can see a convergence to the middle. Indeed. one can identify an area like the regulation of banks where there was something of a race to the bottom during the first half of the 1980s as governments scrambled to offer the most attractive environments to finance capital. Then one saw the G-10 realise that everyone could be losers unless this downward spiral was reversed. And it was reversed as prudential standards for banks throughout the OECD were upgraded during the second half of the 1980s (Kapstein, 1989). Following the ravaging of so many developing countries by BCCI, we are likely to see a general upward movement in regulatory stringency outside the OECD during the 1990s.

So the first worry we must clear away in the debate about regulatory internationalisation is that there is any inevitability about the direction of the effects that this will have on the stringency of regulation. There is no such inevitability. Internationalisation can push regulatory stringency up, down or sideways. It usually does all three at once within any large set of standards. The management challenge is to design deliberative international institutions that improve the quality of standards – their efficiency and decency – regardless of stringency going sometimes up, sometimes down.

The plan of this paper is first to argue the case for rapprochement, then the case against it, then to plot a strategy that secures the advantages of rapprochement while avoiding its disadvantages.

111. The case for rapprochement

Whether international regulatory rapprochement occurs through harmonization, mutual recognition or convergence, there is the potential for three kinds of advantages to be secured: eliminating duplicative inefficiencies, reducing non-tariff barriers to trade, and reducing free-riding on efforts to tackle international problems.

A) Eliminating duplicative inefficiencies

When different nations impose different regulatory requirements on products, there are duplicative inefficiencies in the manufacture, storage and labelling of these products. So, if the regulations of some nations require driving on the left side of the road and

others the right, international auto manufacturers reduce their efficiency by having to maintain different production runs for left- and right-hand drive vehicles. In the new world of just-in-time management of stocks, there are costs in separate storage and in non-substitutability across inventories. There are also information costs for consumers. In **a** perfectly harmonized world of automobile standards, Australian consumers would be able to benefit from the enormous research Consumers' Union undertakes in the United States on car performance. But in the world in which we live, the information generated by consumer testing associations in different countries is mostly non-transferable. All of these regulation-driven duplications rcducc the efficiency of the world economy. Duplicative inefficiencies arise with the regulation of services as well as products. It can be an enormously inefficient use of the time of a world-class doctor, lawyer or architect to be required to study for exams before she can practice in a new country.

B) Reducing non-tariff barriers to trade

If some nations impose royaltics on blank tapes to compensate copyright owners and others do not, this disrupts the free flow of goods across national borders. Governments that enforce such an intellectual property regulation will have to check imports from a nation that does not enforce it to ensure that the royalty is collected at the customs barrier. The delays and administrative costs associated with this process, especially if they are administered with intentional inefficiency, can cause the exporter to abandon that market, thus reducing competitive efficiencies in the importing nation.

The worst inefficiencies arise when national regulations are used as non-tariff barriers. Resistance to regulatory rapprochement in the automobile industry has very much been about national governments defending idiosyncratic national or regional standards, not because they benefit consumers, but because they confer some structural advantage upon a national producer. If a European auto-maker has pioneered headlight technology that doubles the field of illumination, then that auto-maker's national government can impose a severe cost disadvantage on foreign competitors by lobbying for a European standard to expand the field of illumination required for headlights.

C) Reducing free-riding on efforts to tackle international problems

The world faces a tragedy of **its** international commons. No one could argue that the tightening of environmental regulation that occurred in OECD countries during the second half of the twentieth century was unnecessary. Equally, no one could dispute that the old communist nations were free riders on international efforts to restore planet earth's precarious futurc. An objective of international rapprochement is to counter such national free riding on the solving of international problems. In areas like environmental protection where regulatory costs can be enormous, temptations to attract investment by waiving environmental standards are profound, especially for poorer nations.

Such free-rider problems can be addressed, however, by appropriate institutions of regulatory rapprochement. The world has prevailed against enormous national temptations to cheat in solving problems like the slave trade and the atmospheric testing of

nuclear weapons Narrowly economistic thinking is an obstacle to progress in solving such problems. In the economic analysis, the free rider problem reduces to an enforcement problem. How do you change the pay-offs of nations that are tempted to cheat on the rest of the world? The empirical evidence suggests that international institutions do not effect change mainly by enforcement but much more by persuading states to re-evaluate their interests (Chayes and Chayes, 1991). In the Harvard studies of international environmental institutions, "monitoring environmental quality and national policy measures was a far more influential institutional activity than was direct enforcement" (Levy, Keohane and Haas, 1992). This is why international institutions like the OECD, that have no "teeth", can, either in spite of this or because of it, have important effects on regulatory rapprochement.

> *In cases where a laggard state's lack of concern was due to a misunderstanding of its own interests, normative pronouncements (to reduce transborder air pollution or to stop destroying the ozone layer) accompanied by collaborative scientific reviews sometimes contributed to a shift from low to high concern. The collaborative reviews of scientific evidence under the Vienna convention and Montreal protocol on protecting the ozone layer clearly played a major role in the increased concern of several governments for the problem of stratospheric ozone depletion.*
> (Levy, Keohane and Haas, 1992)

In the very worst cases of rent-seeking states, the prospects for achieving change by enforcement seem especially remote because the sums required to change payoffs would be so enormous. Consider the Malaysian state of Sarawak, for example, which, according to Porter and Brown, "now exports 58 per cent of the world's tropical timber" (Porter and Brown, 1991). "Timber concessions totalling 3 million acres and worth $22.5 billion were given to relatives and friends of the chief minister of Sarawak, and the minister of the environment is the owner of more than 750 000 acres of timber concessions" (Porter and Brown, 1991). International institutions have some small prospects of unseating such state rent seeking through fomenting international political pressure at multiple levels – the Malaysian government, regional groupings such as ASEAN, and locally in Sarawak through the activism of environmental NGOs. Prospects of doing so by orchestrating multi-billion dollar payoffs seem absolutely remote.

In short, it is possible for international regulatory rapprochement to tackle some of the problems of states free-riding on efforts to tackle international problems. Agenda-setting within international institutions such as the OECD can help secure this advantage of regulatory rapprochement, just as it can help reduce duplicative inefficiencies and regulatory barriers to free trade.

IV. The case against rapprochement

A) Erosion of sovereignty

All OECD member states subscribe to a belief in a popular sovereignty wherein elected leaders are accountable to the people for government decisions. From this demo-

cratic perspective. the idea of empowering non-elected international bureaucrats with responsibility for regulatory decisions is unappealing. There is no doubt that the impressive regulatory rapprochement that has occurred in Europe in recent years has involved a ''democratic deficit". Both parliamentary sovereignty and direct popular sovereignty have been eroded at the hands of non-elected employees of the European Commission in Brussels. While it is true that this has happened, later I will argue that regulatory rapprochement might be accomplished with a democratic surplus rather than a democratic deficit. The European trends are certainly toward reducing the democratic deficit, by, for example, strengthening the authority of the European Parliament.

B) Stultification of regulatory innovation

Regulation is like any other economic activity in that its efficiency depends on innovation and entrepreneurship to lead responsive adaptations to changing environments. The regulation of regulation therefore risks a stultification of regulatory innovation. International harmonization poses the greatest risk here. The sheer consensus-building demands of international harmonization can be so great that no one wants to break the mould once it is set. Worse than that, consensus can take so long that the problem has changed fundamentally from the one that existed at the beginning of the consensus-building process. So we can have yesterday's solution to today's problem that no one will have the energy to change tomorrow. Delay, inflexibility and the death of innovation is a formula for regulation that is high in cost and low in effectiveness.

C) Reduced efficiencies through preventing jirms from shopping for lowest-cost regulation

This disadvantage of rapprochement is in a sense the obverse of the advantage of eliminating free-riding on efforts to solve international problems. When firms gravitate toward the states with the weakest regulatory standards, they free ride, and they create incentives for lowest common denominator regulation. On the other hand, when they gravitate toward states with low regulatory costs, they create incentives for states to regulate efficiently. Even within states, I have been an advocate of giving firms a variety of regulatory options, all of which meet certain minimum standards, so that firms can choose the regulatory package that is most efficient for them. **A** simple example is the US Mine Safety and Health Act of 1977 which defines standards for seven optional techniques for mine roof support, but then goes on to allow firms to tailor-make their own roof control plans with technologies not covered in the law but which produce outcomes equal or better to those specified in the law (Braithwaite, 1985). **A** single perfectly harmonized set of international standards might eliminate shopping for lowest cost standards at the same time as it eliminates free riding on the greater responsibility of others.

V. The objectives of win-win rapprochement

Having argued for the three key advantages of international regulatory rapprochement and the three key disadvantages, the challenge is now to discover how to deliver the advantages while escaping the disadvantages. With sharp regulatory analysis, creative design of international and national regulatory institutions and strategic agenda-setting by international agencies, this is a challenge that can be met.

Specifying the policy objectives more precisely, we can aspire, through international regulatory rapprochement, to:

A. Reduce duplicative inefficiencies;
B. Reduce non-tariff barriers to trade;
C. Reduce free riding on efforts to tackle international problems;
D. Increase popular sovereignty over the regulatory process;
E. Increase regulatory innovation; and
F. Increase the capacity of firms to shop for lowest-cost regulation.

VI. Delivering on the objectives

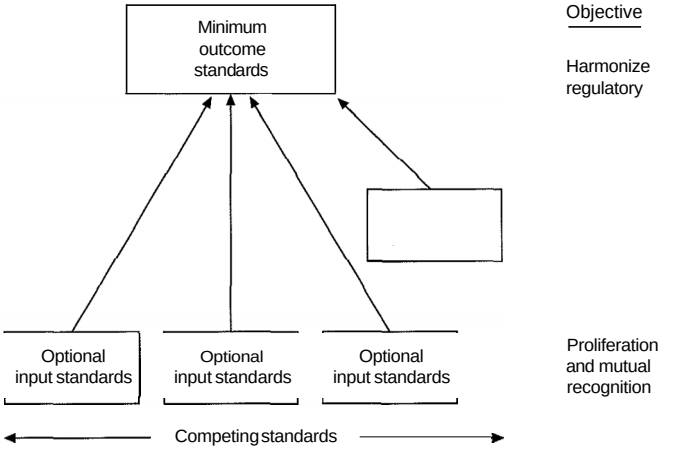
A 10-step strategy is advanced for delivering these six seemingly incompatible objectives. The strategy distinguishes between minimum outcomes (like the crashworthiness of a motor vehicle at *50* kph) and specified regulatory inputs intended to achieve those outcomes (like bumper bars of a specified type). Outcomes are often called **performance or outcome standards** and inputs for achieving them **specification or input standards** (these and the following terms are defined in the Glossary).

The basic idea of the strategy is that minimum performance standards should be harmonized and so should ***one*** acceptable set of input standards. The latter are called the **default input standards** because these are the input standards that will be expected internationally if the govcrnmcnt concerned does not come up with another set of inputs that will secure the required outcomes. Meeting the defaults is a "safe harbour" if you want to be accepted as satisfying the minimum outcomes. A proliferation of **optional input standards,** developed mostly by private organisations and subject to mutual recognition by governments, is the other foundation of the strategy, as summarised in Figure 1.

In summary, the strategy rests on three elements: harmonized outcomes, harmonized default inputs, and a proliferation of competing optional inputs. Intergovernmental consensus is easier to build on outcomes than on input standards: outcomes do not require such constant adjustment in the face of changing technology as do input standards, and outcome standards are harder to use as non-tariff barriers than input standards. We will consider how this package can deliver our six objectives after a quick summary of the ten steps that comprise the strategy.

1. Strengthen international bargaining forums where governments can agree on minimum acceptable regulatory outcomes (performance standards) and on

Figure 1. **Harmonized regulatory outcomes and competing inputs**



schedules for improving these minima over time, or at least for reviewing their levels periodically.

2. Either: *a)* Use these international bargaining forums to have governments harmonize on default input standards; or *b)* Strengthen the capacity and legitimacy of voluntary international standard setting bodies like the International Standards Organisation to promulgate default input standards.
3. Where deadlocks arise with bargaining on 1 and 2, widen the agenda. If some nations want tougher defaults on intellectual property regulation (*e.g.* **X** year patents for pharmaceuticals) while other nations (who are against this) want tougher outcomes on deregulation of agricultural protection, put both agendas on the table. This means strengthening international institutions like the GATT and the OECD that have the capacity to widen agendas, to some extent at the expense of specialised international institutions like the World Intellectual Property Organisation or the Codex Alimentarius Commission.
4. Strengthen governmental capacities to formulate optional input standards.
5. Nurture private capacities to formulate optional input standards.
6. Use international bargaining forums to secure mutual recognition of the optional input standards developed under steps 4 and 5, so long as those options can be shown to deliver the minimum performance outcomes under step **1** (or perform at least as well as the minimum default inputs in step 2).
7. Use international bargaining forums to secure the agreement of nations to arbitration by committees of experts from third countries when disputes arise

over mutual recognition. These committees can also arbitrate on complaints about nations free-riding on the international agreement by failing to achieve the minimum outcomes in step 1.

8. Strengthen the capacity of international organisations to undertake comparative research to inform the deliberations under steps 6 and 7 and to inform competition among regulatory innovations. This means research on the performance of different packages of input standards in delivering regulatory outcomes and minimising secondary effects such as posing barriers to trade.
9. Strengthen practical capacities for national parliamentary sovereignty by establishing international committees of parliamentarians to produce oversight reports on the work of selected international organisations. These international parliamentary committees can be linked to national parliamentary systems of oversight committees.
10. Strengthen practical capacities for popular sovereignty by requiring selected international organisations to fund international NGOs and to empower them with open access to technical discussions about standard setting. The empowerment of an international NGO with resources, information and a voice at the bargaining table should depend on its having a constitution that ensures democratic accountability to relevant national citizen groups.

Now the chapter will move on to a more discursive treatment of what this strategy involves and how it can shift the international system toward win-win-win-win-win-win outcomes on the six objectives set out in this paper.

A) Tackling free-riding

The keys to reducing free-riding on efforts to tackle international problems (objective C) in this strategy are: *a)* international agreement on minimum outcomes (step 1); *b)* agenda-broadening to secure this agreement when the going gets tough (step 3); and c) arbitration by experts from third countries when other nations or NGOs lodge complaints about free-riding on agreed minimum standards (step 7). The strategic importance of agenda broadening in getting nations to agree to arbitration by a committee of third country experts cannot be underestimated.] If the EC, Japan and the US want Southern nations to respect Northern patents and copyright or to honour tough management plans for tropical rainforests, one of the best ways they can move toward such objectives is to put on the table a willingness to bargain about freer access of rice or sugar to these Northern markets, or transfer of technology agreements from North to South. Agenda broadening is the ally of regulatory rapprochement because it enables the creative search for ways where both sides can yield major concessions while leaving both better off overall. This is what the GATT should be, and sometimes is, all about.

B) Tackling non-tariff barriers

The arbitration procedure in step 7 is also obviously the key to reducing regulatory non-tariff barriers to trade (objective B). That is, when one country erects a non-tariff

barrier by refusing recognition of a second's input standards, the second country can seek independent arbitration of the dispute. The arbitrators would find if the second nation's input standards do or do not assure internationally agreed minimum outcome standards. There is nothing radical in this aspect of the strategy because such an arbitration process already exists under the GATT and in the EC. However, such arbitration processes will not effect broad change until they can work from the foundation of many different agreements on minimum performance outcomes (step 1) and comparative research on the performance of different packages of input standards in delivering regulatory outcomes (step 8).

C) *Shifting to outcomes: motor vehicles*

Agreement on minimum acceptable regulatory outcomes is no simple matter. Consider, for example, how tough an agenda this is with motor vehicle safety standards. The stakes are enormous here because consumers pay so dearly for duplicative inefficiencies in automobile manufacture, because competition is constantly being thwarted by nations using standards as non-tariff barriers and because many lives can be needlessly lost when nations settle for suboptimal vehicle design standards. But the change that would bc required to deliver **step** 1 of the strategy is revolutionary. The United States has a regulatory system based on performance standards. What counts in the US system is, for example, the damage done to dummies when cars randomly selected off the production line are crash tested. Europe, in contrast, has a type approval system. EC type approval directives in tlie past have tended to be minimum specifications that car bodies must meet. Once a design gets a type approval as meeting these input standards, all vehicles manufactured to this design are approved. There is no outcome testing of the performance of cars randomly selected from the production line. In a moment we will see, however, that this distinction is becoming increasingly blurred, as EC standards become progressively more extreme-oriented.

What is implied by the strategy of this paper is that Europe should make all the concessions – ***transforming*** **its** entire vehicle regulatory system from type approval toward the more outcome oriented approach of the National Highway Traffic Safety Administration in the United States. Here is where agenda widening is needed. There are other areas of regulation where it is the United States that is more input-oriented (perhaps financial and pharmaceuticals regulation) and therefore where it is the United **States** that would be required to make bigger concessions than Europe. Finally, it should be said that while the transformation from the status quo to the ideal world of this 10-step plan is radical, there are innumerable more conservative transitional positions between the two. Indeed, under tlie auspices of Working Party 29 of thc Economic Commission for Europe, rapprochement between the US and European paradigms of automobile regulation has made slow and painful progress over a number of years. This has been achieved by agreement on common test procedures so that approved types are designated on the basis of common performance criteria. The world is disappearing where car5 with sound lighting performance but which do not have a bright yellow colour could be kept out of France.

D) The challenges of harmonized inputs and mutual recognition: pharmaceuticals

If the tough transition were achieved and acceptable international minimum outcomes could be agreed (step 1), achieving step 2 of the strategy need not be so difficult. This is so, at least, if option *b)* of step 2 were chosen: strengthen the capacity and legitimacy of voluntary international standard setting bodies like the ISO to promulgate international default input standards. This means that the ISO would design a set of agreed technical inputs that would guarantee at least the minimum international performance standard Voluntary standard setting bodies have a good track record of being able to do just this (Cheit, 1990). Option *b)* is essentially the model that is working increasingly smoothly with rapprochement in many domains of regulation in the European Community. The Council of Ministers promulgates agreed regulatory minima. There is then mutual recognition of national regulations to deliver these minima with provision for arbitration of disputes. Then it is left to voluntary standards setting bodies like the European Committee for Standardisation (CEN) and the European Committee for Electro-technical Standardisation (CENELEC) to recommend input standards.

Recommended input standards are important. It is quite naive to believe that performance standards are all you ever need. Input standards are needed to ensure that one technology can plug into another. They are needed to give practical guidance to small or unsophisticated producers who lack the R&D resources to invent their own inputs for meeting outcomes. Finally, they are needed in domains where the costs of getting inputs wrong are so high that investment will not occur unless firms can be given some assurances on what inputs will be accepted as satisfactory for delivering mandated outcomes

When assurances of the international acceptability of inputs are critical to investment, we will want to consider the most demanding task of using international bargaining forums to harmonize on minimum national default input standards (step 2 *a)).* A case in point is pharmaceuticals. International agreement on outcome standards for the safety and efficacy of drugs is desirable and attainable, but it is not enough. On average, in 1990 it cost US$ 231 million to develop and test a new drug (D'Arcy and Harron, 1991). Firms will not make that investment without assurances of what they must do to get their product approved by national health authorities. They need standards that specify just what sorts of tests they must do on how many different kinds of patients. The costs of duplicative inefficiencies of such specification standards in the pharmaceutical industry are enormous. These are not just dollar costs to firms which must do essentially the same tests with somewhat different specifications in different countries to satisfy the requirements of different national health authorities.[2] They also can be costs in lives as duplicative tests are awaited and as patients are unnecessarily exposed to placebos rather than active treatment for the sake of duplicative trials, or as new drugs remain undeveloped because of approval costs.

What is needed is international agreement on default inputs for pharmaceutical testing. By default we mean a safe harbour: *a)* firms can assure that all nations will accept their results if their trials comply with these inputs, **and** *b)* firms can ignore the defaults and come up with innovative research methodologies that exceed performance standards for data quality. The ideal here is international agreement on one set of acceptable input

standards (the default option) combined with nurturing innovation to discover better ways of achieving outcomes. Mutual recognition of optional input standards that achieve satisfactory outcomes is the way to encourage both states and firms to discover innovative approaches to the delivery of outcomes.

The pharmaceutical industries and regulators of the United States, Japan and particularly of the EC have shown leadership in this general direction with the International Conference on Harmonization of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The ICH process involves experts from these nations, with observers from other nations, meeting regularly to arrive at consensus requirements for drug testing and registration that the three regulators and the three industry associations agree to be the state of the art. The process is a fragile accomplishment that could break down at any time. But at this point, progress seems to be being made, not dramatic but steady progress. To accomplish this, leadership from the centres of economic power in the industry has been needed, a leadership that the World Health Organisation had been unable to provide. In the face of this failure of WHO leadership, the European Commission took the initiative, establishing its own bargaining forum with the United States and Japan. WHO leadership has failed because at the WHO there has tended always to be a "veto coalition" to block progress on most fronts. The lesson of the ICH is that there is nothing to stop harmonizers from ignoring veto coalitions by creating new bargaining forums where only those with a genuine interest in harmonization have a seat.

The view of the EC in establishing the bargaining forum was that consensus on harmonized default standards could not be achieved with too many players at the table. But of course as soon as the rest of the world could see that ICH was where the action was, everyone wanted a seat at the table. The three economic powers say they are not writing rules for the world. They are just reaching a consensus among themselves on what they think the regulatory state of the art is or should be. Every nation can then make their own decisions on whether they wish to adopt them or to offer a regulatory alternative that they think is less costly or more effective. Yet if the United States, the EC and Japan all decide on the same regulatory requirement, not many nations will take a different path. This is particularly so when almost all nations have pharmaceutical industries dominated by US, EC and Japanese firms.

Within Europe, the regulatory rapprochement is going much further. With the exception of biotechnology products, pharmaceutical companies can choose to seek registration of the new chemical entity in any EC member. Under a mutual recognition principle, other EC members will then be encouraged to accept the assessment done in the chosen nation, but will be free to reject it and insist on their own assessment. In effect, there will increasingly be competition between European registration authorities for the business of approving new drugs for the European market. The cynics' view is that this will lead to a race to the bottom. They assume that companies will choose the most lax national authorities to consider their application. I do not accept that this will necessarily be so. There might be competition for credibility rather than competition for laxity. That is, firms will want to secure mutual recognition; they will be wary of registration with an authority that other authorities do not trust.

Potentially, the interface of ICH default harmonization and competition within Europe for registration that is subject to non-binding mutual recognition is a promising one. Duplicative inefficiencies might be reduced (objective **A)** by the default harmonization. But the capacity to opt out of mutual recognition leaves space for regulatory innovation (objective E). The competition among national regulators increases the capacity of firms to shop for lowest-cost regulation (objective F), while also giving firms a way of hitting back at regulators who use registration delay or other tactics as non-tariff barriers to trade (objective B). The potential deficit with this initiative, however, is the democratic deficit (objective D) and fear of lost national sovereignty is the big obstacle in the path of widespread practical implementation of the strategy (Koberstein, 1993).

The ICH holds out considerable promise of win-win rapprochement. If the fragile diplomatic process does not break down, duplicative inefficiencies should be reduced saving scarce R&D dollars for drugs and, more importantly, saving scarce research talent for innovative rather than duplicative research, reducing drug lags, increasing incentives for innovation, and preventing suffering among people and animals currently subjected to duplicative experimentation. The very transparency of this whole process and the documentation being produced pursuant to it is proving a resource for less sophisticated governments to build their drug regulatory capacities. Thereby it should lift the worldwide minimum standards of drug regulation (objective C). **As** an official of the International Federation of Pharmaceutical Manufacturers' Associations explained to me, the ICH process is not about "minimum standards" but about "state of the art standards". In short, both industry and consumers in both developed and developing worlds should be better off for the European Community's leadership in pursuing harmonization of default inputs while allowing competition between national authorities in the provision of regulatory services.

E) The challenge of regulatory innovation

The key idea of steps 2 to ***6*** of the 10-step strategy is that less innovative firms can obtain guidance on how to meet the minimum outcomes in step 1 either from voluntary international standards or through harmonized default inputs. But more innovative firms and more innovative governments can opt out of the harmonized defaults and the international voluntary standards. These innovators then develop regulatory and self-regulatory strategies and technologies that compete for allegiance throughout the world. Some of these regulatory innovations may command such support that in time they become new harmonized default inputs.

In this process of regulatory innovation, both private and public innovators are important. Public innovators seek to push their firms to be world leaders with regard to a regulatory outcome by urging their firms to consider a tougher optional set of input standards. They might even offer tax breaks to firms that make an extra investment in control technology over and above that required by the default standard. Private innovators, such as environmental or health and safety consultancy firms, may design packages of standards for firms who want to be at the cutting edge of innovation in control technology. Other private innovators may compete with packages of standards that secure

the same level of protection as the harmonized defaults, but at lower cost. Unleashing the rulemaking and regulatory design genius of private as well as public managers is the key to constant improvement in regulatory design. Perfect harmonization on a single default, without mutual recognition of creative new optional standards, would see the death of regulatory progress. International organisations that undertake comparative research on the cost-effectiveness of competing packages of input standards (step 8) can increase the rewards for regulatory innovation by publicising the accomplishments of innovative regulatory paradigms. The research increases the capacity of firms to shop for lowest-cost or highest-effectiveness regulation.

F) From democratic deficit to democratic surplus

We must start our analysis of the democratic deficit by shedding a few delusions. Democratic accountability over business regulatory standard setting is minimal. Elected parliamentarians have little understanding of or influence over the myriad national business regulations that pass under their noses year in and year out. If they do express an interest in intervening, increasingly they find that the standard is a reflection of "international market realities" that national parliaments, especially in less economically powerful nations, are in no position to change. Australian parliamentarians have no capacity to change standards for telecommunications equipment that are written by a group of technocrats who meet in Geneva, even if they understood them. In turn, Australian citizens are in no position to demand from their elected representatives different standards to make their telecommunications equipment better, safer or cheaper. In so much regulatory decision-making there is no democratic sovereignty to lose.

Yet there is some possibility of sovereignty regained. Democratic influence over business regulation that is so often massive in its detail and technically sophisticated requires organisation. At a national level, the organisation required for a reassertion of some parliamentary sovereignty involves selected parliamentarians dedicating themselves to acquiring the competence and diligence through oversight committees to watch over areas of regulation in which they have a special interest. The organisation required for a reassertion of some popular sovereignty at the national level involves citizens organising themselves into NGOs with special interest in consumer protection regulation, environmental protection, equal opportunities and so on. At the levels of both parliamentary and popular sovereignty, however, this organisation mostly fails because there is simply too much regulation happening, too much technical complexity to come to grips with. There is just not enough energy to go around.

Just as organisation and the acquisition of focused competence is what is required to assert sovcrcignty at the national level, this is also what is required at the international level. At the international level, it is a second-order organisation based on national organisation. Hence, the oversight of telecommunications standards setting can involve consumers of telecommunications services organising themselves through international NGOs such as the International Telecommunications Users Group (representing business consumers) and the International Organisation of Consumers' Unions (representing domestic consumers).

Ironically, the possibility for organised popular oversight of technocratic standard-setting is somewhat greater at this international level than it is at the national level, though it is still rather weak. National consumer groups outside the United States (and perhaps a few other OECD countries) have virtually no capacity to monitor the highly technical deliberations of their national authorities as they go about the day to day business of pharmaceuticals regulation and approval, for example. Health Action International (HAI – a prominent consumer health NGO) still has only a very limited capacity to monitor the deliberations of the ICH. But national consumer groups actually may have more influence by pooling their resources and their best and most expert people through HAI to focus their monitoring on the ICH than they can have through national regulators. In a world of increasingly internationalised regulation, focusing the weak glimmers of scrutiny from 100 national consumer groups onto one international forum of decision making may increase popular sovereignty from nothing to something. An irony for consumer groups of the ICH negotiation process among the EC, the United States and Japan is that it occurs much more in the open than national regulatory negotiations. Why? Not to allow citizen sovereignty over the regulatory process, not as a concession to consunier groups demanding accountability. It has been so open arid well documented as a concession to ***governments*** who have been complaining because of their exclusion from the process.

Even more ironically, similar considerations to direct citizen sovereignty apply with parliamentary sovereignty. There are too many business regulatory agencies (considerably over 100 in Australia) and not enough parliamentarians to go around for oversight at the national level. All the parliamentarians of all the world's governments is a much larger group, however. What I am suggesting is that the Inter-Parliamentary Union appoint committees to produce oversight reports on the work of selected international organisations concerned with business regulation. Some sovereignty, you might say, to select a handful of parliamentarians to represent one hundred and seventy governments in overseeing an international organisation. Yet this is a standard problem in international diplomacy, with some standard solutions. Nations group themselves into coalitions with rather similar interests on particular issues. On many issues there is a large group with little or no interest. Slovakians are not very interested in the regulation of whaling. If the issue is the regulation of intellectual property, there are nations like the United States and Germany with very similar interests as major intellectual property exporters, each of which may be prepared to trust the other to take turns in representing their collective interests on a key committee. Then there are nations like South Korea, Taiwan, Mexico, India and Brazil that are major technology importers and exploiters, who share common interests. There are underdeveloped countries that import massively but that never export or exploit intellectual property rights. Then there are many countries like Australia that are net importers of intellectual property but that also have significant exporting interests. A committee can be constituted with representatives of each of these different groups of nations.

Such international committees would give parliamentarians a more potent opportunity to exercise oversight than they could ever enjoy at the national level. Committee reports would be tabled in many parliaments around the world, mostly, to be sure, only to gather dust in the parliamentary library. But where the national interests touched by the

international standard-setting were profound, a communication channel would have been dug so that the information might flow and alarms might nng to waken the sleepy guardians of our sovereignty.

No claim is made here that parliamentary and NGO networking to wire international forums back to the people can establish a Jeffersonian sovereignty for the modern world. The claim is that it can create a little more sovereignty than the delusion of popular and parliamentary sovereignty that is the status quo of the technically and quantitatively demanding domain of business regulation. The claim is based on the view: *a)* that increasingly it is at the international level where the action is, and *b)* that there are economies from focusing scarce national oversight energies on international forums so long as the selected watchdogs are accountable to a set of national constituents and are required to report back to that set of constituents. It is often said that representative democracy is inferior to direct democracy, but at least is feasible and superior to no democracy. So second-order sovereignty in the international regulatory system may be inferior to direct sovereignty but better than no sovereignty. In taking the possibility of such second-order sovereignty seriously, we may actually be able to move from a world where internationalisation is causing a democratic deficit to one where it causes a democratic surplus – still deeply imperfect democracy, but enhanced democracy.

G) Taking many small steps: APEC

It is evolutionary rather than revolutionary change that can move us towards a world that better accomplishes all six objectives set out in this paper. Grand blueprints are neither possible nor desirable. International bargaining forums of many sorts, private and intergovernmental, can be strengthened to these ends. Opportunities can be seized at many levels to harmonize outcomes intergovernmentally, to harmonize default standards privately, to nurture a proliferation of competing optional inputs, to increase levels of mutual recognition of these optional inputs and to strengthen parliamentary oversight and NGO participation in all of these international activities.

Most importantly, creative opportunities to widen agendas so that progress can be made on all these fronts are available throughout the world system. For example, Australia is advocating the use of APEC as a forum for regional trade liberalization and harmonization of standards.[3] The challenge is how one descends from the commanding heights of APEC meetings to the nitty gritty of a particular food standard. What is needed is leadership from above that nurtures leadership from below. Entrepreneurship for specific harmonizations must come from the technically competent. Leaders with the passion to show the way to harmonizing electrical standards can only come from people whose daily work lives are all about electrical standards.

All APEC governments could agree to urge their own industry associations, their own NGOs, their own regulators, to put forward ideas for bilateral and multilateral harmonizations that will serve their national interests. One way would be to award prestigious national prizes for the best ideas. Then, rather on the GATT model, a politically sage APEC mediator would have the job of packaging sets of widened agendas. A wants this harmonization out of B; B wants that harmonization out of *C;*

C wants another out of A. So A, B, and C are put together to hammer out a mutually satisfactory harmonization of all three standards, being mindful of the need to sell this package to the other governments in the region.

The model is of fomenting a chaos of harmonization agendas led from below, followed by co-ordination of bargaining forums and bundling of issues from above. It cannot be over-emphasised that harmonization ideas that are bold and innovative enough to set new agendas must come from below. Top-down harmonization agendas will have less sustainability. Those who think that we need a world government to bring about regulatory harmonization not only have a naive idea: they have a bad idea. Note that the imperative for rejecting top-down in favour of bottom-up framing of harmonization agendas improves prospects of moving from a democratic deficit to a democratic surplus.

A successful Soviet bureaucrat once said: "Regulation is good; control is better." To be beneficial, regulatory rapprochement should not be about control; it should be about entrepreneurship and parleying mutual advantage.

H) Win-Win Rapprochement

The purpose of this paper was to ask if international regulatory rapprochement is possible that simultaneously achieves six objectives:

A. Reduce duplicative inefficiencies;
B. Reduce non-tariff barriers to trade;
C. Reduce free riding on efforts to tackle international problems;
D. Increase popular sovereignty over the regulatory process;
E. Increase regulatory innovation; and
F. Increase the capacity of firms to shop for lowest-cost regulation.

Surprisingly, the conclusion is that win-win-win-win-win-win is possible, where win means not perfection but improvement on the status quo. Equally, a result with five wins and one loss is possible, or four and two, or any other combination. There is no necessary reason why these outcomes must either hang together or fall apart. The purpose of the paper is simply to show that there is every reason to struggle optimistically for outcomes that deliver improvements on all six fronts, spurning cynics who contend that it is incoherent to do so.

The ICH is an interesting case study of the possibilities for win-win rapprochement; to be sure, possibilities still to be realised. Here, I think the practical advice of Fernand Sauer, the head of pharmaceuticals regulation at the EC and the driving force behind ICH, should be heeded. First, he advises, don't be deterred by long histories of previous failures to secure rapprochement in other forums. You can always create new bargaining forums in the international system. Second, he advises that it is better to start slowly rather than fail quickly with overly ambitious plans.

The third bit of political advice which I privilege in this conclusion is when negotiations are deadlocked, widen the agenda. Don't start with a wide agenda; narrow agendas are simpler and can get quicker agreement when consensus is possible. But when consensus is not possible on a narrow agenda, the deadlock can often be broken by

broadening the agenda. This I think is a key reason for the remarkable accomplishment of 104 nations now being ready to sign the **TRIPS** agreement of the Uruguay Round of the GATT. It is especially remarkable because more than 90 of these nations are net importers of intellectual property rights and hence have a structural interest in weaker intellectual property regulation rather than the stronger regulation the TRIPS agreement provides. **As** someone from a nation that is a net importer, and as a cynic about the economic benefits of patent monopolies, I have some deep reservations as to whether this agreement is a good thing. But my point here is not to debate the respects in which it is a good or a bad agreement; it is to marvel at how agreement is possible among so many countries that have so many reasons for rejecting it. For present purposes, one reason should be noted – the power of agenda broadening.[4] While the US negotiating position for the Uruguay round was no TRIPS, no round, the negotiating position of my own country, and the Cairns group generally, was no agriculture, no round. It has been from the champions of TRIPS – the agriculturally protectionist nations of the EC, the United States and Japan – from which the Cairns group has been most desperate to seek agricultural concessions. So both the Cairns group and the EC–US–Japan will probably sign both for TRIPS and for some freeing of agricultural markets.

It was suggested at the beginning of this paper that international institutions do not generally solve international regulatory problems by directing effective enforcement against rent-seeking nations or firms. Powerful states can do that to some extent and thereby bring free-riding nations to the international bargaining table – witness the US targeting of nations such as Taiwan, India and Korea for intellectual property infractions using Section 301 of its Omnibus Trade and Competitiveness Act of 1988.

The Harvard research team on international environmental institutions found that the ways international institutions make progress are through: 1) increasing governmental concern (*e.g.* disseminating scientific knowledge that magnifies domestic public pressure); 2) enhancing the contractual environment (*e.g.* providing bargaining forums, monitoring national performance indicators of environmental outcomes); and 3) building national capacity (*e.g.* transfer of regulatory technology, boosting the bureaucratic power of domestic allies by requiring them to generate accountability data for international treaty purposes).

We tend to lose sight of the fact that the nations with the lowest regulatory standards in the world system are often in that position because they lack the national capacity to make their regulation work. This may have the effect of attracting some investment that seeks out the locales with the lowest standards. The free rider effect ma) induce a certain inertia about raising regulatory standards to international minima. These benefits of free riding may be a reason for the persistence of the problem, but it is ofter incompetence, lack of national capacity, that is the original reason for the problem. It is ir these circumstances, which I contend are rather common, that OECD nations with national capacities to regulate effectively have an interest in transfemng regulatory technology to nations which lack national regulatory capacity and would like to have it.

International institutions such as the OECD are not well placed to do most of the things that need to be done to secure win-win regulatory rapprochement. I have sought to show that only national governments are well placed to play certain roles (*e.g.* enforce-

ment against free riding), international industry associations and other NGOs are in the best position to make other contributions, international private standard-setting bodies like the ISO in the best position to do certain other things. But there are arenas where the OECD can make major contributions to international regulatory rapprochement by 1) increasing governmental concern; 2) enhancing the contractual environment and 3) building national capacity. The internationalisation of hazardous chemicals regulation is one area where the OECD has done an important job in all three respects (OECD, 1988).

VII. What OECD Members can do towards win-win rapprochement

I have explained that there are major contributions to be made toward rapprochement by international organisations, voluntary standards setting bodies and NGOs. But what are the key things national governments can do? Rapprochement requires leadership by OECD countries at many different levels:

1. *Intranationally,* where different standards apply in different parts of the same country (for example, the 1992 Australian Intergovernmental Agreement on the Environment which advanced the principles of nationally agreed outcomes and mutual recognition of regulatory inputs) (Wilkins, 1993).
2. *Bilaterally* (for example, substantial convergence of antitrust law between New Zealand and Australia under the auspices of the Closer Economic Relations Agreement) (Ministry of Commerce *et al.,* 1992).
3. *Trilaterally* (for example, the ICH for pharmaceuticals between Japan, the United States and the EC; environmental and occupational health and safety convergence among the United States, Canada and Mexico under the North American Free Trade Agreement).[5]
4. *Multilaterally* (for example, the leadership of the Bank of England and the United States Federal Reserve Board in moving the G-10 toward increased minimum prudential standards for banks in 1987) (Kapstein, 1989).
5. *Regionally* (pre-eminently, the mutual recognition of standards on a wide variety of products and services achieved by the European Community (Commission of the European Communities, 1991), with these then spreading to the European Free Trade Association nations and then to the post-communist natinns; also, the aspirations President Clinton articulated for APEC in Tokyo this year).
6. *Globally* (for example, the leadership of the United States in setting up the global regulation of satellite telecommunications through INTELSTAT in the 1960s and its leadership towards some international deregulation in this domain in the 1980s) (Colino, 1985).

The substantive tasks required at these different levels are many:

1. Funding research that helps other nations to recognise their own interests. Most nations will not realise the costs associated with a regulatory problem that might be addressed by rapprochement. The Australian government has adopted this

research-based approach in seeking to persuade the EC of the costs to its consumers of protection and non-tariff bamers in agricultural trade (Bureau of Agricultural Economics, 1985).

2. Creating deliberative forums that give other nations an opportunity to discover the interests they have in rapprochement. This is what the EC did with establishing the International Conference on Harmonisation for pharmaceuticals.
3. Giving technical assistance to nations who would like to put in place the regulatory infrastructure to achieve internationally accepted minimum outcome standards, but who are unable to do so or unwilling to give this problem priority in their budget. Germany and some other OECD members are doing this in their technical assistance to post-communist societies to secure improved environmental outcomes.
4. Nurturing private standard setting and private innovation in regulatory technologies by resisting the temptation to insist on a state monopoly of standard setting. The nurturing of CEN and CENELEC by the EC is exemplary here.
5. Be accommodating to mutual recognition of radically different input standards applied by other governments when those inputs deliver internationally acceptable minimum outcomes. Agree to be bound by independent arbitration of disputes over mutual recognition.
6. Foster interest by national parliamentary committees in oversight of the activities of international standard setting bodies.
7. Share information on international standard setting with national NGOs. For example, with regard to environmental standards, comply with the OECD's "Transparency and Consultation'' guidelines on ''Trade and Environment".[6]
8. Urge national industry associations, NGOs and regulators to put forward rapprochement proposals that will advance the national interest.

Why should OECD members bother with any of this? The simple practical answer is self-interest. If every nation aggressively pushed through these means only those regulatory rapprochements where there is a significant national interest at stake, then a huge amount of rapprochement would occur. International regulatory rapprochement is a domain where the challenge is vast. but where prospects for the public use of private interest and the international use of national interest are substantial.

Notes

1. I am indebted to David Vines for this insight, which he in turn credits to Sidney Pollard.
2. "In Japan, Bayer, for cxnmplc, **runs** a stability laboratory with a staff of ***25*** people. whose only task is to repeat stability tests that were carried out before at company headquarters in Germany in order to get marketing authorization in Japan." (D'Arcy and Harron, p. 52).
3. This initiative was discussed in Andrew Elek (1992), "Pacific Economic Co-operation: Policy Choices for the 1990s'', *Asian-Pacific Economic Literature,* Vol. *6*, No. 1, pp. 1-15.
4. Peter Drahos and I will seek to fully articulate the range of reasons in future research.
5. See, for example, the NAFTA preparatory work in Occupational Safety and Health Administration (1992), A *Comparison of Occupational Safety and Health Programs in the United States and Mexico: An Overview,* US Government Printing Office, Washington D.C.
6. See Annex Two to Chapter One.

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Part IV

THE FUTURE OF REGULATORY CO-OPERATION

Chapter 10

Lessons for regulatory co-operation

by

John Braithwaite

I. Introduction

In Chapter One, Scott Jacobs shows how the world is organized into a multi-layered regulatory system. On top of various subnational regulatory systems sit national systems, and on top of them supra-national systems. The latter range from global regimes such as the GATT, to regional agreements such as NAFTA and the European Union, to bilateral accords such as the Australia-New Zealand Closer Economic Relations Agreement. This report has been about the inter-relationships among all of these layers. In this final chapter, I attempt some concluding observations on what we have learnt about managing these inter-relationships.

In the *long* ***term,*** the survival of our planet depends more than anything else on our learning how to manage co-operation in an interdependent world. The next section argues that in the ***medium term*** we might be able to address some of the major problems of the global economy, such as cyclical unemployment and business downturns, if we learn how to apply our experiences with regulatory co-operstion to macroeconomic co-ordination. Then the rest of the chapter shows how in the ***here and now*** we can seize mutually beneficial opportunities for microeconomic co-ordination. It concludes that governments are more womed about the risks of regulatory co-operation than they should be. This does not mean that maximizing regulatory co operation is a good policy. It is not. Governments should limit their co-operation with other governments to those areas where the benefits of working together will outweigh the costs, but such positive outcomes can be realised far more frequently than governments realise.

After discussing how to manage the process in which opportunities for beneficial co-operation are identified, the chapter moves on to discuss the management of layered strategic planning within interdependent networks. Following the lead of Les Metcalfe in Chapter Two, I conclude that an interdependent world forces us to abandon a hierarchical conception of public sector management and strategic planning. What then does managing change within plural networks require? It requires the cultivation of ***trust and mutual confidence*** within those networks, ***transparency,*** the proactive generation of ***knowledge,***

the *participation* of non-governmental actors, and *accountability* for outcomes. Each of these requirements is considered in turn. More provocatively, it is argued that co-operation that leads to *regulatory competition* can be especially beneficial for consumers. An integrated model of how these requirements nurture bottom-up entrepreneurship leading to beneficial co-operation is then proposed in Figure 1 (page ***233)***. Readers might glance forward to this figure for a map of where we are going. Finally, the chapter suggests some conclusions regarding how governments might make the big strategic choices between harmonization of standards versus mutual recognition, or whether to opt for some hybrid model of convergence-co-operation.

11. From micro- to macroeconomic co-ordination

The point was well made by Giandomenico Majone in Chapter Seven that where we have attempted macroeconomic co-ordination in recent years we have failed, and failed rather dismally, the 1986 Tokyo Summit of the G-7 being a case in point. That is not to deny that it would be a good thing if we could accomplish better macroeconomic co-ordination, just that it seems to be something beyond our competence at this stage. There is a different story at the level of sub-national intergovernmental co-ordination, however, where macroeconomic co-ordination is not only feasible but imperative.

Even at the international level, however, we should qualify any impossibility thesis of macroeconomic co-ordination by considering what happened with fiscal policy during the 1980s. The Reagan and Thatcher governments led a competitive bidding of tax rates down throughout **the** OECD arid beyond. Here we did have a kind of worldwide macro-economic regulatory competition. Some see this example of regulatory competition as a good thing, promoting efficiency. Others see it as a cause of fiscal imprudence in many parts of the world that has fettered the macroeconomy and accelerated a trend toward a system where paying tax is mandatory for the middle classes but optional for chose who can afford international tax planning. Whether we are more persuaded by those who see international competition in tax rates as a good or a bad thing, we can agree that the prospects for international co-operation to lead tax rates back up, or toward **an** international harmonization that thwarts tax shopping, are remote. Some modest rapprochement has occurred and has delivered modest economic benefits – for example, convergence of value added tax rates in the EC. Other modest forms of fiscal rapprochement *could* occur – for example, international agreement to eliminate a situation where some nations impose royalties on blank tapes to compensate copyright owners and some do not. Such **an** agreement would effect administrative savings at customs barriers (where tape imports from some countries but not others must be intercepted and taxed).

While some non-trivial co-ordination of this sort can occur on the margins of fiscal policy, the OECD Symposium (see Foreword) affirmed the premise that it is with ***microeconomic*** rather than macroeconomic policy that real gains are being made through international co-operation. Yet in reaching that conclusion we should bear in mind that there is a deeper importance to learning how better to manage international microeconomic co-ordination: the lessons we learn here about how to solve international microeconomic problems might at some later date be applied to discovering more feasible

strategies of macroeconomic policy co-ordination. If we can learn to walk through telecommunications policy co-ordination, perhaps one day we will be able to run with monetary policy co-ordination.

Indeed, the one well-documented case of successful macroeconomic co-ordination, the 1978 Bonn economic summit (Cooper ***et al.***, 1989), engenders a guarded optimism that the ideas in this report about managing multi-level networks might hold some keys to unlocking a more prosperous world. The Bonn summit settled the essential elements of the Tokyo Round of the GATT, German and Japanese pump-priming combined with American agreement not to do so, and US agrccmcnt to raise oil prices toward world levels. The mystery of this summit was that Germany, Japan and the United States all began from positions of strong opposition to such a package. However, within each nation strong minorities supported the package. Essentially, the summit was successful because of international networking among a coalition of minorities resisting the positions of their own governments. Opposed majorities were defeated by minorities unified through global networking. Co-operation may seem inconceivable when we think of governments as unified actors, but we may find the seeds of consensus when we think of international relations as transacted through networks of national, subnational and supranational actors.

111. Selecting targets

Participants in the OECD Symposium accepted the assumption that interdependence is not **a** policy choice; it is a fact of life. Wc cannot do away with interdependence, but we can learn to manage it. Yet it is necessary for public sector managers to be highly selective about the areas in which they seek to use regulation to manage interdependence. George Bermann includes in Chapter Three administrative advice on how to manage selectivity to ensure that good opportunities for rapprochement are not missed. There are areas where the costs of either national or international co-ordination exceed the benefits. Giandomenico Majone in Chapter Seven speaks of attempts at over-harmonization causing under-harmonization. By this he means that across-the-board harmonization fritters away networking energy on harmonizations with limited payoff (and which therefore secure limited compliance). Futile efforts to move on all fronts at once have the consequence that the enormous commitment needed for harmonizations that really matter cannot be focused. Pre-1985 EC harmonization efforts are precisely an example of over-harmonization causing under-harmonization (see Chapter Eight by Pelkmans and Sun).

National governments can and must make strategic decisions in the face of the globalising influences discussed in this report. They have several options. After considering all the arguments, national governments might sensibly dccidc to drop out of the international game. Instead of harmonizing beer standards – that is, harmonizing the ingredients required before something can be described as beer in other countries – governments might opt for deregulation of ingredient requirements. With respect to standards for building codes, rule-making might be totally delegated to local government without any attention being given to national, let alone international, harmonization. For regulations, like taxi regulations, with effects that are geographically circumscribed, the

benefits of both national and international rapprochement are unlikely to exceed the costs. On the other hand, in markets that have some national as well as local dimensions, such as markets for nursing homes and health services, national but not international regulatory co-ordination may be justified.

Even in many markets that are internationalized, the benefits of international co-ordination will not exceed the costs for many countries. Those countries should decide unilaterally to disengage from the world system with regard to those areas of regulation. Equally, there will be domains where nations should unilaterally follow another nation's regulation without dialoguc with them or third nations. It makes sense for Canada simply to follow most **US** automobile safety standards. Here, free trade arguments trump national sovereignty arguments (which are politically unrealistic in any case) except where Canadian conviction about US regulatory error is unusually strong.

In Chapter Four, Martin and Painter suggest some criteria by which governments can select the right areas for regulatory co-operation. They suggest that the priorities should be new industries or products (*e.g.* high definition television), all pre-approval regulatory programmes (*e.g.* drugs, food additives, pesticides), areas where problems are clearly transborder in nature (*e.g.* global warming, ozone depletion, banking), and health and safety problems where governments can benefit at least from sharing information. Domains like transportation safety satisfy these last two criteria. One might add to this list some areas of complex interdependency such as securities regulation and competition law, which is the subject of a convergence project at the OECD. David Vogel, an expert invited to the OECD Symposium from the Haas School of Business at the University of California, proposed a more general set of criteria for prioritizing efforts of regulatory rapprochcmcnt. Vogel concluded that international co-ordination of regulation is most likely to be imperative when we are dealing with goods: *a)* that are traded extensively; *b)* that are produced and consumed in many countries; and *c)* that are produced by transnational corporations.

IV. The management challenge of global networks

But if nations, after considering the benefits and costs of co-operation, are not attracted to opting out of playing the international game – unilaterally disengaging from the world system or unilaterally following the lead of a bigger player – then what are they to **do?** Les Metcalfe makes some telling points in Chapter Two as to which way one ought to go in such circumstances. He says co-operation is not a matter for a single organization; it is a function of a network of people and organizations:

> *Usually, co-ordination depends on a mixture of horizontal and vertical linkages and the development of partnerships of various kinds among participating organizations. Much co-ordination takes place without a "co-ordinator".*

In thinking about the question of network architecture, the question was raised whether this is really **like** the architecture of **a** telecommunications system (whence the concept of network architecture is taken). I think it is. **A** telecommunications network architecture is constituted by multiple actors – governments contribute infrastructure

toward building the network; private corporations build parts of the network; there is third party certification; there are voluntary standard setting organizations, both national and international; there is the International Telecommunications Union (ITV); there is the International Telecommunications Users' Group (a group of business consumers who have been influential in shaping the international deregulation agenda); and so on.

At each of these levels, strategic planning is possible, indeed imperative. It is possible for there to be, simultaneously, *national* strategic planning of telecommunications policies, *international* strategic planning through fora such as the ITU, and private *corporate* strategic planning. But each of those levels of strategic planning is bound to fail, certain to fail, unless it takes account of the planning occurring at the other levels. It will fail, Metcalfe writes, unless we jettison an outdated hierarchical model of corporate planning in favour of building trust horizontally and vertically, where vertically means both up and down, within an entire network.

V. Building trust

This report shows why trust and mutual confidence are the most critical variables to the success or failure of regulatory co-operation. In a more general sense, this is hardly an original observation. Kenneth Arrow contended more than two decades ago: "It can be plausibly argued that much of the economic backwardness in the world can be explained by the lack of mutual confidence" (Arrow, 1972). Keynes had a particularly acute understanding of this. In *The General Theory of Employment, Interest and Money*, Keynes lamented that economic theory had neglected the importance of mutual confidence, a criticism that remained valid until very recently. (Keynes, 1936) Without citing this forgotten aspect of the *General Theory*, Mark Casson, in his 1991 book on game theory, *The Economics of Business Culture*, was able to show formally that nations will fail economically when their business cultures lack trust. (Casson, 1991) Economic performance in modern economies depends on the minimization of transaction costs, according to Casson, and these are best minimised through the cultural resource of trust

Empirically, my own research team has recently shown that regulation works more efficiently, and with enhanced compliance, when it is based on trust. (Braithwaite, 1993; Braithwaite and Makkai, 1994). Of course, trust is hardest to build across cultures, where values about fair play and appropriate pi-oceduies are maximally different. The most vital role of international institutions is in providing forums where trust and mutual confidence can be developed. The OECD offers many examples – such as the *Guidelines for the Testing of Chemicals Programme* described in Chapter Six – of how trust can be built and sustained between countries to support co-operative work.

Of course, international "talkfests" are often disparaged by practical administrators who understandably feel they are doing more important things when they are home making management decisions. But they can be wrong. What is suggested here is that, on the contrary, there are sound theoretical and empirical reasons for believing that governments should invest *more* in familiarization with each other's styles and processes of regulation.

Moreover, complex interdependency among nations makes it more prudent than it might at first seem to take risks by trusting other governments. (Keohane and Nye, 1977) The reason many international treaties are complied with much of the time without any enforcement is that governments are intertwined in so many different co-operative games that cheating on any one undermines a reputation for trustworthiness that they would rather protect (Keohane, 1984). Governments are well advised to take more risks with trusting other governments because of a peculiar economic property of trust. Unlike other assets studied by economists, trust is not a resource depleted through use. Trust, in fact, is depleted through not being used (Gambetta, 1988; Hirschman, 1984). Once governments realise that they have been under-investing in building trust, they can take action to become wealthier while achieving better regulatory outcomes. International trust is built through honest and open communication within networks that expand beyond governments to include business groups and non-governmental organisations (NGOs).

VI. Building transparency, knowledge and accountability

Trust, in turn, requires transparency (so one can "trust and verify"), knowledge (so one knows where to look and how to interpret), and accountability (so that a failure to verify trustworthiness can be called to account). These will be considered in turn.

Transparency is a principle in its own right. Its importance is not confined either to the way it supports trust or to its centrality to democratic values in regulatory institutions (as discussed below). In a world of hierarchical public sector management, we could manage things, if not very democratically, at least rather efficiently, in secret. But where you have a plurality of centres of power, each doing its own strategic planning, efficiency can no longer be delivered through secret planning. This is because you cannot do your strategic planning as one of a plurality of centres of power unless you know how the other centres of power are doing their strategic planning. Hence, greater transparency is needed in the multi-layered world of regulation that has been foisted upon us.

To accomplish this, proactive enhancement of knowledge is needed. Having windows of transparency is not enough; channels of communication need to be dug between different participants in networks to allow knowledge to flow. In Chapter Five, Jon Bing describes how many different sources of information can be actively wired into the windows opened into our national and international regulatory systems. Neither is transparency enough in itself because people won't know where to find the windows. The virtues of benefit-cost analysis and risk assessment do not arise just from efficiency values: their virtues also arise from democratic values. As such analyses uncover the costs, benefits and risks of different options, they proactively enhance the knowledge necessary for informed public debate.

In a world of problem solving through global networks and bottom-up rapprochement, a rethinking of accountability is needed. Metcalfe in Chapter Two makes the point well that accountability is not mainly about allocating blame when things go wrong: it is about agreed ground rules for interorganisational co-operation and the setting of performance criteria for organizations in the network (see also the chapters by Bermann, Martin

and Painter, and Pelkmans and Sun). This means that a network must do more than agree that voluntary standards-setting bodies can be responsible for defining standards; it must also agree on performance criteria for the voluntary standard setters and means of monitoring them. Peer review, competition and constituency control are advanced by Metcalfe as alternative accountability mechanisms.

An important research agenda is to explore desirable forms of redundancy between these alternative accountability mechanisms so that systems do not fail if any one mechanism fails. What is an optimal policy for configuring accountability mechanisms so that we get the quality assurance benefits of redundancy while minimizing the efficiency loss from redundancy? For example, is there a suitable temporal ordering of accountability mechanisms – such as, try B only when A fails, C only when B fails? In general, simpler, less expensive accountability mechanisms should be tried before more expensive ones. This leads us back to trust and transparency. The cheapest accountability is cultural, residing in mutual pursuit of reputations for being trusting and trustworthy.

VII. Nurturing participation – toward a democratic surplus

Some sacrificing of electoral sovcrcignty occurs when one works within a network, rather than within a hierarchy that leads definitively to an elected parliament. To understand the implications of this, however, we need to go back to first principles of what sovereignty in a democracy means.

Part IV of Chapter Three by George Bermann is helpful on this and also on how accountability and transparency principles follow from one's conception of democratic sovereignty. There are two ways we may be able to compensate for the alleged democratic deficit. First, we can concede a loss of sovereignty at the national level when Canada follows US automobile standards, but there may be more than a counterbalancing gain in consumer sovereignty through allowing consumers expanded choice of competing products from another country. Second, it might be possible to increase transparency and participation through networks. That point is made in my Chapter Nine through the example of the International Conference on Harmonization, which is working on pharmaceuticals regulation. The GATT is another institution that requires nations to make their regulations more transparent to each other. The GATT requires each nation to be more transparent about its own trade regulation than it would like, but leaves each nation better off because each learns so much more about the regulation of other nations than those other nations would want them to know.

New international regulatory institutions such as the International Conference on Harmonization often create new windows through which citizens can see some of what is going on with the regulations that affect their lives. But, as noted, opening windows is usually not sufficient in itself. It is the participation of NGOs in international networks that enables citizens to look through windows opened by international institutions, and thereby increases the accountability aspects of sovereignty. As a pragmatic matter, international networks cannot ignore these NGOs in any case. Environmental groups drive a lot of the international environmental agenda; consumer groups like IOCU are

central to food standards debates through the Codex Alimentarius Commission and the GATT; Health Action International is a vital participant in international drug regulatory debates, unions in debates on labour standards, and so on. The challenge posed by these new windows and new forms of NGO participation is whether international institutions can use them to turn democratic deficits into democratic surpluses.

VIII. Nurturing regulatory competition

It is generally assumed in contemporary debates on good and bad things about the globalisation of regulation that regulatory competition is one of the bad things. As soon as regulators compete, it is said, you will get competition in laxity, a race to the bottom in a scramble to attract investment. Sometimes this will be true. But to assume that it will always be true is to forget what has been said about complex interdependency within global regulatory networks. Because of the dynamics of complex interdependence (Keohane and Nye, 1977), sometimes you will get competition in trustworthiness. You will have the German regulator who wants it to be said that when the Germans have checked an internationally traded product, that judgment is worthy of more trust than if another national regulator has checked it (and ***vice versa).*** Majone points out in Chapter Seven (as do Pelkmans and Sun in Chapter Eight) that regulatory competition can actually be competition in regulatory efficiency that is of benefit to consumers. An unbalanced commitment to harmonization can stultify innovation in regulatory strategies. New ways of solving regulatory problems will be aborted, because they will fail to satisfy international norms, before being given a chance to prove their efficiency in the market-place. The remedy to this problem is international regulatory competition.

At the same time, checks and balances are needed to protect against certain dangers posed by regulatory competition. Damaging competition can take the form of regulatory moves and countermoves to erect non-tariff barriers to coddle local companies. If this occurs, consumers suffer efficiency losses from regulatory competition rather than efficiency gains.

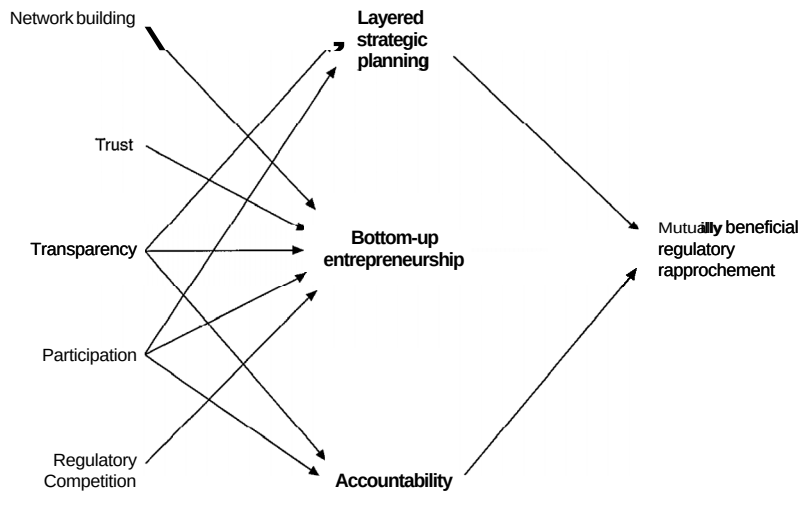
Consumers can also suffer from competition over the laxity of standards designed to protect consumers. Transparency, knowledge, accountability and NGO participation – the themes explored in the last two sections – are the remedies to these concerns. Consumers need to be provided with the resources to watch out for their collective interests and call regulators to account when they are captured by producer interests. Governments also need access to credible international dispute resolution mechanisms when other government regulators need to be called to account for regulatory competition through non-tariff barriers. Dispute resolution mechanisms under the GATT, NAFTA, the EC and APEC and even the OECD ***Guidelines for the Testing of Chemicals Programme*** need to be accessible to both governments and NGOs, usable and used, and they need to have teeth. The effectiveness of different international dispute resolution models is a high research priority for international regulatory studies.

TX. Nurturing bottom-up rapprochement

There are many opportunities in the world system for the public use of private erest, and for the international use of national interests, that are not being exploited. ıportunities to forge efficiencies in the world economy are not being seized by actors ıo have a profound interest in doing so. Yet those who tackle inefficiencies through ernational regulatory co-operation can reap national and corporate benefits that will o benefit other players on the global scene.

Somehow we have to develop our capacities to foster an entrepreneurship from th the private and public sectors to come forward with rapprochement propositions. ırturing of entrepreneurship with respect to rapprochement initiatives can occur feder- y (intra-nationally), bilaterally, trilaterally or at the G-7 or OECD level, and regionally ough forums such as the EC, NAFTA and APEC. There are many private interests out :re who can benefit from rapprochement. If we can harness their concerns, we need not end our lives in meetings where we agree on what is in the international interest. stering leadership from below may be the easiest way to make progress. As Majone ints out in Chapter Seven, one reason microeconomic co-ordination is more achievable ın macroeconomic co-ordination is that the former can occur bottom-up without the ed for top-down summitry. Chapter Six on the OECD *Test Guidelines Programme* ovides a nice empirical illustration. International commerce **is** rife with opportunities to .ze such cases.

Figure 1. **Integrated model for managing interdependent regulation**



Bottom-up entrepreneurship cannot take place, however, unless elites trust enough in administrators and private interests at lower levels to encourage their participation and to enable them to plug into powerful international networks. Figure 1 summarizes how bottom-up entrepreneurship is enabled by building networks characterized by trust, transparency and participation, in a world that allows regulatory competition. Earlier in this chapter it has been argued that transparency and participation are vital for both effective strategic planning and accountability in an interdependent world. Figure 1 integrates these claims with the conclusion that the benefits of regulatory rapprochement are most likely to be secured when layered strategic planning, bottom-up entrepreneurship and accountability are all accomplished simultaneously.

X. When to opt for harmonization, mutual recognition, co-operation, and competition

The chapters by Bermann, Bing, Majone, and Martin and Painter imply that in almost all situations countries will benefit from the most basic form of co-operation – information exchanges that foster "tacit co-operation". When governments make the judgment that it is not worth the (often rather small) costs in attending meetings where information is exchanged or in plugging into the information systems discussed by Bing in Chapter Five, they just stay home or save their electricity. Even when the information that is exchanged does not turn out to be very strategic or illuminating, the meetings at which the exchanges occur can build the networks of trust that might be mobilized to tackle deeper problems at a later date. Both Chapter Six on the OECD *Test Guidelines Programme* and Bing's chapter illustrate that the returns from information exchange can be greatly enhanced when a degree of harmonization on information formats is attained.

At the other end of the continuum, systematic policies of harmonization are clearly misguided. Harmonization imposes such time-consuming consensus-building demands that it must be used sparingly. Moreover, harmonization has the disadvantage of preventing innovation in rule-making and regulatory systems. Since preference discovery is likely to be more successful at the local than at the global level, global rules are least likely to protect citizen preferences. So there is a *prima facie* case for subsidiarity.

There are, on the other hand, several sorts of issues where the benefits of harmonization are more likely to outweigh the costs. Citizens are eager to harmonize driving rules because no one wants to crash into others. Similarly, it is easy to get perfect compliance with international regulatory arrangements for allocating satellite orbits, because no one wants to crash his satellite into another satellite. Harmonization is also important with health and safety standards where competition in laxity would bc unconscionable and with prudential standards where competition in laxity would threaten the stability of financial markets.

Majone suggests that regulatory co-operation and co-ordination are likely to work and produce benefits when there are reciprocal externalities in which several jurisdictions are both causes of an externality and are harmed by it. We all put pollution into the Rhine and we all suffer from those externalities. Majone interprets this as the reason for the

considerable success of the Montreal Protocol nn Substances that Deplete the Ozone Layer where, in spite of a lack of effective enforcement mechanisms, and in part because of trust and mutual interest, we have seen surprising progress that exceeds both expectations and formal targets. Where there are reciprocal benefits, compliance with co-operative arrangements can be secured quite readily.

It is where we don't have reciprocal externalities or reciprocal benefits that we have difficulties in making co-operation work. That is where the GATT model of solving problems – widening the agenda – becomes more relevant. "I'll **fix** you up on your externality if you'll fix me up on mine." If you do not have reciprocity of "externality" effects, you have to have two items on the table with one negotiator conceding the need to take action on one externality, the other conceding the need to act on the other externality. There is much scope for creative trading of this sort.

When externalities are non-reciprocal, the likelihood of competition in regulatory laxity is greatest. Mutual recognition is unlikely to work in such circumstances. My Chapter Nine suggests strategies to deal with this problem. This is to have harmonization on certain minimum outcome (performance) standards, but have competition on the input or specification standards that deliver those outcomes.

When harmonization on outcomes seems too politically or conceptually difficult to accomplish, an alternative is to draw up a default set of input standards that will be accepted as delivering the internationally desired outcome. The default standards provide a benchmark for performance. Producers can then follow any other set of input standards which they can show to be equally effective in delivering internationally-desired outcomes. That is, standards can be the subject of mutual recognition when they are as effective as the default set of internationally approved input standards. Under this approach, the political problem of agreeing on outcomes is avoided by simply agreeing on a commonly used set of input standards and then entertaining any other set of inputs that can be shown to be equal or better than the default set. There are other creative ways for solving the problem of competition in laxity under conditions of non-reciprocal externality.

More generally, one conclusion of this report is that harmonization, mutual recognition and simple co-operative approaches such as exchanges of information are often complementary rather than mutually exclusive policies (see Chapter Eight in particular). For example, harmonization of certain basics may need to be combined with enhanced information exchange to bring national systems close enough together to engender the trust needed for mutual recognition to work. Hence, one might subscribe to Majone's dictum: "as much competition as possible, as little harmonization as necessary." Yet one might subscribe to it in the belief that certain minimum levels of harmonization are needed to support mutual recognition and regulatory competition. Over-harmonization may cause under-harmonization, but under-harmonization may also cause under-recognition. This is the challenge of "balance" raised by Martin and Painter in Chapter Four. The optimal level of harmonization can only be discovered through specific problems that are deliberated in networks fostering a global meeting of minds.

XI. Toward a richer global dialogue

In establishing regulatory co-operation, how do we balance the different values and principles articulated in Chapter Four by Martin and Painter? The challenge is to develop the institutions of dialogue that will enable that balancing to occur. We now know something about cultures of regulation. We know something about how to build trust so that we have a regulatory culture where debates are transacted in a public-regarding regulatory discourse rather than a discourse of doing deals between self-interested actors. Networks of dialogue mean that interests are developed, revealed and transformed by the regulatory process.

I have already described situations where nations and firms have an interest in regulatory rapprochement but fail to understand how this interest can be realised through regulatory entrepreneurship. Much of the work OECD governments do when transferring regulatory technology to developing countries is to assist them to clarify what their interests are – to enable a nation that is decimating its forests to recognise exactly how finite is the resource they are destroying so that they have an interest in renewable forestry management. Many nations do not identify the unequal treatment of women in the labour force as something that is against their national economic interests. The examples could be endless. International cultures of regulatory dialogue are very fundamentally about clarifying interests and building commitment for national action.

A number of participants at the OECD Symposium in October 1993 were concerned about the **risk** of consumer and environmental movements being co-opted by protectionist producer interests in their home countries. The alliance in the Uruguay Round of the GATT between consumer groups concerned about food standards, and agricultural interests in Europe who opposed the internationalization of food standards, was cited as a case in point. If this is a case of consumer groups failing to understand the genuine interests of consumers, then again the answer is to have international regulatory debates conducted through an open, public-regarding dialogue, where protectionist producer groups cannot get by with self-interested demagoguery. That means a more transparent GATT that is open to NGO participation.

Perverse outcomes, where participants who think they win in fact lose, are least likely when regulatory co-operation is carried out in an open dialogue between actors with transparent interests, in a regulatory culture that expects and demands that arguments will be public-regarding. We can work at changing the quality of the regulatory dialogue between consumer interests, producer interests arid governmental interests. Through the OECD Symposium, we learnt a little of how to work for richer, better informed, more open regulatory cultures. Indeed, the exchanges that occur at such meetings are an important part of this very transformation.

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