



# Transnational Institution Building as Public-Private Interaction – The Case of Standard Setting on the Internet and in Corporate Financial Reporting

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## **Contents**

Introduction: transnational institution-building .....	1
Origins of transnational standard-setting on the Internet and in corporate accounting .....	5
The transnational regulation of the Internet .....	5
The transnational regulation of corporate accounting.....	7
Forms of private–public interaction in transnational regulation .....	9
Inception of self-regulation .....	10
Limits of private self-regulation.....	11
State authorization of private self-regulation .....	14
Limits of private self-regulation authorized by the government.....	15
Mechanisms of transnational institution-building.....	17
Integration and closure .....	18
Authorization.....	19
Proceduralization.....	19
Conclusion: transnational institution-building as public interplay between private and public authority .....	20

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# **Transnational Institution Building as Public-Private Interaction – The Case of Standard Setting on the Internet and in Corporate Financial Reporting**

Sebastian Botzem and Jeanette Hofmann<sup>1</sup>

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## **Abstract**

This article sets out to compare processes of formal institution building in two transnational policy areas, the regulation of the Internet infrastructure and the regulation of corporate financial reporting. Both cases are concerned with regulatory arrangements beyond the nation state, in which standards are sought to reduce the uncertainty that actors face when interacting at the transnational level. The article focuses on changing actor constellations, arguing in favour of dynamic conceptions of transnational regulation and rule-making. Both cases demonstrate that the creation of regulatory institutions such as standards, codes or contracts is a dynamic and interactive process that involves both public and private actors. Based on a comparison of the regulatory arrangements we specify various phases of transnational institution-building and we suggest three mechanisms that help explain the observed institutional changes. Both cases illustrate that transnational regulatory institutions do not only reduce uncertainty, they also contribute to the creation of new forms of uncertainty.

## **Introduction: transnational institution-building**

A core challenge in the transnational space concerns the lack of an institutional order that would provide relevant actors with clear rules and norms. This paper centres on two broad efforts to create a regulatory framework with a globally accepted rule setting authority. While both fields, communication networks and corporate financial reporting, have a long history of national regulation, today they epitomize the dynamics and modes of trans-border integration. The following comparison of the two fields has been inspired by and focuses on the somewhat puzzling relationship between public and private actors. The observed changes allude to developments beyond the generalized accounts of deregulation and re-regulation. More specifically, we were interested in patterns of change and mechanisms explaining these dynamics.

The emergence of social institutions has been described as a response to uncertainty. Broadly defined, uncertainty characterizes situations in which actors don't know what is best to do because they cannot predict the outcome of their actions (Beckert 1996: 804). The relevance of institutions such as norms, values or formal rules reflects the fact that uncertainty constitutes a more or less constant companion in modern life. In the economic tradition, institutions are assumed to reduce uncertainty by restricting choice and at the

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<sup>1</sup> We are grateful to David Antal who provided the English translation of this text.

same time providing information about the likely behavior of others (Dequech 2006). Institutions are conceptualized as efficient ‘behavioral regulators’ that decrease transaction costs by rendering social action more predictable (Boin 2008: 88; see also Power 2007: 6). Sociologists also study institutions against the background of uncertainty but emphasize their role in shaping reciprocal expectations and interests, and thereby creating credibility and legitimacy (Beckert 1996: 827; Djelic and Sahlin-Andersson 2006). In this tradition, institutions are portrayed as norms or shared mental models that induce ‘appropriate’ action. They reduce uncertainty by providing frames of meaning that reflect broader cultural environments (Hall and Taylor 1996: 949). Formal institutions such as laws, rules, codes of conducts and standards are particularly relevant in the field of governance and policy studies both at the domestic and the cross-border level. International institutions have been defined ‘as stable sets of constitutive, regulative, and procedural norms or rules’ that are anchored in the expectations of relevant actors (Duffield 2007: 7-8; Senge 2007). They may assume a constitutive function in the sense that they ‘create social entities (actors) and determine their very capabilities and other endowments related to action, such as rights’ (Duffield 2007: 12). To the extent that international institutions create new forms of cross-border authority, they help reduce the ambiguity and uncertainty emanating from globalization processes (Grande 2006). This article focuses on the creation of regulatory institutions that govern transnational interactions (see Streeck and Thelen 2005: 9). More precisely, we look at the changing actor constellations that are part of the institution-building process.

Transnational relationships are defined as interactions ‘across state boundaries when at least one actor is not an agent of a government or an intergovernmental organization’ (Nye and Keohane 1971: 332). Transnational or cross-border policy fields form particularly interesting areas for studying the emergence of formal institutions since compared to national jurisdictions they show a considerably higher level of ‘disorder and uncertainty’ (Stone 2008). Weak hierarchies, unclear responsibilities, shifting “voluntary-legal divides” (Sahlin-Andersson 2004: 151) and blurring boundaries between regulators and regulated entities are seen as typical elements of transnational policy arrangements. Intergovernmental and non-governmental organizations thus interact under conditions of changing, often fragmented, sometimes even competing forms of authority and decision-making procedures. In the face of rising levels of international interdependence, the lack of a global constitution and of comprehensive regulatory regimes creates a demand for institutions able to facilitate trans-border activities. Private, formal institutions such as standards, contracts or codes of conducts have become widespread means of ordering the global sphere below the intricate negotiation of international treaties, conventions and intergovernmental standard setting (Haufler 2000).

There is currently a variety of definitions of rules, norms, and standards. Braithwaite and Drahos (2000), for example, propose understanding rules to mean precise codes of behaviour; standards, as a yardstick by which to appraise behaviour or performance; and norms, as a generic term for rules, principles, standards, and guidelines. Because the exact distinction between norms, standards, and rules is not central to the argument of our text, we are going to use these terms synonymously. The important aspect in our opinion is that standards and norms can be of both a technical and social nature and that they are, contrary to what is frequently stated, not necessarily voluntary (see also Brunsson and Jacobsson 2000).

In political science, the emergence of private formal institutions has been discussed against the background of observed changes in statehood. ‘Governance without government’ (Rosenau and Czempiel 1992), self-regulation and soft law became catchy phrases to refer to the changing division of labour between government, business and society (Graz and Nölke 2008; Mörth 2004; Kahler and Lake 2003; Hall and Biersteker 2002). At first, the shift from public to private forms of authority was predominantly interpreted as a decline of public institutions such as the Westphalian order with its principle of national sovereignty and related forms of political legitimacy. The state, once the guarantor of collective and individual security, appeared to shrink to a *primus inter pares* or even vanish altogether.

To the degree that private institutions effectively exert authority, they have been characterized as alternatives to public institutions such as legal rules (Kerwer 2005: 611; Arts 2003; Cutler, Porter and Haufler 1999). Pattberg (2005: 593) portrays them as functional equivalent to international governance: ‘Similar to regimes established by states, private institutions might provide goods, reduce transaction costs, and decrease uncertainty’. In a similar vein, Genschel (1995) suggests conceptualizing standards as a horizontal form of coordination that partly replaces public hierarchy.

In the past few years, however, the diagnosis of an eroding nation-state has been qualified by a more differentiated understanding. Recent empirical work on transnational governance arrangements shows that the intensity and density of international regulation are distinctly escalating, not declining (Djelic and Sahlin-Andersson 2006). Governments are not disappearing from the international stage but rather changing their roles (for Internet regulation see Drezner 2007). To describe this process, Jordana and Levi-Faur (2004) avail themselves of Osborne and Gaebler’s (1992: 11) metaphor of steering and rowing: ‘While the state is responsible for steering, civil society took over the functions of service provision and enterprise’. Even though governments are not always directly involved in negotiating regulations, they continue to have a prominent part in it. ‘Since they retain residual rights to enact policy – to regulate business practices, to licence new plants, to tax corporations – states are a feature of the bargaining process’ (Kahler and Lake 2003: 427).

Despite the transformation of public-private relationships, the shadow of public hierarchy remains an important element of private institution-building (Haufler 2003). Multi-stakeholders processes in which government, business, and society work together in varying combinations are described as a characteristic feature of new modes of transnational governance (Biersteker and Hall 2002; Haufler 2003: 232). Meanwhile, a number of proposals for categorizing such transnational forms of coordination have been forwarded. Knill and Lehmkuhl (2002: 53), for instance, distinguish between four kinds of interaction of public and private actors: ‘interfering regulation’ and ‘interventionist’ regulation as hierarchical forms of regulation, and ‘regulated self-regulation’ and ‘self-regulation’ as cooperative and private forms of governance.

As we wish to show in this article, the weakness of this categorization and similar ones is not their failure to capture the relevant practices of coordination. Instead, conceptual problems arise from their lack of dynamic perspective. The relations between public hierarchy and private self-organization are not static but subject to perpetual negotiation so that regulatory arrangements are in constant flux. This observation leads us to address the following questions about the interrelation between private and public authority: Firstly, do

the transformations of regulatory arrangements exhibit recognizable patterns? Secondly, how may we characterize the related actor constellations? Thirdly, are there any mechanisms able to explain the transformations in both fields?

In this contribution we compare two prominent cases of transnational self-regulation. While both communication infrastructures and corporate financial reporting show long traditions of national regulation, they are today regarded as prime examples of transnational coordination. As Knill and Lehmkuhl (2002: 42) note, both areas are characterized by a salient gap between economic and political integration. The speed with which cross-border markets have emerged, has left public regulation behind and allowed self-regulatory processes to fill this gap. However, both cases also vary according to the specific conditions of the respective fields and the actors involved. Our comparative approach reflects the assumption that that ‘the crucial variation may no longer be among different states and their domestic realm, but between different transgovernmental and non-governmental networks, their internal configurations, and their unique domestic and international context’ (Orenstein and Schmitz 2006: 17; see also Dingwerth 2007: 191).

The first case study deals with the regulation of the Internet’s infrastructure by setting rules for the registration of domain names and for the allocation of Internet addresses (IP numbers). A model originally developed by the US government provided for complete delegation and privatization of the allocation of Internet addresses. A private company was entrusted with the task of establishing a contract network with all participating actors to reduce uncertainty induced by conflicts over property rights on domain names. But the early optimism about the ability of Internet users and operators to self-organize and agree on clear rules waned after a few years. Doubts about the clout and legitimacy of private authority soon led to reforms. Since then, the question of the appropriate relation between private and public regulatory supervision has become a subject of an international discussion, suggesting that the model of private self-regulation may become embedded more firmly in an international framework.

The second case study traces the inception of transnational private standards for the preparation of corporate financial reports. Conceived three decades ago as an association-based, initially voluntary harmonization project dominated by experts as an alternative to national regulations, an assertive private organization emerged whose standards have spread to almost the entire world. The development of the once voluntary standardization project is characterized on the one hand by an increasing integration of important, even critical actors, and on the other hand, it perceptibly ties in with public hierarchy, especially where transnational standards have been accepted.

Whereas the early phase of Internet governance and the setting of international accounting standards seemed to bear out the thesis that state regulatory authority was declining, today the debate is more differentiated. In both cases governments practise what Knill and Lehmkuhl call ‘interfering regulation’, meaning that public interests are emphasized, as are specific public resources and institutions such as legitimation and legal recognition, on which private regulatory initiatives ultimately depend (see Genschel and Zangl 2007). The mutual dependence between private and governmental actors in transnational institution-building provides an empirically observable swing between private and public dominance in governance arrangements. In other words, our comparison contradicts the widespread presumption that changes in governance structures are taking place linearly as a process of either privatization or, recently, ‘re-regulation’ (Vogel 1996). The comparison

demonstrates that change is occurring as an oscillation between different forms of cross-border norm-setting with different phases of interaction between private and public actors.

To explain the sustained dynamics of transnational institutional change, we go back to the idea of causal reconstruction through mechanisms, which gains its explanatory quality through an *ex post facto* analysis. In other words, we use mechanisms as analytical tools. Thinking in these terms makes it possible to link initial conditions with a particular result (explanandum) and, hence, to facilitate causal generalizations about recurrent processes (Mayntz 2005: 207). Mechanisms permit statements on *how*, that is, through which interim steps, a particular result proceeds from a particular set of starting conditions (Mayntz 2005: 208; see also Davis and Marquis 2005: 336). Djelic and Sahlin-Andersson (2006: 380) ascribe self-reinforcing regulatory spirals to three empirically observable mechanisms: ‘distrust, the question of responsibility, and the search for control’. Accordingly, the burgeoning amount of transnational regulatory measures seems partly attributable to ongoing uncertainty reflecting the fragility of rules and control mechanisms as well as democratic shortcomings outside the nation-state (see also Jordana and Levi-Faur 2004: 12–15). We derive the causal links described below from comparing the process dimension of the two cases, looking for ‘lower order mechanisms’ that enable specific but nevertheless general explanations (Braithwaite and Drahos 2000: 16).

On the basis of our case studies, we propose three specific mechanisms as vehicles for explaining the dynamics of transnational institution-building: integration and closure, authorization, and proceduralization. Processes of integration and closure are intended to reduce uncertainty by controlling access to decisions on standardization, partly in order to protect a profession’s inventory of knowledge and partly to assure its acceptance and acknowledgment beyond groups of experts. Authorization refers to governmental provisions leading to the recognition of private initiatives to set regulatory norms. Customarily, such measures of authorization are tied to conditions that can be both substantive and legitimating in nature. A higher level of certainty is offered to private standard setting bodies in exchange for political concessions. Proceduralization is what we call strategies that participating actors use to manage uncertainty by neutralizing conflicts and to gain status or legitimacy. It can be about constitutionalizing organizational structures or processes but also about recognizing accountability to others. In our view these three mechanisms help improve the understanding of global processes of institution-building and explain the dynamic of the interaction between private and public actors.

## **Origins of transnational standard-setting on the Internet and in corporate accounting**

### ***The transnational regulation of the Internet***

International communication requires worldwide communication services such as postal service, telephony, and data transmission. Until a few years ago, communication services in most countries were run as a sovereign monopoly. International collaboration was confined to ensuring that autonomous national infrastructures were compatible across frontiers. International cooperation, in turn, was organized as an intergovernmental process. An organization of the United Nations (UN), the International Telecommunication Union (ITU), saw to the cross-border operation of telephony networks (Cowhey 1990).



In the 1970s the development of digital information technology led to a rapid proliferation of manufacturer-specific communication networks (Abbate 1999, 149). Because communication between these networks was difficult, if not impossible, the obvious path was to develop generic, uniform standards that would not only facilitate digital communication as a global mass service but also create an international market for information technology. Whereas standard-setting in telecommunications was a state or intergovernmental responsibility until the privatization of telephony in the 1990s, numerous private initiatives for standardization emerged to compete with ITU. The standardization of data networks was affected as well. Before ITU set out to develop appropriate standards in the early 1980s, a group of engineers supported by research funding from the US Department of Defense had formed and had begun addressing the problem of 'internetworking'. The network architecture that grew out of this endeavour prevailed over the ITU model and makes up today's Internet. The engineers involved in the development of the Internet formed the Internet Engineering Task Force (IETF) in 1986. The IETF is still a 'loosely self-organized group of people who contribute to the engineering and evolution of Internet technologies' (Hoffman 2006) and it has no formal legal status or formal organizational boundaries. In the 1990s the open community of engineers went on to become the most important standardization platform for the expanding Internet industry.

The Internet's nongovernmental origin has had an enduring impact on both network architecture and administrative structure. Unlike territorially organized national network architectures of the telecommunications world, the Internet is global. That is, it does not consist of national, autonomous networks; it constitutes a uniform global address space. Many observers initially acclaimed the borderless architecture of the communication network as a welcome liberation from state control and national tariffing. But dispensing with territorial national structures has serious implications for regulatory policy. The Internet addresses and the Domain Name System, two resources essential to the operation of the network in its current form, are subject to supervision by one single country. The design of the Internet thus also violates the traditional 'interface solutions' typical of intergovernmental telecommunication policy (see Hofmann 2007). The global architecture of the Internet raises questions of regulatory authority. Who or what legitimizes the enforcement of global rules and standards?

Initially, responsibility for administering the Internet's name and addressing systems went to the engineers who had developed the Internet. The delegation of top-level domains and the allocation of Internet addresses, for instance, were up to one person who had the confidence of the IETF. The net's private coordination structures proved successful until the mid-1990s. Rule-setting by technical experts hit its limits after the Internet was opened to private users, at which time its growth rate and degree of commercialization soared. Domain names, which had until then been considered a public resource, became assets with high speculative value. At the same time, claims to ownership of domain names were asserted. The first legal disputes over domain names occurred in 1994. An informal secondary market for domain names evolved, which caused uncertainty among the unfolding Internet commerce. Another problem arose from the administrative structure of the Domain Name System. Although many observers argued for creating additional top-level domains and launching a competitive delegation and registration system, the private coordination structures no longer had enough clout to take legitimate action on such goals. In the end, the IETF's attempt to protect its regulatory function by integrating trademark associations and international organizations failed when the US government objected. In

the course of 1997, the US Commerce Department intervened in the growing authority conflicts and henceforth assumed responsibility for negotiating a new regulatory model for the infrastructure of the Internet.

The US government adopted the popular idea of creating stability and order on the Internet through private forms of coordination. In cooperation with the US Commerce Department, a private nonprofit organization, the Internet Corporation for Assigned Names and Numbers (ICANN), was created in 1998. A Memorandum of Understanding between the US government and ICANN laid down the division of responsibilities between them and a schedule for the foreseen privatization of those responsibilities. The US government delegated the administration of the Domain Name System, including the introduction of regulated competition in the domain name market and the allocation of Internet addresses, to ICANN. The Memorandum of Understanding also established that regulatory measures affecting the market for domain names were to be developed consensually by all participating actors representing interests of business and civil society (the bottom-up principle). Business organizations and Internet users were expected to negotiate solutions to market problems on the basis of self-regulation.

However, the intended privatization of the Internet's administration, first scheduled to take place two years after ICANN was created, has still not come about. The US government has repeatedly extended its contractually based supervisory function, also moving away from the idea of total privatization politically. The private structures of self-regulation have obviously not achieved the levels of efficiency, certainty, and legitimacy expected of them, though the change in the international security situation may also have been a factor in the US government's about-face.

The reconsideration and delay of the projected privatization has become the subject of a protracted multi-level negotiations not only between ICANN and the US government but also among various governments and intergovernmental organizations. Since the 2003 UN World Summit on the Information Society, the international community of nations has sought to enlarge its part in this negotiation process. Some actors regard the Internet Governance Forum, an outcome of the World Summit set up by the UN, as a suitable vehicle for holding ICANN accountable to a broader public outside the United States. Where ICANN had interpreted the growing intergovernmental concern as a threat and additional source of uncertainty, it has now made efforts to cooperate with the UN. The relation between public and private actors in Internet regulation is thus not heading unidirectionally towards increased authority of the private sector. Instead, we observe an oscillation between private and public dominance.

#### *The transnational regulation of corporate accounting*

Companies quoted on the stock exchange give account of their economic activities in the annual reports they are legally required to publish. These balance sheets are primarily supposed to inform shareholders, but they are also directed to public actors: the interested public, the workforce, and their representatives. The standards for the preparation of these reports, whose technical accuracy must be checked by independent certified public accountants, are laid down in various national laws and follow from the listing requirements of stock exchanges. The intensifying international activity of companies, the significance of foreign subsidiaries, and the mobility of invested capital across frontiers raise the demands of transparency on companies, which are increasingly competing with each other over investment capital. One way to reduce the uncertainty for companies and

investors resulting from the contradictions and complex challenges is to harmonize accounting standards, the expectation being that doing so would facilitate transnational economic activity as well.

The international harmonization of rules on preparing and presenting balance sheets also poses a challenge to national regulations because accounting standards are embedded in a web of laws and practices related to economic policy. Accounting standards are not just abstractions guiding the way the balance sheet should be dealt with. They express national institutional realities, such as specific forms of corporate capitalization, specifics of tax policy, and the role of associations. In addition, one may regard accounting standards as yardsticks of social power relations governing the distribution of economic benefits (Hopwood 1990). Economic systems that focus on investors, as they do chiefly in the Anglo-Saxon countries, have a strong shareholder orientation. Economic systems in continental Europe, by contrast, have long been dominated by a culture of compromise between different social groups. Actors in Europe have practised forms of coordinated problem-solving that concentrate on the long term and take a large pool of social actors into consideration. This arrangement is a stakeholder orientation (see also comparative research on capitalism by Hall and Soskice 2001).

To simplify transnational economic activities, one can envisage different ways of standardizing national rules for accounting and for preparing and presenting balance sheets (Samuels and Piper 1985). These approaches to harmonization vary in the kind and depth of regulation, ranging from mutual acceptance of national corporate balance sheets to the use of worldwide identical accounting standards intended to lead to uniform reporting. Historically, there have been both international and private efforts at regulation designed to unify accounting standards across borders (Botzem and Quack 2006). These different projects have competed with each other and with received national standards embodying different socioeconomic modes of dealing with uncertainty.

From today's perspective, a private organization that began producing accounting standards more than 30 years ago has decided this regulatory competition in its own favour. The London-based International Accounting Standards Board (IASB)<sup>2</sup> has been responsible for standardization since the 1970s but has also greatly changed in the past decades (for a detailed history of the IASB, see Camfferman and Zeff 2007). Contrary to today's occasionally prevailing viewpoint that the road to acceptance of the IASB was straight and clear, closer inspection reveals that the organization's establishment and recognition was a volatile and contested process whose outcome was uncertain until just a few years ago. On the whole, the regime of private standardization overseen by the IASB is marked by strong private–public interaction. The institutional structures, regulatory content, procedures, and forms of participation have been subject to sometimes considerable change and are in perpetual development.

Accounting practitioners have been the IASB's determining actor groups from the outset. Formally, its origins go back to 1973, the year in which national associations of certified public accountants from nine countries came together to work on devising transnational standards. Anglo-Saxon associations and IASB experts dominated from the start. They laid

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<sup>2</sup> Until 2001, this standardization body was officially called the International Accounting Standards Committee (IASC). For clarity's sake, however, only the current name (IASB) is used in the present text, though important organizational changes were made during the transition from the IASC to the IASB in 2001.

the foundation for a pluralistic understanding of self-regulation, one that stressed the advantages of efficient, private standard-setting over cumbersome regulation by governments. Over time, though, the business sector's influence soared, especially that of global auditing firms (Cooper and Robson 2006; Botzem 2008). For a long time, the IASB was a meta-organization (Ahrne and Brunsson 2005) whose members were not persons but national associations. It was from their ranks that individuals from various professional backgrounds were delegated for the work on transnational standardization.

Professional associations, especially those in Anglo-Saxon countries, are dominated by experts whose work centres on the practical activity of bookkeeping, accounting, and auditing. The major significance that the capital market traditionally has in these countries makes the informational bearing of corporate reports a core element whose objectivity is guaranteed primarily by auditing firms. These companies check for appropriate application of the accounting standards and ultimately attest to the correctness of the information. In practice, the auditing companies cooperate closely with the companies they audit. These business connections are not confined to checking and certifying the balance sheet for the fiscal year. They also encompass consulting and service activities, which were mixed up in and partly responsible for the business scandals of the past years in the United States and elsewhere (Eaton 2005).

The auditing companies provide much of the expertise for the IASB's work on transnational standardization and dominate the substantive development of the standards. Nevertheless, the expert-based standard-setting only partly explains International Accounting Standards' (IAS) global diffusion. The gradual elaboration of a comprehensive catalogue of accounting regulations did meet the necessary condition for private transnational standard-setting, namely, the production of rules that can be complied with. That outcome alone, though, cannot explain the spread and recognition of IAS as the applicability of international standards is determined by national laws. Another factor was that the stock exchanges in some countries led the way, enhancing the legitimacy of IAS by availing themselves of the opportunity to publish IAS-based balance sheets voluntarily. But the crucial reason for the eventual adoption of IAS and for the IASB's recognition as the producer of quasi-binding standards was an agreement with national and supranational actors.

State regulatory policies and public support by private actors were essential to the binding introduction of IAS. However, the recognition of IAS leaves public actors with less manoeuvring room than they would gain with the national standardization of accounting methods. Public actors must recognize and recommend IAS, vesting the IASB with public authority has buttressed the position of private experts, whose judgments are highly regarded in the political discourse. In the following sections we compare and evaluate the individual phases of development in setting the standards of corporate accounting and allocating addresses on the Internet.

### **Forms of private–public interaction in transnational regulation**

As different as the two realms of regulation may seem at first glance, there are a number of processes they conspicuously have in common. Among other things, these processes have to do with the changing role of the state and private actors and with the reconfiguration of the relationship between private and public actors of standard-setting. Over time, two sets

of dynamics have become apparent. Firstly, comparison shows private and public contention for predominance as transnationalization disseminates into processes of regulation and private institutions such as standards. Secondly, cross-border activities lead to changes in the substance of regulation. To illustrate these dynamics, we outline the courses of standardization processes in four stages for both the cases presented in this article. The phases we differentiate are to be understood as empirically observable, but ideal-typical, composites of the corresponding developments.

### *Inception of self-regulation*

The tradition of the Internet's self-regulation owes not least to the disinterest of government authorities in the former research network that gave rise to today's Internet. Although the development of the technical standards constituting the Internet was funded by the US Defense Department's Advanced Research Projects Agency, that organization claimed no influential role in either the process of development or the coordination of the network infrastructure. The structures of self-regulation that framed the development of standards and the administration of the Internet arose from the immediate need of the engineers who operated the experimental data network. Within the 15 years or so between the commencement of research funding and the privatization of the network infrastructure, informal practices of norm-setting became fixed as official institutions and routines. Some of them still exist (see Mueller and Thompson 2004), one being the Requests for Comments (RFC), which is the name for the IETF's technical standards. The first RFC dates back to 1969 and was literally a request for comments. In subsequent years an increasingly formalized procedure for generating technical standards evolved.

The editing and indexing of these standards was incumbent upon the Internet Assigned Numbers Authority (IANA, the institutional precursor of ICANN). IANA was also responsible for the allocation of Internet addresses and, after the Domain Name System had been implemented, for the delegation of top-level domains. For all its power, until the late 1990s IANA consisted essentially of one person acting on behalf of the engineering community: Jon Postel. As long as the Internet was the preserve of a small, exclusive community and as long as the range of the technical and administrative rule-setting seemed confined to that user group, an informal form of organization resting on personal trust was sufficient. It gained its legitimacy in the early phase of standard-setting by virtue of low participation thresholds and efficient, application-oriented standard setting processes. The demands on the legal character and legitimacy of the standard-setting procedures changed when the Internet became a global mass medium and the importance of technical and procedural rules grew.

In the field of corporate accounting, the early years of transnational standard-setting were marked by the swift and steady elaboration of IAS. Those of the 1970s and 1980s, though, were not precise accounting standards; they were adopted from the existing national systems and recompiled. These additively developed standards tended to be normative guidelines whose purpose was to make the different national rules comparable (Thorell and Whittington 1994). Because the early standards were set up voluntarily and aimed at winning majority support, transparency and participation were of secondary importance. The need to harmonize accounting rules was discussed above all by the professionals working for global auditing companies (Samuels and Piper 1985). Anglo-Saxon founders set the agenda of these debates. They were closely tied to large service businesses, whereas

many of the continental European representatives were self-employed persons or employees in small auditing firms (Camfferman and Zeff 2007). Involvement of company representatives was minimal in the early phase of standard-setting for accounting. The main actors were a small circle of professional accountants who performed the audits, represented associations, and maintained transnational contacts all in one (Tamm Hallström 2004). Anglo-Saxon practices were followed in the IASB from an early point on. Governmental representatives, especially from developing countries, played little or no part (Hopwood 1994; Rahman 1998).

In both cases the early phase of the development of transnational standards reflected the great emphasis that the participating actors put on practical matters. Self-regulation at that juncture in the process meant the search for immediate solutions to problems with cross-border cooperation and coordination. Sharing objectives and values across their professional cultures, Internet pioneers, national professional associations, and practising certified public accountants worked together without having to keep government authorities, user organizations, or other external interests in mind. Through direct impact, they ensured the participation of people who were affected and could count on public support, provided they did not compete with governmental actors. In both cases, the germ of private transnational standard-setting was a small, self-determined group of experts who knew each other through practical collaboration and who framed problems and goals in the same way. The orientation towards relevant experts permitted and warranted the exclusive character of the standard-setting projects.

### *Limits of private self-regulation*

Aided by government funding, yet largely free of government intervention, the IETF created a cluster of technical, social, and administrative standards that effectively regulated the Internet and its use until the mid 1990s. An academic culture of personal responsibility and sharing of what were regarded as public computing and network resources were formative aspects of the IETF's ideas about administering the Internet. As long as the Internet was a research network reserved almost exclusively for academic research institutions, its users broadly accepted this culture of common welfare and its behavioural institutions ('netiquette').

But the composition of the users changed quickly after privatization of the infrastructure, and the IETF's power to define the technical and administrative standards of the Internet began to erode. The decline of the IETF's authority became especially evident in disputes over title to domain names. In 1994 Jon Postel still declared self-confidently that 'concerns about "rights" and "ownership" of domains are inappropriate. It is appropriate to be concerned about "responsibilities" and "service" to the community' (Postel 1994). This view, which indisputably reflected majority opinion in the IETF, collided increasingly with the interests of the expanding electronic commerce, which was out to protect its claims to ownership of trade marks both off- and online. Flaring conflicts of interest showed that the engineering community was no longer acting on behalf of all Internet users and that the hitherto unquestioned link between technical and social authority of norm-setting was losing acceptance.

The IETF and its legal holding organization, the Internet Society (founded in 1992), responded to the pluralization of interests on the Internet by striving to integrate them.

Offers to cooperate were made, particularly to the intellectual property organizations and the competing intergovernmental standardization organization, the ITU. In 1996 the IETF created an 'Internet International Ad Hoc Committee' to rearrange the coordination structures of the Domain Name System. One of the goals was also to replace hitherto existing monopolies in the Domain Name System by creating new top-level domains and bringing in competition in registration services.

The proposals submitted by the International Ad Hoc Committee in 1997 drew heavy criticism from actors who felt their interests ignored. The heaviest fire came from the opponents of trademark interests, who argued against privileging intellectual property rights to the Domain Name System.<sup>3</sup> Consequently, the engineering community saw its regulatory authority defied by the reproach of favouritism. The effort to integrate vociferous critics as partners-in-cooperation had only exacerbated the problem of representation that had arisen on the Internet. The rapid expansion of the net resulted in a growing sectoral and regional heterogeneity of user groups, complicating endeavours to develop consensual regulatory standards. The community of technical experts lost its dominant position and developed into one of several expert groups intent on having a voice in the further development of the Internet.

In the case of corporate accounting, the early years of standard-setting were marked by considerable output. The IASB developed and adopted 22 general standards in its first decade, though they did need to be honed. The IASB therefore gradually broadened its external contacts and tried to initiate the introduction of IAS by businesses and stock exchanges. Still shaped and dominated by Anglo-Saxon experts, the professional culture revolved largely around the needs of actors on the capital market. Cooperative relations were thus sought with international organizations such as the OECD and the International Organization of Securities Commissions (IOSCO) (Nobes and Parker 2004: 82). Recognition by third parties proved to be a significant element in the continued development of international standards. Despite the significance attributed to the recognition of IAS by private actors such as stock exchanges, financial institutions, and businesses, the government's positive sanction was essential. Legislation or government-authorized national standard-setters had to make IAS mandatory, or at least had to tolerate them.

Despite the IASB's early recognition of the need to network with other actors, and despite the organization's systematic quest to integrate and co-opt key private and public actors since the 1980s, the actual work on standardization was mainly influenced by national professional associations and practitioners from international accounting firms. Standardization has been dominated by a professional culture in which rational argumentation about the 'best technical solution' is highly valued. However, it continues to be a political process in which actors intend to influence the content of standards (Botzem and Quack 2006). It includes the systematic integration of international organizations (e.g., the OECD, the World Bank, and the Bank for International Settlements in Basel, Switzerland) as well as critical actors (e.g., US regulatory authorities, the Commission of the European Union, and IOSCO). To guarantee the financial foundation and practical application of IAS, it was important to be open to the concerns of multinational corporations, financial market analysts, and global auditing firms. The simultaneous integration of international organizations and the cooptation of private actor groups assured

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<sup>3</sup> Among other things, the Ad Hoc Committee had suggested a waiting period for registering domain names so that they could first be checked for violations of trademark law.

the recognition of IAS and support by the IASB. The price for this inclusion was adaptation of the standards to the interests of capital markets and assent to political concessions, especially when it came to the US standard-setter, the Financial Accounting Standards Board (FASB).<sup>4</sup> Integrating the associations of financial market analysts and financial executives into the IASB's decision-making bodies provided for orientation to the capital market. It also promoted the willingness to abide by privately generated rules (Tamm Hallström 2004: 152).

In both cases examined here, the second phase of transnational standard-setting has been marked by pluralization that pushes non-binding private self-regulation to its limits. One reason for the escalation of external influence is the increasing economic and political relevance of standardization activities. The Internet's success has brought about a kind of collision between intellectual property rights on the one hand and the institutions governing the allocation of infrastructure resources, particularly domain names, and the interaction of the engineering community on the other. Moreover, the standards and rules of both standard setting organizations did win the acceptance of everyone involved but did not suffice for universal recognition beyond organizational boundaries. In the case of corporate accounting, national laws virtually prevented the standards from spreading. In both areas, economic and political interests of third parties therefore had to be tied into transnational norm-setting. The involved professionals and their associations at first invoked the neutrality and objectivity of their professional cultures and rejected 'inappropriate' intervention. Nonetheless, they opened their norm-setting projects to selected economic and public actors. The US government proved itself to be a particularly powerful entity in both cases, one whose recognition of the two projects was bought only with major concessions.

The integration sought by private actors illustrates the contestation prevailing in transnational institution-building. As the rules and standards become ever more precise and binding, the private organizations pursuing standardization begin competing with existing rules and regulatory authorities. The integration and cooptation of critical actors are the attempt to respond to these conflicts. The integrative activities point to the innate weaknesses of private rulemaking. Although pooling pertinent expertise enables private actors to formulate rules, they lack the leverage to get them accepted and applied. A 'hybridization' of private standard-setting initiatives thereby comes about, a process characterized by a growing interaction and cooperation between private and public actors.

The differences between the integration strategies illustrated in the two empirical cases can be explained in terms of the specific contexts of action that frame transnational standard-setting. With corporate accounting, it was obvious that a binding acceptance of IAS would require their recognition by public actors. With the Internet in the mid 1990s, however, it was uncertain who had to be won over as a cooperation partner in order to gain binding acceptance of regulatory rules for the Internet's Domain Name System (Hofmann 2005).

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<sup>4</sup> Paradoxically, the FASB has had observer status since 1990, although IAS have never been recognized in the United States. The FASB's observer status is due primarily to the influence wielded by the US financial markets. The United States long emphasized the superiority of its own standards, declaring them the ultimate yardstick of information needs. Behind this stance is the FASB's domestic political power and a fundamental American refusal to bow to international rules. The accounting scandals at the end of the New Economy bubble (e.g., Enron and Worldcom; see Eaton 2005) and ensuing regulation, however, have raised the odds that IAS will spread in the United States. Intense negotiations about introducing IAS for foreign joint-stock corporations listed on US stock exchanges are in progress.



The engineering community expected to gain additional legitimacy by internationalizing the rule-setting. That idea turned out to be a miscalculation.

### *State authorization of private self-regulation*

In the course of 1997, the US government officially intervened in the ongoing discussion of future regulation of the Internet, declaring that it had political jurisdiction over its infrastructure by virtue of the public research funding that had gone into its development. In order to press this claim on the regulatory authority, the state first needed technical control over the more or less privately operated core of the Domain Name System, the authoritative root server, the operation of which the National Science Foundation had delegated to a private company a few years earlier. Only after the US government had established its political supervision of the technical root of the Internet's name space could it delegate that function back to the private sector (see Mueller 2002).

The US Department of Commerce announced its intention to create a global private and contractual regime for the Domain Name System and publicly requested comments on the idea. In effect, the US government entered into direct competition with private regulatory initiatives such as the International Ad Hoc Committee that had originated in the environs of the engineering community and that involved subsidiary UN organizations such as the ITU and the World Intellectual Property Organization. In 1998, the US government formally recognized ICANN in a Memorandum of Understanding as a private body for the coordination of the Domain Name System and commissioned it to create a market for the registration of domain names and set rules for the creation of additional top-level domains. Hence, the US government interjected itself into a largely private weave of coordination with the official objective of privatizing it. This procedure's inherent contradiction became even clearer in subsequent years, when it turned out that the government's supervisory function would not end within two years as planned at the outset. Today, nearly a decade after ICANN was founded, complete privatization of the network infrastructure's regulatory structure seems less likely than in the late 1990s, when the optimism about private self-regulation was considerably greater. The embedding of private regulation in a contractual system of control by one individual government affects only regulatory standard-setting.<sup>5</sup>

In the case of corporate accounting, the IASB has been successfully recognized for the most part thanks to the integration and cooptation of prominent private and public organizations. This expansive strategy has clearly demonstrated the limits of the board's functionality. Both standard-setting and the enlarged scope of consulting led to fundamental structural reform of the IASB in 2000, another step towards final acceptance and legitimation of private work on standardization. The European Commission (EC) mandated the introduction of IAS with an EC regulation, paving the way for the dissemination of international accounting standards throughout the world. This decision was taken out of weakness, though, for the project the European Union (EU) had on developing its own standards for harmonizing the single market had failed. Instead of doing nothing other than watch European companies turn to US standards, the EU decided to recognize individual standards after reviewing them. The Commission believed this step

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<sup>5</sup> The Internet's engineering community has resisted long-term entanglement with governments. Despite the creation of ICANN, for instance, the IETF has been able to retain its autonomy in setting technical standards. This is mainly because the technical standards of the IETF are not mandatory. Instead, the IETF pursues a 'let the market decide' approach.

to be the only way to counter the unique position of the United States and its capital markets. Moreover, the Asian economic crisis in 1997 and 1998 had strengthened the IASB (Martinez-Diaz 2005). Thorough reform of the organization created the procedures and legitimacy required for gaining the acceptance of IAS (Botzem 2008). With the adoption of EC regulation 1606/2002, the EU made IAS binding in its member states, committing 8,000 businesses to use them in the preparation of their balance sheets.

In both cases, formal recognition of private standard-setting initiatives was a pivotal element of government involvement. Making privately developed rules obligatory was one last step in the diffusion of private standards. In doing so, the public actors were obviously pursuing their own interests. On the one hand, they were partly about foreign policy and centred on defending spheres of influence (with the EU keen on preventing US domination of accounting, and the US government bent on preventing the internationalization or multi-lateralization of regulatory authority for the Internet). On the other hand, public interests also revolved around regulatory policy itself (pushing through market mechanisms in the Domain Name System and aligning accounting rules with the information needs of capital markets). At the same time, government authorization of private self-regulation implied a move away from traditional forms of intergovernmental regulation. Closer cooperation between private and public actors meant that disputes between public and private authority shifted into the regulatory arrangement.

### *Limits of private self-regulation authorized by the government*

Since its inception, ICANN has created a market for registering domain names and has established an international arbitration procedure, so trademark law is now largely respected in the Domain Name System. For the generic top-level domain space such as .org or .com, ICANN's regulatory rules and standards are mandatory. Domain name holders as well as commercial registrars and registries are contractually obliged to comply with them. Even the introduction of new top-level domains is gradually approaching, though no serious competition to the most popular top-level domain 'com' has emerged yet. At first glance, then, the private regulatory regime seems to have met general expectations. Nevertheless, the US government has so far decided against complete privatization and steadfastly holds to state supervision of ICANN for an unlimited period.

Leaving aside the changed security situation since 9/11 and domestic policy considerations, there are at least two other reasons that the supervisory relationship between the US government and ICANN has persisted. One has to do with deficient effectiveness and efficiency; the other, with a concomitant lack of legitimacy of the self-regulation model. Private self-regulation has failed to prove more flexible and efficient than comparable state measures. For example, ICANN's bottom-up process for building consensus has repeatedly foundered on the participants' lack of willingness to compromise. Notorious bones of contention concern the creation of new top-level domains or (nationally varying) data-protection regulations pertaining to domain name registration. Issues of legitimation arise primarily when ICANN imposes contractually binding regulative rules (Hunter 2003). The grounds for legitimating unilateral control of the network infrastructure is being challenged not only by the regulatory parties directly affected but also by states and international organizations. Some countries and intergovernmental organizations, including the EU, have meanwhile argued for setting up an intergovernmental process by which to agree on general public policy principles for regulating the Internet. Only the

practical aspects of acting on them is to be left to private operators (see the Tunis Agenda 2005 for the results of the UN World Summit on the Information Society). ICANN has responded to such threats of its status by formalizing its policy development and consultation processes, introducing accountability provisions and by making its decision making procedures more transparent (Koppell 2005).

One may currently assume that public actors will keep trying to affect the regulation of the Internet both nationally and internationally. Complete internationalization based on the traditional model of telecommunications is very unlikely, however. More probable is the establishment of a rough division of labour between public authority including a commitment to principles of the common welfare and private, contractual self-regulation.

The successful propagation of private accounting standards also draws criticism as does the legal requirement to apply them. Resistance is mounting, especially in Europe, where IAS have not only complemented but have sometimes already replaced national standards. It focuses on the IASB's questionable accountability (Véron 2007). The most pressing controversy so far has been about mandating the use of particular financial instruments (IAS 39 Financial Instruments). In that dispute, national actors were not willing to adopt transnational rules. In the end, parts of the rules governing international standards were suspended within the EU; with certain individual terms eventually being 'carved out' of the overall package (Botzem 2008). On the whole, politicization of transnational standard-setting of corporate accounting has increased lately. With Washington continuing to play out its powerful position, the European Commission in Brussels has intensified its endeavours to sway the IASB (Martinez-Diaz 2005). But direct impact on specific regulatory matters, as in the case of IAS 39, is rare and meets with open repudiation from IASB practitioners. The EU Commission is striving to engage itself more in the production of standards than it has in the past and is seeking to augment its veto power. However, the Commission depends on cooperation with private actors such as associations, businesses, analysts, and auditing firms, whose practical expertise and diverse resources remain independent wellsprings of influence.

State authorization of private regulatory jurisdiction has raised new problems of legitimation in both accounting and Internet regulation. Private standard-setting agencies are criticized for favouritism; insufficient orientation to the common welfare; and lack of transparency, inclusiveness, and accountability. In other words, private standards face normative requirements that resemble those of public regulatory agencies. When formal private institutions acquire binding character, the originating organizations are measured according to the same kind of democratic procedures that apply to public decision-making. Self-regulated organizations are resorting more and more to democratic procedural ideals and forms of legitimation in order to gain acceptance and ensure their survival. Both ICANN and the IASB have undertaken extensive reform designed to bolster trust and confidence in private forms of standard-setting. In recent years, for example, ICANN has multiplied its provisions relating to accountability. The IASB subjects its standardization procedures to formal criteria of openness and participation. Aside from the fact that many of these measures are prone to be symbolic, it is unlikely that they will convince public actors to relinquish their veto power permanently. One can more readily assume that the oscillation between private and public standard-setting authority will continue and that the governance arrangements intended to increase the level of certainty at the international level will therefore keep developing.

## **Mechanisms of transnational institution-building**

The two transnational regulatory arrangements examined in this article stem from the need to reduce uncertainty through cross-border coordination. The initiative came from private actors pursuing special interests. They were, so to speak, thereby acting in the shadow of state authority – by and large unnoticed or not considered relevant objects of regulation. That situation changed as the political and economic significance of privately generated rules grew, particularly as their competition with existing standards intensified. The regulatory regimes began to expand beyond the narrow circle of experts and practitioners and to impinge on the interests of other parties. Both the ‘enlightened monarchy’ of the Internet’s engineering community and the accounting standard-setters had to allow the participation of other actors yet tried to uphold their normative fundamentals and to perpetuate their independence as private rule-setters. Although the practical work of setting standards still takes place among experts, it is hard to imagine that the results would prevail without the acceptance and support of government regulatory authorities.

Regulation’s focus, too, changed over time. Internet regulation at first centred on allocation and delegation of resources such as numerical addresses and top-level domains. After existing allocation procedures came under criticism, technical and economic standard setting activities were separated (the creation of ICANN) and the latter area shifted to the formulation of rules for setting rules that would govern the emerging market for domain names. Likewise, the IETF has undergone a reflexive turn of formalization of decision-making processes bearing on the setting of technical standards. As for corporate accounting, standardization was initially conceived to facilitate comparability between various regulatory jurisdictions but has moved more and more towards becoming a uniform catalogue of standards whose worldwide application is oriented to the informational needs of actors operating globally on financial markets. These changes were by no means free of conflict. In the area of accounting, however, the use of what is often a formalized, technocratic procedure to channel differences between interests and thereby to underscore the effectiveness and flexibility of private regulation has succeeded more convincingly than in Internet regulation.

Comparison between projects of standardization in corporate accounting and allocation of Internet addresses shows that configurations of actors and the substance of regulation continually change and go through ceaseless renegotiation by public and private actors. It also reveals that the course of these developments is anything but inconsistent or erratic. The dynamics in these two case studies recognizably cluster into what we regard as phases. Private actors attempt to mobilize government support when the regulatory authority of their transnational coordination projects hits limits. However, state authorization of private self-regulation also proves to be a temporary solution, for the acceptance and effectiveness of these arrangements go only so far. To pursue self-initiated coordination projects and remain somewhat independent from government interests, the formerly private arrangements tend to take on procedures and principles typically associated with state organizations, including formal decision-making processes that offer transparency and ways to involve external groups.

Despite empirical differences between the two cases, the dynamics of private self-regulation indicate the tension between private and public actors. Private actors primarily

bring what they regard as neutral expertise to regulatory contexts. They seek to transform them into objective inventories of knowledge in order to increase compliance and thereby structure decisions and exert control in an altogether uncertain transnational environment. Public actors wield their authority to promote recognition of private arrangements, linking their authorization to an accommodation of their interests. A historical perspective shows that it becomes increasingly difficult to separate public and private practices of rule-setting. This convergence is another source feeding the dynamics in both fields of regulation.

The observed oscillating motion in the configurations of actors poses the question about explanations that might be generalizable beyond the two case studies. Based on this comparison we derive three explanatory mechanisms that help explain the dynamic development from privately coordinated efforts to projects designed to create binding global standardization. We define these three mechanisms as integration and closure, authorization, and proceduralization.

### *Integration and closure*

In the eyes of the involved actors, working on transnational self-regulation was about increasing certainty by entrenching their technical expertise, shared orientations, and qualitative norms and about firmly establishing autonomy pertaining to the definition of recognized knowledge. The main goal was to define and delimit professional expertise. As at the national level (Abbot 1988), such demarcation determines affiliation and social status among experts interacting in the transnational realm. The emphasis on practical experience privileges experts who earn, or have earned, money at companies that profit from transnational standard-setting. It rewards the experts for their engagement in transnational standardization. Having specific expertise and practical experience is important for participation in transnational standard-setting. It sets the group of experts apart, for example from competing standard-setting bodies, and shields them from external influences such as political bargaining. However, defending professional autonomy conflicts with efforts to win recognition of the standards and their global diffusion.

From the experts' point of view, the challenge lay in both protecting their autonomy and coming to terms with the effects of their efforts, the continuing pluralization of interests. Put in neo-institutional terms, transnational standards aimed at reducing uncertainty will inevitably lead to new forms of uncertainty. The experts responded by co-opting actors who were sympathetic to their goals, who could furnish material and non-material resources to their project, and who promised to legitimize their activities (see Black 2008: 147 for the notion of legitimacy communities). At the same time, public actors rushed into private standard-setting in order to assert interests of their own. Determining the access to and participation in transnational standard-setting became a central component of coping with uncertainty in transnational self-regulation (see Grande 2006: 90-92 on the issue of participation and membership). Control of this involvement comes through mechanisms of integration and closure. But embedding private standard-setting in the mesh of international organizations and associations eventually politicized the bodies of experts and their professional expertise. Ultimately, the IASB has been able to assert its norm-setting autonomy better than ICANN, whose authority to act is as yet only delegated.

### *Authorization*

Another mechanism facilitating the embedding of private standard-setting in government-dominated organizational structures is the authorization of self-regulating bodies and their standards. Implementing privately generated rules and making them binding is the eye of the needle through which private actors can pass only with the help of government influence. Even if standards generated by private actors are recognized by other private actors – often through contracts under civil law (as is the case with IAS that were recognized by national stock exchanges before there were any rules for introducing them) – private acceptance does not lead to mandatory provisions. Through processes of public recognition of standards or standard-setting organizations, the state can act as an agent that screens private standards for quality and orientation to the common welfare. It authorizes the results of private self-regulation and thus reduces uncertainty through expanding their scope and impact. Simultaneously, the state can set basic conditions defining the validity of standards and thereby negotiate potential distributional effects. Similar opportunities emerge when it comes to delegating tasks to private actors such as ICANN. As principal or supervisory agency, the state can define tasks and quality criteria and can establish reporting obligations and potential sanctions. Public actors do not take direct part in developing standards and regulatory measures, but they do have indirect affect on them. In both cases studied in this article, governments actively exploit this leverage. However, the scope for affecting private governance arrangements is unequally distributed. Frequently, government approval of standards focuses on preventing undesired measures. Few public actors are powerful enough to succeed at aggressively asserting their own notions of policy.

### *Proceduralization*

A third major mechanism in the dynamics of transnational regulation is the proceduralization of standard-setting. Both cases show a persistent trend towards the formalization of procedures and organizational structures. It appears, for instance, in the detailed codification of steps and sequences of standard-setting. Additional formalization is often a response to criticism from outsiders deploring a lack of balance, transparency, accountability, or opportunities to participate. Proceduralization is thus a pillar supporting the legitimation of transnational self-regulation. Functionally, their strength lies in the channelling of participation. In normative terms, however, participatory procedures convey the impression of openness and inclusiveness without necessarily measuring up to democratic standards of decision-making. Instead, they tie seamlessly into an expertise-based understanding which considers openness to technical arguments an inherent quality. Criticism of private regulatory competence shows that private standard-setting is measured against qualitative criteria similar to those applied to national and international regulatory authorities. Private actors, too, are expected to respect recognized principles of equality before the law and the orientation to common welfare. The mechanism of proceduralization figures prominently in attempts to meet external concerns about the legitimacy of private standard-setting. Public actors take part in the procedures as critics (e.g., the EU vis-à-vis the IASB) and as responsible supervisory bodies (e.g., the US government vis-à-vis ICANN). In both capacities public actors can stipulate that private standard-setting bodies must abide by the fundamental principles of due process, independence, accountability, and transparency. Conceivably, then, the diagnosed swings

between public and private rule-setting ironically amount to a convergence of structures and procedures of private and public actors for the sake of long-term survival.

### **Conclusion: transnational institution-building as public interplay between private and public authority**

The relationship between public and private actors has been subject to various metaphorical images. Osborne and Gaebler's boat metaphor has already been mentioned. Gunningham and Rees (1997: 397) evoke the image of 'two partners in a mazy dance' to make the point that private and public regulatory institutions are closely linked. Braithwaite and Drahos (2000: 24) compare 'regulatory globalization' to the tide of the sea: 'Like the real tide it ebbs and flows. Unlike the real tide, the control of these ebbs and flows is found not in celestial law but in the intricate struggles of actors as they seek to influence the tide.' Other metaphors that have been used to illustrate the oscillating movement are the pendulum and the spiral (for the latter see also Djelic and Sahlin-Andersson 2006: 379; Grande 2006: 100). While the pendulum suggests motions between fixed starting and end points, our comparison shows that the constellations of actors go through organizational and functional changes in the wake of negotiation processes. The image of the spiral seems to capture these transformations more aptly than that of a pendulum. However, all these metaphors share a sense of constant collective response to uncertainty. The dynamic character of transnational standardization points towards the need to explain how uncertainty is reduced and why each arrangement proves to be only temporarily stable. The oscillating motion described in this article reveals a twofold dynamic of transnational institution building. It relates to both the content of various regulatory measures as well as to the principles and modes of rule-setting between private and public.

In summary, our observations boil down to the thesis that institution-building beyond the nation state does not follow the often predicted linear trends towards privatization or re-regulation but rather leads to cooperative relations between private and public actors. Private actors usually contribute their expertise, whereas public actors are strong at mandating, implementing, and legitimating. Mattli (2003: 200) speaks of 'joint governance' and points to the tandem structure of transnational standardization between various jurisdictions. From our perspective, however, the observable developments in Internet regulation and corporate accounting even go beyond that insight. In both the cases examined in this article, the participants neither foresaw nor strove to divide the labour between private and public actors. The dynamics of transnational regulation emerge from the very circumstance that private and public actors alike are perpetually wrestling for recognition of their respective competence, autonomy, authority, and legitimacy so as to reduce the uncertainty they face in transnational areas. In the medium term, this process ought to lead to a progressive proceduralization of standard-setting and to a convergence of public and private rationales of action.

To be sure, stabilizing organizations and institutions have sprouted in the transnational realm. But the interplay of private and intergovernmental authority must be re-ignited constantly, making it a continual bone of contention, as shown by the course of the phases outlined in our two case studies. We refer to these dynamics as an oscillating motion (with a spiral twist) characterized by fluctuations between private and public leadership in the continued development of institution-building. While the initial uncertainty of cross-border

engagements was reduced through global standards, the transnational arrangements give rise to new uncertainties because perpetuated dynamics constantly bring about reconfigurations of public-private standardization. In addition, there is a potentially irreversible shift of levels towards transnational regulatory arrangements, which are decoupling more and more from procedures traditionally under national and democratic control. In practice, multi-level constellations linking national, state, and international private actors with each other arise in the regulatory areas analyzed in this article.

For all the support furnished by the three mechanisms, however, the new ‘division of labour’ between private and public actors in transnational regulation cannot obscure the fact that the weight shifts between the government and the business community. The generation of rules and standards themselves is customarily reserved to private actors. In order to legitimate their claim to regulatory authority, they strive to increase the transparency and openness of their procedures. The strength of private authority can lie in greater compliance by third parties, provided that private self-regulation elicits increased advance trust among the organizations affected. Private authority in the area of Internet regulation lacks this strength, though, partly because ‘delegated authority’ has not afforded ICANN sufficient independence, partly because the policy field is very contested.

In conclusion, the dynamics of formal transnational institution-building processes, especially their nonlinearity, deserve more attention than they have received up to now. By describing oscillations and referring to causal mechanisms, we take the unexpectedly clear parallels revealed by our comparison and try to condense them heuristically in a way that makes it possible to test their applicability in other areas of governance as well. Most of all, our study should be seen as a call to continue doing process analyses that helps improve the understanding of transnational institution-building.



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