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# The challenge of transnational private governance: Evaluating authorization, representation, and accountability

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# **The challenge of transnational private governance: Evaluating authorization, representation, and accountability<sup>1</sup>**

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The shift of regulatory activities to the international level is clearly visible in the increasing number of intergovernmental organizations and sector-specific “regimes,” or in the progress of supranational political integration above all in Europe. But one can also think of a less visible shift that has led to the explosion of transnational regulation outside the intergovernmental realm. This shift takes various forms, including public-private ventures or informal modes of cooperation between public actors (Pauwelyn et al. 2012). It is to the study of an increasingly important particular aspect of transnational regulation outside the intergovernmental sphere that this programmatic note is devoted: <sup>2</sup> regulation by non-state actors, such as NGOs and firms, which are two of the three poles of Abbott and Snidal’s (2009) “governance triangle” (the third pole obviously being the state, or more generally public institutions). Such a development is emblematic of “a remarkable period of institutional innovation in transnational governance” (Hale & Held 2010).

Since the 1980s, transnational private rules have witnessed a global expansion in their number, complexity, and institutional reach (Grabosky 2012). A plethora of non-state and sector-specific governance arrangements have been established with the aim of developing, setting, and implementing these rules in a variety of areas such as finance, corporate governance, labor rights, human rights, environmental and intellectual protection, risk regulation, the Internet, and even security.<sup>3</sup> In the area of industrial production standard-setting, for instance, “thousands of standards were authorized for thousands of commodities and productive processes by autonomous and non-

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<sup>1</sup> This paper was also presented to the high-level workshop on “The Object and Methodology of Global Governance”, European University Institute—Robert Schuman Centre—Global Governance Program, Florence (Italy), 24–25 January 2013.

<sup>2</sup> I will use “global” and “transnational” interchangeably throughout this paper, although I acknowledge that “transnational” may refer to less broad-ranging phenomena than “global.” As a matter of fact, many private governance arrangements are transnational, but not truly global.

<sup>3</sup> See, for instance, the cases of private governance surveyed in Hale and Held (2010a), alongside transnational regulatory networks composed of public officials and hybrid forms of regulation, such as multi-stakeholder initiatives.

governmental organizations well before quasi-state bodies became involved in monitoring and implementing the standards” (Rosenau 2002: 82). It has repeatedly been argued that private governance arrangements matter for global governance, albeit with strong empirical variation (Abbott & Snidal 2009; Bartley 2007; Börzel 2008; Bütthe & Mattli 2011; Cashore et al. 2004; Cutler et al. 1999; Fuchs et al. 2010; Biersteker 2002; Lipschutz & Rowe 2005; Mattli & Woods 2009; Prakash & Potoski 2006; Peters et al. 2009; Ronit & Schneider 1999; Scherer et al. 2007; Vogel 2008).<sup>4</sup> Let us take just few examples in order to make this discussion a bit more concrete.

In the field of transnational standard-setting, the non-governmental International Standardization Organization (ISO) has developed more than 16,000 standards (Prakash & Potoski 2010: 75) and accounts for an overwhelming proportion of all international product standards (Bütthe & Mattli 2010: 456).<sup>5</sup> ISO comprises about 180 technical committees, 550 subcommittees, and 2,000 working groups involving several thousand representatives selected by national organizations, mostly from industry. Although ISO standards are voluntary and the organization has no formal capacity to enforce them, countries increasingly adopt this form of “soft” law. ISO is best described as a global network

comprising hundreds of technical committees from all over the world and involving tens of thousands of experts representing industry and other groups. The institutional backbone of these networks is formed by private sector standards bodies at the national level. Domestic bodies are thus part and parcel of the international institutional architecture. (Mattli & Bütthe 2003: 4)

Together with the ISO, Bütthe and Mattli (2011) study two other powerful global private regulators: the International Electrotechnical Commission (IEC) (see also Bütthe 2010a and 2010 b), and the International Accounting Standards Board (IASB) (see also Mattli & Bütthe 2005 and Perry 2009). The IASB, for instance, is directed and financed by the International Accounting Standards Committee Foundation, a private company registered in the state of Delaware and funded by voluntary contributions. Most of them

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<sup>4</sup> See, however, Drezner (2007) for a more circumspect state-centric view that emphasizes the persistent impact of great powers upon global economic regulation.

<sup>5</sup> On the ISO, see also the book devoted to it by Murphy and Yates (2009).

come from the “Big Four” global accountancy firms, which also monitor the implementation of accounting standards. This private organization has now become the de facto global regulator of accounting standards and develops financial reporting rules used by corporations in more than a hundred countries. In the European Union alone, more than 7,000 companies have started using IASB standards. Each IASB standard requires the endorsement of the EU Commission, and this form of public recognition is reversible. However, the Commission bases its endorsement decisions on regular advice from another private organization: the European Financial Reporting Advisory Group (EFRAG), which is “an umbrella network of organizations representing European employers, banks, accountancy professions, insurers, stock exchanges and financial analysts” (Perry & Nölke 2006: 576). Hence, the impact of private rulemaking bodies on transnational standard-setting (and beyond, in global governance more generally) is no doubt substantial.

## **I. State of the art**

Many authors have studied whether and under what circumstances some actors demand global governance rules, and the same or other actors privately create self-regulatory arrangements, codes of conduct, voluntary standards, non-binding agreements, ratings, and blacklists. Transnational private governance is emerging where it is considered necessary, but public intervention is not possible or desirable for the key players, mainly because it is hard to achieve due to high transaction costs (of intergovernmental negotiations) or because it lacks legitimacy, being considered inefficient or inflexible. There is therefore room for the emergence of “bottom-up” regulatory instruments, such as corporate governance codes (Vogel 2006, 2009; Moon et al. 2010), or standards developed in a cooperative manner within multi-stakeholder environments (Cashore et al. 2004). Private actors involved in this kind of regulatory activities both seek a competitive harmonization of rules at the global level and look forward to avoiding further, more stringent regulations (Mattli & Büthe 2003).

There is a vast amount of research on the reasons for the emergence of transnational private governance, on its modalities, and on its consequences (often in terms of winners and losers). Surprisingly, less attention has been awarded to the question of the

democratic credentials of private transnational regulation. The editors (Avant et al. 2010: 359) of a recent volume on *Who Governs the Globe?* point out in their concluding chapter that the question of the sources of authority—“Why are you in charge?”—is asked much less frequently than one might suppose at the global level. This deficit is more conspicuous in the study of private modes of governance than of intergovernmental regimes, global institutions such as the IMF and the WB, or modes of regional supranational integrations such as the EU.<sup>6</sup> Issues of representation (e.g., North-South or producer-consumer imbalances) and accountability (most notably to “stakeholders”) are addressed in a number of works—sometimes applied specifically to public-private partnerships (see the various contributions in Bexell & Mörth 2010), and frequently in relation to the more complex issue of legitimacy (e.g., Bernstein & Cashore 2007; Cashore 2002; Cashore et al. 2004; Chan & Pattberg 2008; Chango 2011; Dingwerth 2007; Fuchs et al. 2010; Koppell 2005; Peters et al. 2009; Take 2012, 2012a; Ullrich 2011; Weinberg 2012).<sup>7</sup> However, this is clearly not the “core business” of research on private regulation, and we still miss an adequate global picture.

In the case of private regulation, one can speak of “the construction of many public policies as a result of what are essentially private efforts” (Hirschland 2006:12). This “paradigmatic shift” (Rudder 2008) means that private actors make decisions that, under some conditions, can be collectively binding. Private governance entails in quite a number of cases the exercise (to varying degrees) of de facto political power—that is, the power to produce decisions that *in fine* have binding effects, reduce actors’ autonomy, and are conducive to resource (re-)allocation:

Questions of whose interests get served, who gets to make decisions, how these participants view the world and their tasks, whether conflicts of interest are built

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<sup>6</sup> For a survey of accountability problems at the global level see Borowiak (2011: 150–174) and Grant & Keohane (2005). On the accountability of transgovernmental network forms of governance see the various contributions by lawyers in Pauwelyn (2012); legal science has dealt more closely with such issues than political science, notably in discussions about the construction of global administrative law (Kingsbury et al. 2005) emphasizing issues of transparency, participation, and review.

<sup>7</sup> Koppell (2010) is an empirical study of 25 global rule makers, including private bodies (such as the ISO, the IASB, or the FSC) that analyzes representation and administration, the rulemaking process, adherence and enforcement, and interest group participation. For a legal perspective, see the research project <http://privateregulation.eu> and the special issue (38: 1, March 2011) of the *Journal of Law and Society* on “The Challenge of Transnational Private Regulation,” also published as a book (Scott et al. 2011).

into schemes of private governance, and how a larger public is affected by privately made decisions are ones that should be of particular interest to political scientists. (Rudder 2008: 909; see also Bütthe 2010: 8)

Private governance is not confined to the transnational level,<sup>8</sup> but it is particularly prominent at this level, and as we shall see below the double reallocation of regulatory power (Cafaggi 2010) from the domestic to the global level and from public to private regulators (sometimes coupled with informality) raises important problems. Even though private governance may be socially legitimate, and the exercise of regulatory power by private transnational actors may in practice be endowed with the “weight” of authority (Kratochwil 2006: 306), its normative legitimacy in the light of democratic standards is problematic. Private governance affects the behavior of target groups and generates distributive effects (winners and losers), but at the global level this happens in the absence of a public order (Kingsbury et al. 2005) that can possibly tame such effects. A specialist in private forms of governance (Cutler 2002: 32) maintains:

Only public authorities are entitled or empowered to prescribe behavior for others because only public authorities are accountable through political institutions. Private entities, such as corporations or business associations, are not entitled to act authoritatively for the public, because they are not authorized by society and are thus not subject to mechanisms of political accountability. Indeed, their accountability (legally and financially) is to their private members. Thus, under democratic theory, only elected representatives and their delegates may function authoritatively in prescribing and proscribing behavior.

Referring to social and environmental accreditation bodies, such as the Fair Trade Labeling Organization or the Forest Stewardship Council; or to financial regulators such as the International Accounting Standards Committee Foundation and the International

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<sup>8</sup> A number of countries are familiar with “PIGs” (private interest governments), mostly composed of interest-group associations (Streeck & Schmitter 1985). PIGs do not confine themselves to the narrow self-regulation of a specific sector, such as vocational training, but they may produce decisions that affect broad and diffuse interests, such as those of consumers. Such decisions may even acquire the force of law through official “imprimatur.” This is demonstrated by negotiated “corporatist” agreements between business and labor unions regarding economic and social policy matters, and by standards set by professional associations; in those cases, the authority of PIGs is not truly distinguishable from that of the government (Rudder 2008). At the state level private governance modes are constrained by constitutional limitations (Cafaggi 2010: 15).

Accounting Standards Board; or to the Basel Committee on Banking Supervision,<sup>9</sup> Black (2008: 143) writes:

It is not clear on whose behalf they purport to act and to whom accountability should be owed. In principal-agent terms, who is the principal for whom these bodies are acting? Lack of jurisdictional boundaries and the problem of identifying “principals” complicate questions of who has a right to call them to account, and how the boundaries of their accountability should be drawn. If principles of democratic accountability are to be introduced, for example, who should be eligible to participate in that democratic process?

Private actors involved in governance activities often provide necessary expertise for problem-solving, and they do this in structures that are best portrayed as “knowledge bodies” (Vibert 2011: 92). However, notwithstanding its usefulness, is private governance technocratic, and thus undemocratic, governance?<sup>10</sup> Cutler and Black seem to make this point, but Cutler conflates problems of authorization and problems of accountability, and Black seems to think that the “principals” who delegate authority are also necessarily those to whom rulemakers are accountable. A (to some extent) distinct, although related, issue is that of the social legitimacy of private governance rules (see Cashore 2002; Quack 2010; Schneider et al. 2010: 2–5; Take 2012, 2012a). Empirically, rules may be more or less legitimate in the eyes of various stakeholders, but their legitimacy may be uncoupled from their normative properties, such as their democratic quality (Black 2008, 2009).<sup>11</sup> The “right to govern” (Black 2008: 144) of private regulators may for instance be “capacity-based” (Avant et al. 2010a: 13), and be drawn from their credibility as experts.<sup>12</sup> Alternatively (or in addition) regulators may be endowed with authority because those being regulated identify with them. Private rules may be considered legitimate because they are technically appropriate, less intrusive

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<sup>9</sup> Note that governmental representatives are not always absent from these bodies.

<sup>10</sup> Picciotto (2011: 464) asserts more generally that “technocracy constitutes the main form of global governance.”

<sup>11</sup> Take (2012, 2012a, with more case studies) found, for instance, that monitoring and sanctioning mechanisms are no precondition for acceptance. On a normative appraisal of the legitimacy of partnership bodies at transnational level, see Brassett et al. (2012). See also the special issue on “Legitimacy and Global Governance” (18:1, 2011) of the *Review of International Political Economy* and the special issue “The (Democratic) Legitimacy of Global Governance: New Theoretical and Empirical Perspectives” (18:2, 2012) of the *Swiss Political Science Review*.

<sup>12</sup> See the special issue on “Law, Expertise, and Legitimacy in Transnational Economic Governance” of the *Socio-Economic Review* (8(1): 2010).



than rules produced by public authorities, morally necessary, or simply unavoidable. The construction of legitimacy on pragmatic grounds is considered more fragile than legitimacy grounded on moral appropriateness, and the most resilient form of legitimacy is supposed to be grounded on the feeling of inevitability (Black 2008: 145). However, it may be reasonably suspected that the legitimacy of private rules does not extend beyond a rather narrow circle of insiders. This is not to say that legitimacy is challenged outside this circle, simply that outsiders are not aware of the stakes related to private governance.

## **II. Authorization, representation, and accountability**

The study of the democratic quality of private governance sometimes focuses on its democratic accountability (e.g., Chan & Pattberg 2008), and the possible lack thereof. However, this is only part of the picture, which should not only include accountability that follows rulemaking, but also the authorization that precedes it and the participation that is concomitant to it. These three features do not necessarily covariate: authorization may not be followed by accountability, lack of authorization does not necessarily imply lack of accountability, and direct participation of those requesting regulation may be a substitute for authorization and render representation unnecessary. Neither do they necessarily involve the same actors: those who authorize an entity to act are not always those to whom this entity is accountable, and neither do their representatives necessarily populate the entity.

Authorization is intimately related to the question of delegation in decision-making. By authorization I mean the act through which we allow someone to make decisions that will be binding for us. This may involve the formulation of a mandate, in which we make explicit the expectations we have from delegation. Mandates are more or less specific (“incomplete contracts”) and “imperative,” and thus leave more or less room for discretion. By performing such an act of authorization, we accept decisions that are binding for us but are not taken ourselves, and we commit ourselves to comply with them. We have to do here either with decision-making based on the “congruence” principle—we do (even if not always explicitly) *as if* the decisions that affect us were made ourselves—or with decision-making based on the “deference” principle—we

agree to comply with decisions made by those whom we consider more apt (and thus legitimate) to take them than ourselves.

Although authorization is superfluous if “principals” directly participate in the decision-making process, this ideal of “participatory” democracy is the exception (and even the much en vogue “stakeholder” involvement takes representative forms, even at the local level, e.g., neighborhood associations and the like). The classic model of representative democracy within the confines of the nation-state is not transposable at the global level, but we can draw lessons from it on mechanisms of authorization. In this model, the legitimacy of the decision-making system (often called procedural or “throughput” legitimacy) relies on the bottom-up delegation of power from citizens to their (partisan) representatives. It is because the rulers are considered to be representative that they are authorized to make collectively binding decisions in a top-down manner. Representative democracy thus operates on the grounds of democratic authorization, and if citizens feel that they are not adequately represented (“crisis of representation”), the chances that they are satisfied with representatives’ decisions are weaker.<sup>13</sup> However, authorization does not always need to be democratic: for instance, we may authorize (and thus legitimize) technocratic governance if we think that those who make decisions are better equipped than us to make them (we think that thanks to their expertise they know better than us what is good for us). The democratic and “aristocratic” (Manin 1997)<sup>14</sup> principles are not mutually exclusive: in national democracies voters delegate their power to elected MPs, who select an elected or unelected prime minister; the prime minister selects the other members of government (they may also be elected or not), and the latter delegate part of their power to members of the bureaucracy, who (at least according to the Weberian meritocratic principle) possess the necessary expertise to implement political decisions in a competent way.

In the representative model ex post accountability follows ex ante authorization, and it acts as a safeguard for the responsiveness of decision-makers to their voters’ preferences. It is the shadow of future competitive elections that induces

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<sup>13</sup> According to Easton (1965) a reservoir of “diffuse” support contributes to “specific” support.

<sup>14</sup> Manin argues that even democratic elections obey an aristocratic logic, because we not only expect our representatives to mirror our views, but also (since they are professional politicians) to do a better job than us.

representatives to behave in a responsive way. The normative attractiveness of such a circular model relies thus on the existence of a direct line upward from “we the people” to government, and downward from government to society (Hupe & Edwards 2011: 6). Not only representatives are accountable to voters, but also the whole delegation chain is supposed to be supplemented by a parallel accountability chain operating in the reverse direction. The parliament delegates some of its powers to the executive, which delegates them to the bureaucracy; in return, members of the bureaucracy are accountable to their superiors, and (in parliamentary systems) the latter are accountable to the majority that supports them.

The following description of (among others) private rulemaking bodies shows that the exercise of transnational private governance substantially deviates from the classic model of authorization, representation, and accountability:

There are no governmental actors represented in the FTLO, the FSC or the IASC or IASB, but the Basel Committee is comprised of banking supervisors from the G10 countries. However, they share the characteristic that their activities are not based on or mandated by national, supranational, or international law. Moreover, there are no clear existing structures such as courts, legislative committees, national auditors, ombudsmen, and so on, to which recourse can be made to render them accountable; they have no clear jurisdictional boundaries; and there is no easily identifiable set of potential democratic participants in their processes. (Black 2008: 138)

- The fact that decisions are taken at a global level extends the chain of delegation.<sup>15</sup>
- The fact that decision-making actors are private may undermine beliefs in the existence of a congruence relationship between policymakers and policy-“takers.” In addition, the accountability of decision-makers is an open question.
- The fact that in some cases decision-making bodies are set up informally challenges the principle of authorization (informal networks operate in a sort of

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<sup>15</sup> This is also true for official decision-making in intergovernmental organizations. “Intergovernmentalists” argue that as long as governments are democratically elected they enjoy sufficient legitimacy, whereas more critical scholars claim that the lack of visibility makes accountability fictitious (e.g., the problem of “many hands” in cooperative decision-making facilitates blame avoidance and credit claiming).

“gray zone” and are not necessarily composed of formally authorized representatives).<sup>16</sup>

I need to add here that the attributes of private global governance that make it deficient with respect to the requirements of democratic authorization, representation, or accountability are structural. I do not see such gaps as the outcome of deliberate design on behalf of malevolent rulers. True, it is argued sometimes that the shift of regulation into private hands (or to technocratic bodies such as independent agencies) is inspired by politicians’ attempts to avoid blame in case of regulatory failures. However, this is not easy to prove. In my view, this shift mainly results from the primacy among designers of (and participants in) private regulatory bodies, of too narrowly conceived concerns for regulatory effectiveness and efficiency. Vibert (2011: 13) refers to improvisation combined with a neglect of normative standards. In addition, the media and the public are not aware of the scope and the complexities of global private governance: “It is a world that is comprehensible only to experts and specialists” (Vibert 2011: 36). A substantial amount of power is now in the hands of various *de facto* rulers whose democratic authorization and accountability are deficient. However, the democratic deficit of global private governance develops by stealth, is hardly visible, and thus not subject to public debate.

### III. Research questions

The democratic deficit of private governance is a variable and depends on the specific configuration of each governance arrangement.<sup>17</sup> First, this deficit is more acute if governance outputs closely approximate *hard* law, and if *broad* communities are *intensely* affected in their vital interests and life chances (Macdonald 2012) by private

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<sup>16</sup> Although the growth of private and informal modes of governance seems to be a major global trend, these things should not be conflated (private governance arrangements may be codified, whereas informal cooperation can take place among public actors). While the problem for Pauwelyn et al. (2010) or Vibert (2011) is the informality of network-like processes of frequently “soft” regulation, the problem here is primarily its non-public character.

<sup>17</sup> Zweifel (2006) compares the variable democratic deficit of international institutions. Writing on credit rating agencies, Kerwer (2005: 472) pleads for “a comparative research project [that] could identify the accountability challenges that arise in these cases and point out the differences between them.”

regulations.<sup>18</sup> Second, it is a function of the *combination* of deficient democratic authorization, representation, and accountability: if all these elements are missing, then the deficit is at its peak. It should be added here that deficient democratic authorization, representation, or accountability, and as a result the acuteness of the democratic deficit itself, are not dichotomous (either/or), but ordinal variables.

*Given the diversity of private transnational governance arrangements, one should seek to construct a typology of cases to be selected that maximizes variation of the most relevant factors.*<sup>19</sup> Possible candidates to be considered for that purpose are the degree of mandate formalization, of public involvement, of regulatory coercion, the existence of a regulator as an uncontested focal point (Büthe & Mattli 2011: 5) and alternatively the presence of competition between rulemaking bodies, or the gap in congruence between membership breadth and the universe of target groups (generalist vs. specialist bodies).<sup>20</sup> Alternatively, one can focus only on the most effective private bodies, or those whose rules have the most far-reaching implications, assuming that the democratic question is more pressing here. But one might thus lose some interesting variation (if one hypothesizes, for instance, that the most democratic bodies also happen to be the less influential). The empirical study should rely on the triangulation of different types of sources: The study of official and “gray” documents; in-depth interviews with relevant actors and experts; and whenever possible, direct observation of the “account-giving” activities of private governance bodies and of the monitoring activities of accountability “forums.”

In order to assess the amplitude of the democratic deficit, one should seek to answer a set of questions about each specific private governance arrangement. Although extant research seldom focuses explicitly on these questions, it sometimes provides answers on single cases of private regulators. However, more systematic research is needed on authorization, representation, and accountability in individual arrangements. I submit below for discussion a list of research questions related to these topics:

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<sup>18</sup> Concerning the need for democratic accountability, Curtin and Senden (2011: 174) estimate that it is greater “if a regime is or has become more compulsory, has more external effects, a higher impact on people’s lives or involves the exercise of public power or a public function.”

<sup>19</sup> For types of international standard-setting, see, for instance, Büthe and Mattli (2011, chapter 2).

<sup>20</sup> See Black (2008: 142–143): “This narrow membership becomes particularly relevant when such bodies develop standards which they seek to apply not only to their own members but to others as well—as in the case of BCBS, the Financial Action Taskforce (FATF), and the IASB. In contrast, transactional or market based standard setters, such as the International Swaps and Derivatives Association, or the ISO or social accreditation bodies respectively, may be regarded as less democratic on some measures in that they do not represent the state in any way, nor do they have particularly clear criteria of membership, although in practice their membership may be broader than that of some of the transnational committees of governmental regulators.”

- How influential are the diverse private governance arrangements? “Which norms are ‘law’ and which are not” (Black 2008: 140): How “soft” or “hard” are the norms they produce?<sup>21</sup> What is the degree of their “crystallization” (Casey & Scott 2011), and through what kind of formal devices are they hardened? Are these norms formally or de facto binding, and if de facto, then whose freedom do they restrict, to what extent, and through what kind of social mechanisms? Are we just in the presence of “self”-regulation by a community, or of the regulation of others, too? Bütte (2010: 8) distinguishes three major subsets of stakeholders for private regulation: the actors who call for private regulation, the private actors who supply such rules for the global economy, and the “targets” of the rules. Self-regulation implies an overlap between these groups; the less this overlap exists, the more a democratic deficit can be posited.
- In addition, does regulation produce spillover effects *on* others outside this triad? How extended is the circle of affected third parties, how intensely are they affected, and who can be considered as beneficiaries and who as losers? These are, of course, questions that cannot be easily answered. It is argued that in fragmented power systems such as those of transnational private governance “myriad non-state actors can also wield ‘public’ forms of power when they systematically affect people’s lives in autonomy-threatening ways” (Macdonald 2012a: 50). However, substantiating claims about such causal relations is difficult and requires very cautious process tracing. Therefore, as a preliminary question, is there a consensus on who is affected (and how much) and who is not?<sup>22</sup>

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<sup>21</sup> “Legalization” entails at least three independent dimensions: degree of obligation, extent of precision, and provisions for delegated implementation by third parties (Abbot et al. 2000). In the field of certification, Bernstein and Cashore (2007: 350) distinguish between, on the one hand, self-regulation and corporate social responsibility standards that are voluntary, and on the other hand “non-state market driven” certification systems that develop mandatory standards for those who sign into the system, contain external (independent) auditing mechanisms, and provide for sanctions in case of failure to comply. On multiple ways to harden soft law, see Picciotto (2011: 200–206). However, one should not consider that enforcement problems are necessarily less acute in hard than in soft law. See Cafaggi (2012) on the enforcement of private rules and compliance with them.

<sup>22</sup> Notwithstanding the participatory rhetoric of rulemaking bodies, there is often controversy on who is a “stakeholder,” and the universe of affected people is not necessarily confined to the list of those officially accredited as “stakeholders” by institutional gatekeepers.

- What is the institutional design (mainly the structure and degree of formalization) of the governance arrangements considered? How are participants selected, and whom are they supposed to represent? Who among them are the most influential, considering the usually high requirements in terms of expertise that may induce gaps between formal participation rights and effective impact on rulemaking (Quack 2010)? Once we have identified them, to what extent do those affected have a voice in the activity of norms production? What kinds of channels for communication and influence are they able to utilize? To what extent, and through which mechanisms, is the “congruence” principle between policymakers and “policy-takers” safeguarded? Or, to put it differently, how high is the distance between demanders for rules, suppliers (rulemakers), targets (those subject to rules), and other affected groups?
- Consent may express itself through participation in rulemaking, but also through the authorization for a private governance site to rule, or through approval if one has a veto capacity over the outputs of rulemaking bodies (accountability). The larger the proportion of stakeholders who are absent from these phases of the rulemaking process, the greater the democratic deficit. Even if the affected have no voice in rulemaking, is at least some form of ex ante or ex post consent required from them? If crucial stakeholders have no sufficient voice in the process,<sup>23</sup> are at least governance processes and outputs visible to the (which?) public, and thus subject to dissonance, contestation, and dissent (Vibert 2011)? Public debate may reveal not only the existence of interests that are ignored by rulemaking bodies, but also of different frames and modes of reasoning: How broad, then, is the circle of public debate on the outputs of private governance, and what kind of feedback effects does this debate produce, if any?
- A closer scrutiny of representation processes is necessary: Do representative organs or elected officials play a role? If yes, which are the represented constituencies, and how do representatives come to play their role? If not, have those who are formally authorized to issue collectively binding decisions

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<sup>23</sup> See, for instance, Bütte & Mattli (2011: 222-225) on the difficulties consumer interests face in being voiced in private transnational standard-setting bodies.

deliberately relinquished some of their power, or has it escaped from their hands and shifted to new self-emerging decisional sites—and if yes, how? In other words, is there a transfer of decision-making capacity to non-state actors, or does such a capacity autonomously emerge outside public organizations? If private governance is delegated governance,<sup>24</sup> who are the “principals” that have delegated their power? Is the delegation chain between democratically legitimate actors and private rulers uninterrupted?

- Private governance is not unaccountable governance. Quite to the contrary, reporting tasks may be important episodes in the organizational life of private rulemaking bodies, and the “giving reasons requirement,” a “mild self-enforcing mechanism for controlling discretion” (Shapiro, 2002: 230), applies to them. For instance, Koppell (2005) even refers to a “multiple accountability disorder” that affects the ICANN, which is in charge of the regulation of Internet domain names.<sup>25</sup> Private institutions may fear the shrinking size of their membership or of constituencies that support them, cuts in their budget, the erosion of their reputation in the eyes of various publics, and so on (Grabosky 2012: 6). After all, as nicely posited by Keohane (2011: 102), “almost all institutions are accountable to someone—if only to the criminal gang or the ‘Godfather’ behind the scenes. So accountability as such is not sufficient.” The problem is rather that the forums to which private governance bodies are accountable usually lack democratic credentials, and may not be accountable themselves: think of professional “peers” who need to prove that they are independent, or even of the much idealized “civil society” organizations.<sup>26</sup> In the accountability “regimes” of private governance, *democratic* accountability is not at the forefront. Therefore, one should seek to identify who is the primary target of the accountability discourse of regulators, and what is the de jure (if any) and the de facto sanctioning capacity of the

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<sup>24</sup> Although less frequent than at the domestic level (Cafaggi 2010), one of the most notable developments in global governance has been the increase in the *explicit delegation* of regulatory authority by states to private actors (Büthe 2010: 10), which can be seen as a correlate of the regulatory “lethargy” of the state (Grabosky 2012: 2). This creates ambiguity that can be conceptualized as a multiple-principals problem: private actors also have their own principals, such as owners, members, or funders (Mattli & Büthe 2005: 232).

<sup>25</sup> On the ICANN, see also Chango (2011), Take (2012), and Weinberg (2012).

<sup>26</sup> On the democratic credentials of “civil society” actors see Erman and Uhlin (2010), Scholte (2011), Steffek and Hahn (2010), and Tallberg and Uhlin (2012).



diverse accountability forums (a function of their resources, such as the repertoire of formal sanctions available, expertise, time, etc.).<sup>27</sup> How, for what, and under what kind of standards are the actions of rulemakers evaluated, and what kind of sanctions should they fear if the forum's judgment is negative?<sup>28</sup>

- In case of delegation, does the delegating agent retain scrutinizing power ("internal" accountability)? Do accountability forums include the affected constituencies ("external" accountability)? In any case, is there a role for democratically authorized bodies in the monitoring of the activity of private governance bodies, and in the critical scrutiny and endorsement of their outputs, or are they passive "rule-takers" (Cafaggi 2010) or "receivers" (Vibert 2011)? Importantly, this question is no less relevant for private governance arrangements (such as codes of conduct in the apparel industry) aiming to enhance "stakeholder empowerment" and "corporate accountability" (Koenig-Archibugi & Macdonald 2012; Macdonald 2012). In addition, we should seek to find out not only to whom private governance bodies are collectively accountable, but also to whom the most influential among their members are individually accountable.
- In a sense, even if there is no clear ex ante authorization, formal endorsement can be seen as ex post authorization, or at least as an accountability mechanism (Corthaut et al. 2012: 334) (if we assume that official recognition requires prior critical scrutiny, which of course depends on the expertise of the endorsing body). One should thus focus on the endorsement process and its actors as well,<sup>29</sup> and this may require delving into a multi-level implementation system (we know, for instance, that studying WTO or EU decisions may be necessary). In any decision-making system the implementation sequence may be populated by new actors and obey its own logic; there may be, for instance, a gap between an open

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<sup>27</sup> It may be added here that not only regulation but also accountability can be "soft" (e.g., more or less codified), raising the issue of whether "soft" sanctions (such as those related to "naming and shaming") are an effective disciplining instrument or a toothless device.

<sup>28</sup> For a similar set of questions about the accountability of informal international lawmaking involving public actors, see Corthaut et al. (2012).

<sup>29</sup> Whose accountability is an issue as well, if, for instance, they are independent agencies, or if endorsement is achieved through court rulings. See, for instance, the detailed study by Schepel (2005).

formulation moment and a less open implementation phase (Mattli & Woods 2009: 19). In a multi-level system, do implementing bodies operate under the shadow of control, how effective is this shadow in making them internalize the preferences of the accountability “forums,” and (again) what are the democratic credentials of these forums?

- Finally—and this is typically the kind of value-added that can be provided by political science research—in all these accountability episodes, does “real-world” accountability operate as prescribed on paper by formal accountability “regimes” (regarding justification, debate, and sanctions), if any? And, if not, why (due to informational asymmetries, collective action problems, etc.)? Is, for example, the accountability chain so excessively long that problems of “hidden action” and “hidden information” inhibit effective monitoring, rendering the exercise of accountability fictitious even in the presence of a favorable institutional structure? We should keep in mind here that the problem with accountability is the same as with regulation (Mattli & Woods 2009): supply does not create demand.

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