Distributional Consequences of Transnational Private Regulation: Institutional Complementarity as a Structural Source of Power in Global Product and Financial Markets

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Abstract

Transnational regulations, often established by private bodies, play a large and important role in the international political economy. This paper makes two contributions to the literature on transnational regulation. First, governments and international organization often legitimate the delegation of regulatory authority to transnational private bodies with efficiency gains. It is rare, however, that the alleged gains are empirically examined, which requires a comparative analysis vis-à-vis other regulatory regimes. I contrast rule-making for manufactured goods and financial reporting, where a single transnational private body is the clear focal point for rule-making at the international level, with purely domestic regulatory regimes and the prior attempts to establish international product and financial standards through negotiations between governments or public regulators. I show that the shift to transnational (private) regulation indeed brought real, substantial gains in the effectiveness and efficiency of rule-making. Second, I scrutinize the distributional consequences of transnational private regulation, which I submit are closely related to the efficiency gains. Here, the existing literature focuses on the distribution of the financial costs and benefits of specific rules among those who are the targets of such rules, given a particular regulatory regime. Institutional complementarity theory provides a powerful analytical framework for examining such distributional effects. In this paper, I push the framework further to examine the distributional consequences of the shift to transnational private regulation. I argue that this shift has persistent structural consequences for the relative power of a broad range of stakeholders (both within and across countries) and thus for their regulatory capabilities.
1. Introduction

Financing international trade relies to a large extent on the rules for the issuance and acceptance of letters of credit developed by the non-governmental International Chamber of Commerce (Levit 2005; Shaffer 2009; Snyder 2003). Spreading investment risks through international portfolio investments is facilitated by the increasingly widespread use of the financial reporting standards developed by the International Accounting Standards Board (IASB), a private-sector body headquartered in London. Making information about the functionality, interoperability, and safety of manufactured goods—from toys to advanced medical devices—comparable and exchanging it efficiently across languages and cultures in international trade is made possible by product standards from the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), two transnational organizations (Mattli and Büthe 2003; Murphy and Yates 2008). And the efficient processing of payment transactions between banks in the EU is made possible by the technical standards specified in the "Rulebooks" of the European Payments Council, a private body constituted by the major European banks (Cafaggi and Janczuk 2010, esp. 4-8). In short, global commerce relies—often in fundamental ways—on transnational private regulation.

Transnational private regulation entails rule-making, -monitoring and/or -enforcement by stakeholders from two or more countries in non-governmental or hybrid public-private bodies, governing the behavior of socio-economic actors in two or more countries. Transnational private regulation is thus distinctive from—and should be assessed in comparison with—other, more familiar forms of regulation. In this article, I focus on rule-making, which I understand as encompassing the two essential elements of what Cafaggi and Pistor (2012) call "regulatory capabilities:" (1) setting the regulatory agenda, incl. by drawing the substantive and geographic boundaries of the regulatory domain, and (2) establishing the rules that govern this domain.

Transnational regulation has increased tremendously in both scope and importance in recent decades (Abbott and Snidal 2009), not only as a conscious response to, but even as an integral part of economic globalization. Often, transnational regulation has arisen with the acquiescence or quiet support of states, as governments have found it too costly or impractical to try to regulate complex transnational commercial activity. I consider this implicit delegation to transnational rule-makers. In many cases, governments have gone further and have explicitly delegated regulatory authority to transnational bodies. Both implicit and explicit delegation is often accompanied by efficiency claims. An exclusive focus on efficiency gains, however, provides at best a partial understanding of the consequences of—and possibly the motivations for—transnational private regulation.

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1 Evidence that the increasing use of common international financial reporting standard has such effects is presented, e.g., by Armstrong et al (2010); Barth, Landsman and Lang (2007); Brüggemann et al (2009); Hope, Jin and Kang (2006). The benefits of financial reporting harmonization are disputed by some, see, e.g., Ball (2006); Jeanjean and Stolowy (2008).

2 I draw here on Keohane and Nye's (2001 (1977)) definition of transnational.

3 On the benefits of comparative analyses of regulatory regimes, see (Levi-Faur 2006).

4 On the concept of international delegation, see esp. Hawkins et al (2006) and Bradley and Kelley (2008, 17-20); on regulatory delegation, see esp. Coen and Thatcher (Coen and Thatcher 2005). For illustrations and discussion, see Bartley (2003); Büthe (2010a); Marceau and Trachtman (2002); Trachtman (2003); and D. Vogel (2008).
I argue that the delegation of regulatory authority to a transnational body always also has distributional consequences. Some of those consequences, which we might call ad hoc distributional consequences, are relatively well understood: Any particular regulation results in material costs and benefits for stakeholders, which are a function of its specific provisions. The distribution of those costs and benefits is often highly uneven among the individuals and groups who have a stake in the specific regulation—sometimes by accident, often by intent. Since this distribution is unlikely to be the same as under the other types of regulation, a shift to transnational regulation has probabilistically distributional consequences regardless of the benefits that it may offer in terms of increased efficiency.

Less well recognized (and generally under-analyzed) are distributional consequences that are political and structural: Delegating regulatory authority systematically empowers some vis-à-vis others in ways that may be difficult if not impossible to reverse or change in the short run. Such political consequences arise, I argue, even in cases in which the observed distribution of economic costs and benefits from the particular regulatory decisions is relatively equal. Moreover, unlike the ad hoc distributional consequences, the structural distributional consequences are directly related to the efficiency gains in that the efficiency gains cannot be obtained without the distributional consequences. Analyses of efficiency gains without an analysis of the distributional effects therefore are not only incomplete but biased.

The article proceeds as follows: Any statement about the distributional consequences of a shift toward transnational private regulation entails a comparative claim. To be clear and explicit regarding my baseline for comparison, I distinguish in section 2 transnational private regulation from traditional domestic public regulation, but also from domestic private regulation and international public rule-making. In that context, I briefly introduce two prominent transnational bodies, the ISO/IEC and the IASB, which regulate international product and financial markets by developing private rules for manufactured goods and corporate financial reporting—following Cafaggi and Pistor’s call for analyzing transnational private regulation in specific empirical context (2012:20f), I examine ISO/IEC and IASB transnational rule-making in various subsequent places in the paper. In section 3, I then examine the claim that delegating rule-making to such transnational private bodies brings efficiency gains, and I find that there is substantial prima facie evidence for it. Turning to the analysis of distributional effects, I begin in section 4 with a sketch of Büthe and Mattli’s “institutional complementarity” theory, on which I build in section 5 to establish the extent to which (and the ways in which) delegating to transnational private regulators results in rules with a more uneven or significantly different distribution of the material benefit (ad hoc distributional consequences). In section 6, finally, I examine the political and structural consequences of delegating regulatory authority to transnational private bodies, again building on institutional complementarity theory.

2. Transnational Private Regulation and Its Alternatives

Both positive and normative analysis of the delegation of regulatory functions to transnational private bodies require that we specify our baseline against which conduct the analysis. Without it, we cannot draw firm conclusions since any assessment of a change is inherently (if often only implicitly) comparative, as illustrated by Churchill's famous caveat about the imperfections of democracy, which might lead one to conclude that it is the "worst
form of government … except all those other forms that have been tried from time to time."\(^5\)
Which regulatory arrangement then should serve as the baseline?

Rules that effectively govern the behavior of economic actors (leading them to behave in more rule-compliant ways than they otherwise would have) depend on the recognition of the authority of the rules or the rule-maker by the governed, where authority may be a function of coercive capacity or some source of legitimacy (Avant, Finnemore, and Sell 2010: esp.9-14). Such authority is frequently associated with the existence of a widely recognized institutional focal point for rule-making. The most reknown government regulators at the national level, such as the U.S. Food and Drug Administration (Carpenter 2010) or the Securities and Exchange Commission (Khademian 1992; Seligman 2003), tend to have exclusive regulatory responsibilities. The international organizations or transgovernmental networks that are best known as effective regulators of global markets, such as the OECD-sponsored Financial Action Task Force (Hülsse and Kerwer 2007; Sharman 2009; Simmons 2000) or the Basel Committee on Banking Supervision (De Bellis 2006; Singer 2007), have similarly become a regulatory focal point at the international level. Effective private regulation—such as standard-setting for corporate financial reporting by the Financial Accounting Standards Board (FASB) in the United States (Miller, Redding, and Bahnson 1998)—is also associated with the existence of an institutional focal point. This association is not accidental: While the development of rules by a particular body might precede its recognition as an institutional focal point in some issue areas (e.g., Peters \textit{et al.} 2009), and while establishing a particular government agency, international organization, or private body as a focal point for rule-making can be a highly contentious and drawn-out process (Auld 2012; Bartley 2007; Carpenter 2001; Mattli 2013), it is difficult to remain an effective regulator for very long without becoming recognized as the focal point for governing the issue area. I therefore focus my analysis on cases of transnational private regulation in which a similarly clear institutional focal point exists.\(^6\)

In the remainder of this section, I first sketch three alternative forms of regulation, which will serve as the baseline(s) for the comparative analysis. Domestic public rule-making (bottom left corner in Figure 2.1) is the traditional form of market regulation (e.g., McCraw 1981; D. Vogel 1986) and remains an important point of reference for any analysis of regulatory governance (e.g., Balleisen and Moss 2010; Moss and Cisternino 2009). With domestic public regulation as the baseline, transnational private regulation (top right corner of Figure 2.1) entails a shift from public to private and from domestic to inter/transnational. There is, however, no reason why these two changes must occur simultaneously. Indeed, domestic private regulation as well as international public regulation constitute well-established alternative forms of regulation, which can aid in achieving analytical clarity. Transnational private regulation differs from private regulation at the domestic level (top left in Figure 2.1) in that transnational regulation cuts across the jurisdicitional boundaries of at least two nation states, both with respect to the stakeholders that it recognizes and the behavior that it seeks to govern. Transnational private regulation differs from international or trans-governmental public regulation (bottom right in Figure 2.1) in that the regulatory forum is a private institution,\(^7\) so that the usability of

\(^5\) Churchill in the House of Commons, 11 November 1947 (\textit{Hansard}).
\(^6\) I do so in conscious deviation from the common association of transnational regulation with a "multiplicity of regulators" (Cafaggi and Pistor 2012:7). I stipulate that there is no necessary link between issue areas that are governed transnationally and the presence of multiple competing rule-makers.
\(^7\) Or a hybrid public-private institution, whose procedures or decisionmaking rules assign private actors an independent role with real influence over outcomes.
the power resources that are familiar from analyses of international regulatory conflict and cooperation cannot simply be assumed to drive outcomes. Finally, I briefly introduce two of the most prominent examples of transnational private regulators of global product and financial markets (top right corner of Figure 2.1), which constitute a regulatory focal point in their respective areas of expertise, before I examine in subsequent sections efficiency gains and distributional consequences of the shift to such transnational private regulation.  

2.1. Domestic Public Regulation

Traditionally, economic regulation has been equated with government regulation, which was thought to entail, necessarily and exclusively, the use of public authority (backed up by the coercive power of the state) to enable and constrain private exchange, create markets, and enable or possibly impede their efficient operation. Such government regulations have come to define the modern "regulatory state"—first in the United States but later also in other parts of the world (Jordana and Levi-Faur 2005; Majone 1994)—whose jurisdictional boundaries thus also determine the maximum reach to which such regulations lay claim. Traditional regulation is thus strictly governmental and strictly domestic.

The rule-making bodies in domestic public regulation may be legislatures, the public bureaucracies of the executive branch, or "independent" regulatory agencies (Thatcher and Sweet 2002). Establishing the authority and focal position of such national public rule-makers over private economic actors was often accompanied by lengthy political battles (Carpenter 2001; de Swaan 1988; McCraw 1981) but ultimately assured by the coercive power of the modern state—

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8 It is not the ambition of Figure 2.1 to provide a full typology of regulatory forms, as a number of empirically observed variants, such as various hybrid types of "informal international lawmaking" (Pauwelyn, Wessel, and Wouters 2012), do not fit easily within Figure 2.1. I also exclude domestic rule-making with extra-territorial reach (Putnam 2009; D. Vogel 1995) as an analytically distinct phenomenon.

9 See, especially (Akerlof 1970; Bernstein 1955; Carpenter 2010; Lederer 2012; Mann 2012 (1986); Ogus 1994; Schwartz 1973; Trapp and Wallerus 2006, esp.16-77; S. Vogel 1996; Wilson 1980)
at least where such a state took root. A vast literature challenges public regulators' claim to be pursuing the public interest and/or seeks to safeguard or restore the centrality of the public interest. While much is debated in that literature, it generally shows that public regulation tends to be a highly political process, even when it is delegated to specialized "independent" agencies.

2.2. Domestic Private Regulation

The traditional notion of regulation as strictly domestic and governmental changed as private bodies in many issue areas took on public regulatory functions, often at the request, or at least with the acquiescence, of the state. In a trend that begun in the United States in the 1960s but started to spread to other advanced industrialized countries as early as the 1970s, governments have explicitly delegated "technical" rule-making to non-governmental (and mostly private-sector) bodies, including for sensitive health and safety issues (Gunningham and Rees 1997; Hamilton 1978; Héritier and Eckert 2008; Mahoney 1997; Streeck 1983). In fact, this variant of private regulation has antecedents in forms of business "self-regulation" in the 19th and early 20th century that were often recognized by the state and might be considered examples of implicit delegation (Balleisen 2009).

In addition, as economic and business historians have pointed out, private sector firms have in many cases effectively set the rules for many other economic actors within a given country (or parts thereof) without even implicit delegation by any government. One example of such private rule-making is the development of color television technology, resulting in different and incompatible systems in different countries, due to nationally dominant manufacturers who used both their engineering strengths and patent rights to set de facto standards, sometimes governmentally recognized ex post (Austin and Milner 2001; Crane 1979; Fisher and Fisher 1997:esp. 211ff). Such use of "network power" (Grewal 2008) has only become more prevalent with the rise of information technology, where the need for connectivity and compatibility creates strong network effects.

Common to both variants of private domestic regulation is that the rule-makers are non-governmental, that all recognized stakeholders are within the jurisdictional boundaries of a single country, and that this jurisdictional boundary also describes the regulatory reach of the rules. This domestic private rule-making is often associated with an emphasis on issue-specific technical expertise and a de-politicization of the decisionmaking process, characteristics to which I will return below.

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10 Among the classics are Ayres and Braithwaite (1992); Breyer (1982); Stigler (1971); and Wilson (1980).
11 The issue arose again in the introduction of digital TV; see Hart (2004); see also Farrell and Shapiro (1992).
12 Non-commercial civil society groups have also sought to govern the behavior of firms through "social regulations," then reward firms for compliant, "good" behavior; many such transnational initiatives started within the domestic confines of a country (e.g., Baron 2003; Bartley 2003; Singh 1993; Snyder 2003; D. Vogel 2005; Werner 2012). Some such initiatives have succeeded in establishing a regulatory focal point; more often, social regulation is characterized by substantial contestation over who may develop rules to govern the behavior of others (e.g., Auld 2012) and therefore falls outside the scope of the analysis in this article.
2.3. International Public Regulation

The rapid increase in global commerce in the second half of the 19th and the early years of the 20th century—far beyond the trade in light, precious, non-perishable goods that had long accounted for most international trade (O'Rourke and Williamson 1999)—soon led governments in the Western world to the realize that such economic exchange across borders lengthened what Norbert Elias would call the "chains of interdependence" beyond the boundaries of individual governments' jurisdiction. And this change occurred just at the time when subjects turned "citizens" came to expect and demand that those governments also safeguarded their economic well-being and health, rather than merely their physical safety (Marshall 1963). The reality and fear of diseases spreading across countries via their port cities therefore spurred not just rapid increases in local and national public health regulations in trading nations but also some of the earliest attempts to develop common rules to address "market failures" in a global economy through transgovernmental collaboration among government agencies responsible for human health and the safety of the food supply, including animal health, protection from pests, etc. (R. Cooper 1989; Leive 1976; Zacher and Keefe 2008).

While international rule-making by international (governmental) organizations and transgovernmental bodies has often been motivated—or at least justified—by the need to address negative externalities of global commerce, much international public regulation has above all sought to boost inter-national economic exchange. The Universal Postal Union, for instance, was founded in 1874 to facilitate the delivery of mail across national borders through the development of common standards for postal addresses, mail processing, and delivery (Codding 1964); and the International Bureau of Weights and Measures was founded in 1875 to ensure common and comparable measurements in the increasingly international product markets, after earlier attempts to impose common measures unilaterally through political or economic dominance had had very limited success (de Boer 1975; Moreau 1975).

After World War II, the drive for common public regulations at the international level intensified again after repeated successful multilateral negotiations for tariff reductions failed to achieve a corresponding integration of product markets. Cross-national and -regional regulatory differences—from product specifications to seemingly innocuous consumer or workplace health and safety regulations—became increasingly prominent and internationally contentious as non-tariff barriers to trade. And the growing recognition that such regulations were at least sometimes adopted for protectionist purposes (Coughlin, Crystal, and Wood 1988; Ray and Marvel 1984; WTO 2012), undermined the early post-war consensus in favor of near-complete national regulatory autonomy as the best way to make international trade economically and politically sustainable. International regulation of product markets promised to square the circle by allowing governments to achieve regulatory policy objectives that were widely recognized as "legitimate" while safeguarding against the creation of non-tariff barriers.13 Later, the new consensus in favor of increasingly open financial markets led to a similar push for international harmonization of regulations for financial systems, securities markets, etc. Many of the major international public institutions—the GATT/WTO, the World Bank, the IMF, the OECD; even the UN and the G7—therefore added regulatory coordination and cooperation to their agendas (Braithwaite and Drahos 2000). As discussed in greater detail below, however, such high-profile

13 Proponents of "regulatory competition" also rose to prominence in the postwar period, at least from the 1960s and '70s onward, but such competition is unlikely to address problems arising from interdependence efficiently if at all; see also Geradin and McCahery (2004).
political fora have often proven ill-equipped to find compromises on highly technical matters that would simultaneously overcome domestic and international conflicts of interest (e.g., Grieco 1988; Mansfield and Busch 1995), even when relatively clear lines of authority safeguard against forum-shopping.

2.4. Transnational Private Regulation

Those who seek to foster global commerce have often embraced transnational private regulation as a way to overcome the limitations of international public regulation, particularly when the private regulator is the clear institutional focal point for transnational rule-making. While this is not a universal feature of transnational private regulation, it is a common characteristic of the most influential and immanently important transnational regulatory bodies. A particular transnational body may become the focal point for rule-making in a particular issue area as the consequence of explicit or implicit delegation of regulatory authority by states or public authorities to the private body (e.g., Büthe and Mattli 2011), as a function of conscious strategic steps taken by the transnational body to establish itself as the regulatory focal point (what Green (2010) calls "entrepreneurial private authority"), or even as an accidental consequence of being the only established body with the requisite expertise and multi-national membership when the need for an international rule-making institution arises (e.g., Büthe 2010b). Rule-making in such bodies may still exhibit intense conflicts of interest concerning the content of any particular rule, but there are then no credible alternative fora for regulatory governance in that issue area (i.e., for drawing up rules with a broadly shared expectation that they will be widely followed).

A prominent example of a transnational regulatory body that constitutes an institutional focal point in most of the issue areas in which it is engaged is the International Organization for Standardization (ISO) with its sister organization for electrical and electronic technologies, the International Electrotechnical Commission (IEC). It is therefore one of the transnational private regulators for which I will examine both efficiency gains and distributional consequences below. ISO and IEC jointly account for about 85% of all international product standards, including standards for manufactured goods in almost all industries.14 These standards seek to allow producers to convey information about performance, design, compatibility with related products, packaging, etc. in a cross-nationally consistent manner.

ISO and IEC are clearly transnational private regulators: They are non-governmental organizations, whose Geneva headquarters ensure tight coordination among hundreds of specialized "technical committees" in which most of the actual rule-making work is undertaken by mechanical and electrical engineers and other technical experts, embedded in (and at the apex of) a network of national standards organizations, which for most advanced industrialized countries and a number of developing countries are also non-governmental bodies (e.g., Murphy and Yates 2008). For some fast-changing, high-tech industries, proprietary standard-setting by individual firms or consortia is a real alternative to ISO/IEC standard-setting, but for most industries, IEC and ISO have long been the uncontested institutional focal point for setting international product standards.15 This central position has been further cemented by individual

14 The ISO also sets some process and management standards, sometimes using distinct rule-making processes; they are therefore not the focus of this analysis.
15 While ISO and IEC are legally distinct entities with separate membership rosters, leadership, and staff, they can for purposes of this analysis be treated as a single transnational private regulator: a long-standing agreement
states and some international organizations (most importantly the WTO) which have delegated rule-making for global product markets to ISO and IEC—in the case of the WTO, for instance, by obliging all member state governments to use international standards as the technical basis for domestic regulations. ISO/IEC standards thus effectively control market access for large parts of the world economy, which has prompted growing interest among policymakers and scholars (e.g., Heires 2008; ISO/IEC 2007).

A second example of a private body that is a clear focal point for inter- and transnational regulation is the International Accounting Standards Board (IASB). It develops international financial reporting standards (IFRS), which specify how to calculate profits, losses, assets and liabilities, and what other information must be disclosed in the financial statements that stock-market-listed companies must file at regular intervals. The IASB and its standards constitute transnational private regulation because the rule-making body is set up explicitly as a transnational non-governmental organization, overseen and funded by a private foundation. The Board and its staff are comprised of corporate financial reporting experts, embedded in—or at the apex of—broader professional, academic, and (public and private) regulatory networks of accounting and corporate finance experts, predominantly from the private sector (e.g., Goedl 2012).

In recent years, financial market regulators in a rapidly increasing number of countries around the globe have implicitly or explicitly delegated regulatory authority to the IASB by requiring the use of the IASB's financial reporting standards (Büthe and Mattli 2011, 2-4, 68-73). In addition, several international organizations have explicitly endorsed the IASB as the forum for international financial reporting standard-setting (Mosley 2009). After several decades of competing with traditional intergovernmental bodies for preeminence as the transnational rule-maker in this issue area, the IASB has thus effectively become uncontested as the source of inter- or transnational financial reporting rules for the private sector (Mattli 2013). As a consequence, it has attracted greatly increased attention not only among policymakers and the media but also scholars of accounting and financial economics (e.g., Bischof, Brüggemann, and Daske 2012; Houqe et al. 2012; Landsman, Maydew, and Thornock 2012), law (e.g., Barney 2009; Brummer 2012; Kirchner and Schmidt 2005), and political science (e.g., Botzem 2012; Perry and Nölke 2006; Posner 2010), as well as from an interdisciplinary social science perspective (e.g., Richardson and Eberlein 2011; Véron 2010; Zimmermann, Werner, and Volmer 2008).

between the two organizations ensures that only one of them (or a joint committee) develops an international standard for any given product, their institutional structure is essentially identical, and they have adopted common procedures for developing international standards.

For general introductions to financial reporting and its role in financial markets, see the early chapters of Roberts, Weetman and Gordon (2005) or Nobes and Parker (2008). The IASB also maintains or revises international accounting standards (IAS) developed by its predecessor organization, the IASC; see Camfferman and Zeff (2007); Tamm Hallström (2004).

Government regulators also provide some funding for the IASB, though the bulk of its financial resources come from the private sector, mostly from "public" (i.e., stock-market traded) companies. In recent years, several countries' stock market operators or financial market regulators have introduced mandatory levies on publicly traded companies, thus making most private sector financial contributions mandatory rather than purely voluntary.

For a comprehensive review of research about the economics of accounting standards, see Leuz and Wysocki (2008).
3. Efficiency Gains from Transnational Private Regulation

Delegation to transnational regulators, whether it is explicit or implicit, is often accompanied by efficiency claims: Delegating to a transnational private body of experts (who are deeply embedded in an epistemic community-like network with strong professional norms) is said to de-politicize rule-making, allowing higher quality rules to be developed more quickly than through the traditional political process, i.e., at the global level, through inter-governmental negotiations (e.g., Loya and Boli 1999). Delegation to transnational regulators is also said to yield efficiency gains by allowing for specialized input from highly paid experts familiar with cutting-edge technology and current practices in the private sector without the need for government to pay for the expertise (e.g., Haufler 2001).

A close analysis of specific cases of transnational private regulation in comparison with actual or counterfactual alternatives suggest that claims about the greater effectiveness and superior efficiency of transnational rule-making in non-governmental fora have merit. In keeping with my focus on product standards as crucial tools for the governance of global product markets and financial reporting standards as critical regulatory norms for the operation of financial markets, I examine these two cases here.

3.1. Efficiency Gains in the Private Transnational Harmonization of Product Standards

Proponents of a truly common product market among the EEC (now EU) member states recognized already in the early 1960s the need to either eliminate or harmonize "technical" standards and related regulatory measures for manufactured goods if they were ever going to achieve their ambition. Given that product standards were not just non-tariff barriers to trade but often served legitimate public policy purposes such as consumer or workplace safety—and indeed could create markets by overcoming information asymmetries that would otherwise cripple economic exchange (Akerlof 1970)—reducing or eliminating product regulations whenever they differed was neither good politics nor good policy. Rather, the Commission began in 1965 to seek regulatory harmonization, specifically by asking the member states to adopt common rules as EEC directives.

The international public process succeeded in developing relatively uncontroversial common rules for cosmetics, motor vehicles, and the labeling of dangerous chemicals; then it stalled (McCarthy 1979). To accelerate regulatory harmonization, the member states adopted in 1969 a General Program for the Elimination of Technical Barriers to Trade, which committed them to agreeing and adopting 124 directives in short order. The General Program was a phenomenal failure. It excluded from the start most controversial issues, and it still took ten years to adopt just 100 directives—instead of 124 directives within a year and a half as originally planned. Moreover, the protectionist clamor after the 2nd oil shock in 1979 only made it more difficult to reach agreement in intergovernmental negotiations (Dashwood 1983; Egan 2001:esp. 61-82). Most importantly, international harmonization could not keep pace with the creation of new, uncoordinated regulatory measures at the domestic level. As a consequence, during the first half of the 1980s, the share of imports subjected to NTBs actually increased for every EEC member state (Laird and Yeats 1990), and in a comprehensive business survey, European firms—especially firms with the ambition to sell their products in several member states—
considered technical standards and the related regulations the most important barriers to greater market integration (Nerb 1988).

Twenty years' failure to achieve substantial regulatory harmonization and thus make progress on the integration of product markets through a public international process prompted the Commission to try a "new approach" beginning in 1984/85 (Pelkmans 1987; Schreiber 1991). Building on the then-recent Cassis de Dijon decision of the European Court of Justice (Alter and Meunier-Aitshalia 1994), the New Approach encouraged mutual recognition to minimize the trade-inhibiting effect of national product regulations whenever possible. But above all, the New Approach entailed a shift from writing detailed technical specifications into European directives toward specifying only regulatory objectives (possibly broadly, covering an entire range of products in one directive) and delegating to three European regional standards bodies the specification of the precise technical requirement that individual products would have to meet to be compliant. Two of these three European bodies (CEN and CENELEC) are essentially regional versions of ISO and IEC, respectively—i.e., transnational private standard-setters. The delegation of regulatory authority to these transnational private bodies, which is central to the New Approach, has generally been considered very successful, as CEN and CENELEC have virtually always delivered on developing technical specifications with the time frame set out in the directive, with fewer objections from stakeholders as in public regulation. Delegation thus has brought about real regulatory harmonization at a much more rapid pace than the "old" inter-governmental approach, contributing significantly to the successful completion of the "Single Market" by 1992 without a shift to lowest-common-denominator product regulations (Egan 2001:esp. 210ff, 260ff; Hanson 2005:esp. 44-107).

In contrast to the above comparison of transnational private regulation with international public regulation, a comparison with the two domestic forms of regulation is informative is purely hypothetical, but such a counterfactual analysis can nonetheless be informative. Domestic public (or domestic private) rule-making might lead to effective inter- or transnational regulation if there is spontaneous cooperation among the domestic regulators of the countries involved (to be expected only in the event of a harmony of interest) or if one country's rules became the de facto international rules due to a kind of "California effect" (D. Vogel 1995). Neither occurred empirically in the case of product standards harmonization in the EU. There was no sign of spontaneous cooperation among the domestic private bodies to which product standard-setting had been delegated in most member states. And, despite the importance of the German economy for the European economy (Mattli 1999), neither the German nor any other European national economy is dominant to the point where its domestic public regulations exert a compliance pull through which they organically become de facto European regulations. Given that achieving international regulation through domestic rule-making proved impossible, I conclude that transnational private rule-making has proven clearly more effective (and as a consequence infinitely more efficient).

Finally, it should be noted that the history of international cooperation on product standardization beyond Europe similarly supports the argument that delegating to a transnational private regulator brings efficiency gains. Many years of attempting to harmonize product standards (or otherwise reduce their trade-impeding effects) through intergovernmental negotiations in the GATT failed to yield results, eventually prompting governments to negotiate the TBT-Agreement during the Uruguay Round of the GATT, which obliged all member states of the soon-to-be-formed WTO to use "international standards" as the technical basis of their
domestic product regulations, delegating the development of such standards more or less explicitly to transnational private bodies such as ISO and IEC.  

3.2. Efficiency Gains from Private Transnational Harmonization of Corporate Financial Reporting

The history of financial market regulation—specifically the attempts to harmonize the rules for corporate financial reporting (“accounting standards”)—similarly offers prima facie support for the argument that delegation to transnational private regulators yields efficiency gains. Here again the EU case is illustrative, since inter-governmental cooperation should here have been easier than on a global scale, given similarities in political-economic context (capitalist democracies), levels of economic development, and the existence of facilitating institutions.

Before the EU delegated rule-making for financial reporting to the non-governmental International Accounting Standards Board in 2000, it took EU member states more than a decade to agree on a first common set of minimal rules for financial reporting by limited liability companies—and another five years to negotiate a first set of financial reporting rules for business groups. Moreover, similar to what I found for the harmonization of product regulations, the compromises that finally made intergovernmental agreement possible entailed allowing so many options and exemptions that the agreed measures largely failed to achieve the harmonization objective. By contrast, in the decade since the EU delegated regulatory authority to the IASB, the latter has produced a substantial body of financial reporting rules with few options and exemptions and an increasingly global reach—albeit to the chagrin of many European stakeholders who are experiencing high switching costs (see Büthe and Mattli 2011:esp. 2-5, 60ff; Gray and Coenenberg 1988; cf. Leblond 2011; Nölke 2011).

Transnational private rule-making by the IASB is, to be sure, not without its critics (partly for good reasons, as I will argue below), but this approach has without a doubt proven more effective and far more efficient in developing common inter-/transnational rules for corporate financial reporting than the previously attempted international public regulation. This conclusion from the comparative analysis holds not just when transnational private regulation of corporate financial is compared to European regional public international regulation, but also when it is compared to attempts to achieve international harmonization in other public institutional context, notably the OECD and the United Nations (Mattli 2013). And here, too, a comparison with domestic regulatory arrangements is only counter-factually possible, due to their inability to spur de facto international standards (though for some time in the 1990s it appeared as if U.S. domestic accounting standards could become the de facto global standards, see Camfferman and Zeff 2007). The analysis of financial reporting regulation thus again confirms the efficiency gains from transnational private rule-making.

19 ISO, IEC, and ITU are explicitly noted in the appendix to the TBT-Agreement and thus clearly recognized as sources of "international standards." Which other public or private rule-makers might also be considered "international" standard-setters under WTO law has not yet been settled.

20 The inter-governmentally negotiated EU financial reporting rules are known as the Fourth and Seventh Directive of 1978 and 1983, respectively, negotiated in the EU’s predecessor organization, the EC. For details, see Camfferman and Zeff (2007); Diggle and Nobes (1994); Emenyou and Gray (1992); and Mattli (2013).

21 Recent research on global regulation in other realms suggest that the embeddedness of public or private regulators in transnational peer networks might well lead to rules of higher technical quality (and/or greater suitability given
4. Institutional Complementarity Theory of Global Governance as a Framework for Analysis of Distributional Effects

Institutional Complementarity Theory (ICT, Büthe and Mattli 2011; Mattli and Büthe 2003) was developed to analyze precisely the kind of transnational private rule-making that we see in ISO/IEC and IASB. As a general theory, it assumes a governance system with two (or more) levels of aggregation, which might be found in various contexts. For the discussion here, I will refer to the higher level of aggregation as the "transnational" level and to the lower level of aggregation as the "domestic" level.

ICT assumes further that decisions taken at the transnational level—such as the development of standards or rules that prescribe some behavior as more desirable, legitimate, or legal than alternatives—are consequential for stakeholders at the domestic level. And it assumes that the resulting transnational regulations have the potential of affecting stakeholders at the domestic level differently, such that transnational regulation entails conflicts of interest. This makes it important to ask: Who will exert greater influence over the decisions at the transnational level?

The central claim of the institutional complementarity theory of governance is that, to answer this question, we need to analyze the institutions at both levels and their interactions with each other, because stakeholders are likely to differ in their ability to influence transnational rule-making as a function of the fit between the domestic institutions to which these stakeholders have access and the rule-making institutions at the transnational level. The complementarity between domestic and international institutions thus becomes a power resource, which can and should be analyzed in conjunction with other (possible) power resources such as material resources or expertise.

Recognizing the interaction between institutions at two levels of aggregation as consequential complicates the analytical task compared to theories that focus only on international institutions or only on variation in domestic institutions. It implies that any statement about the "optimal" institutional design at the domestic level (or about the political consequences of any particular domestic institutions) must be made conditional on the key features of the international institutional context in which those domestic institutions will operate—and vice versa. The implicit, derivative claim of ICT is that any reduced ability to make general theoretical claims, which follows as a consequence of adopting this analytical approach, is worth it in terms of the improved understanding of global governance that it affords us.

Büthe and Mattli illustrate the analytical power of ICT through multi-methods analyses of transnational regulation in two rule-making bodies, the IASB and ISO/IEC, introduced above. IASB and ISO/IEC as transnational institutions for rule-making share a number of important similarities. In its respective areas of expertise, each organization is the clear focal point for

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22 This assumption merely makes explicit a necessary, defining characteristic of global governance.
23 This core idea of ICT might be generally applicable, but the effects of differences in institutional complementarity should be most apparent when there are identifiable decision-making rules for collective decisionmaking at the higher level of aggregation, which are generally known and followed, i.e., when rule-making at the inter- or transnational level is highly institutionalized.
rule-making for global markets (partly due to earlier delegation to these organizations by states, unilaterally, and—crucially—via inter-governmental agreements that make it difficult if not impossible for individual governments to exert influence through a threat of re-delegating). Each of them has a multi-stage standard-setting process, in which fundamental decisions are taken early on. Much of the work is conducted in specialized committees of technical experts, though administrative law-like procedures assure broader exposure and opportunities for feedback. Throughout this process consensus norms call for accommodating preferences of stakeholders from as many countries as possible, based on a system of stakeholder representation through national member/associate bodies. And at the end of the process, adoption of any technical rule as a formal international standard requires support from a substantial super-majority.

What power resources and which features of domestic institutions would best complement transnational rule-making that has these features? In terms of material resources, stakeholders who want to influence international standard-setting will need (1) technical expertise to figure out how a proposed international standard would affect one's interests and to articulate one's own preferences in the technical language of accounting and engineering, respectively, and (2) financial resources to pursue those preferences.\(^\text{24}\) In addition, however, the above characteristics of the transnational rule-making institutions deductively suggest that stakeholders also need (3) good and timely information about the rule-making agenda at the transnational level and (4) effective mechanisms for aggregating preferences at the national level to be able to take advantage of the consensus norms that are based on national representation, notwithstanding the non-governmental character of the organizations.

Two ideal types of domestic institutional structures differ starkly in how well they serve domestic stakeholders with regard to the third and fourth of these needs, which are most directly implicated by the notion of institutional complementarity. Figure 4.1 provides a schematic representation of the first type: a unitary domestic system. Such systems are structured like a pyramid, characterized by organizational hierarchy, a high degree of coordination among economic actors, and highly institutionalized linkages between domestic stakeholder and, ultimately, the national representative at the international level.

\(^{24}\) As advocated by Cafaggi and Pistor (2012:15f), ICT thus does not simply equate wealth with power but derives the importance of material resources analytically.
Figure 4.2 depicts the second type: domestic systems that are fragmented and characterized by often intense competition among multiple standard-setters, with contestation over who speaks for the country's interests at the international level and often tenuous, arm's-length relationships to domestic stakeholders.

Institutional Complementarity Theory predicts that stakeholders operating in hierarchical and coordinated domestic systems should have a substantial advantage vis-à-vis their counterparts from countries with fragmented domestic systems, because the former exhibit greater institutional complementarity with the institutional structure at the transnational level.
Specifically, hierarchical structures are geared toward passing information up and down the hierarchy, enabling stakeholders to speak timely and with a single voice at the global level.

As Büthe and Mattli show, domestic standard-setting institutions—whose structures (at least in advanced industrialized countries) were established decades before the contemporary period of globalization—tend to resemble one of the two types closely. But importantly, the distribution of institutional differences at the domestic level differs across the two issue areas of product and financial standardization. In financial reporting, U.S. domestic institutions resemble the unitary/hierarchical type whereas European countries (at the domestic and the EU level) resemble the fragmented type. U.S. stakeholders of international financial reporting are therefore expected to exert greater influence over transnational rule-making than their European counterparts. In the realm of product standardization, by contrast, European institutions resemble the unitary type, whereas U.S. domestic institutions resemble the fragmented type, suggesting greater European influence in this issue area. And indeed, Büthe and Mattli demonstrate that U.S. firms are significantly more successful than European firms when they try to influence international financial reporting standards whereas European firms are significantly more successful than American firms when they try to influence international product standards. And using a wealth of quantitative and qualitative evidence, they show that it is definitely the greater complementarity of the transnational structure of rule-making with their domestic institutions that puts U.S. firms at an advantage in the former and European firms at an advantage in the latter case (Büthe and Mattli 2011, chs.4-7).

5. Toward a Broader Analysis of Distributional Consequences: Ad hoc Consequences

Büthe and Mattli focus on business firms in advanced capitalist democracies as stakeholders with similar material resource endowments, including similarly high levels of the pertinent technical expertise, in order to isolate the effect of cross-national differences in institutional complementarity. In effect, then, they concentrate on cross-national distributional effects for commercial actors relative to each other, where transnational private regulation is taken as given. I seek to broaden the analysis of distributional consequences of transnational regulation vis-à-vis other forms of regulation, while building on the logic of their argument. To do so, I distinguish between what I call ad hoc distributional consequences, discussed here, and what I call structural distributional consequences, discussed in the next section.

5.1. Ad Hoc Distributional Consequences in Transnational Private Regulation

A regulation has what I call ad hoc distributional consequences if its material costs and benefits differ across stakeholders as a function of its specific content. There are numerous reasons to expect transnational rules that govern the behavior of economic actors to probabilistically yield greater material benefits for some than others, even when they are written as general rules that do not overtly discriminate.25 Consider, for instance, firms producing competing products within the same manufacturing industry. They will with high probability differ in the product design, production methods, or technological solutions incorporated into their product (as well as in their record-keeping and accounting practices), which should result in differential switching costs when new regulations require certain product characteristics (or a

25 Whenever I write only "benefits" here and below, I mean net benefits, thus subsuming costs.
particular format for corporate financial reporting). Similarly, intellectual property rights are often bound up in a particular product design or production method, so regulatory measures that affect manufacturing practices can render some IP rights worthless while making others suddenly extremely valuable.

Such distributional consequences are obvious when one of previously several different practices is elevated to the preferred or required practice (e.g., metric versus U.S. "imperial" units for product labeling requirements or "fair value" versus "historical cost" accounting). But distributional consequences can even arise when a compromise imposes similar technological adjustments on everyone, because the flexibility and skill of management, the complementarity with other prior practices, and spillover from seemingly unrelated developments can still lead to an uneven distribution of the actual costs and benefits.\textsuperscript{26}

Moreover, producers of manufactured goods are not the only ones affected. We should also expect, for instance, an uneven distribution of benefits among consumers or generally purchasers that have adapted their own practices and expectations to the continued availability of a particular product or another, e.g., as an input into their own economic activities. In sum, there are strong reasons to expect transnational private regulations to have \textit{ad hoc} distributional consequences.

There also is ample empirical evidence for such \textit{ad hoc} distributional effects of transnational private regulation from specific cases of product and financial standard-setting. From 2005 through spring 2008, for instance, Microsoft conducted a savvy and by many accounts ruthless campaign to get its Open XML standard recognized first as a European and then an international standard by building a supporting coalition of ISO national member bodies.\textsuperscript{27} This recognition for the technical standard—the backbone of Microsoft Office applications since the 2007 version—was important to ensure Microsoft's continued eligibility for winning and retaining software contracts from governments around the world, worth billions, as more and more governments adopted a preferential procurement policy in favor of open source software (Borges 2010; Weber 2004). Gaining the status of an ISO/IEC "international standard" required Microsoft to make the code public and to allow subsequent development by a technical committee of the transnational standards body, but Microsoft retained all its intellectual property rights that are bound up in the Office Open XML standard, requiring all prospective users of the standard to pay licensing fees to Microsoft.\textsuperscript{28} As a consequence, when the ISO/IEC Joint Technical Committee 1 made Microsoft's Open XML standard an international product standard, the value of Microsoft stock rose as investors inferred that the decision boosted the value of Microsoft's intellectual property rights (largely correctly; see, e.g., Tung 2011). By contrast, major investments into alternative XML standards by Microsoft's competitors in the

\textsuperscript{26} Moreover, if compliance has prisoners' dilemma characteristics, differences in the strictness of enforcement (e.g., across countries) should also have \textit{ad hoc} distributional consequences.

\textsuperscript{27} There is no comprehensive account of this "standards war" within the transnational private standard-setting organizations—the lengthy entry for "Standardization of Office Open XML" on Wikipedia has been extensively battled over by interested parties (see Jelliffe 2007 and wikipedia page history)—but overlapping partial accounts, independently corroborating the empirical information on which I rely here, are provided by FT (2008); ISO (2008); Lai and Montalbano (2007); O'Brien (2008); Palmer (2008); Robie with Chernoff (2008); Shannon (2005) as well as sources referenced above and below in this paragraph.

\textsuperscript{28} During the standardization process, however, Microsoft was forced to delete from the code the parts that originally also tied it to Windows, which would have further increased other users' need to pay Microsoft licensing fees.
OpenDocument Format Alliance were rendered largely worthless, at least initially\(^{29}\)—confirming James Barcia's assessment that seemingly technical product standards "can be the source of enormous wealth or the death of corporate empires" (U.S. House of Representatives Committee on Science, 2001).

Even though the case pitted, at least most visible, one U.S. company against other U.S. companies (and their civil society allies from the open source movement), it strongly supports Büthe and Mattli's argument about the importance of having not just ample resources but also exploiting the advantages of institutional complementarity. Deep pockets might have put Microsoft at an advantage vis-à-vis smaller players and those in the open source movement working on not-for-profit models, but hardly gave Microsoft an edge vis-à-vis large corporate opponents such as Sun Microsystems or IBM. Decisive for Microsoft's success in the end were its subsidiaries and affiliates in more than a dozen countries in Europe and beyond, and its understanding of transnational private regulation as a political process, i.e., its recognition that the subsidiaries and affiliates' local participation rights in national standards bodies would allow Microsoft to shape the preferences of a large number of national member bodies and hence ultimately the votes in the joint ISO-IEC committee.

Evidence of substantial distributional effects also exist from many other, less overtly politicized cases of transnational private regulation: In 1992, for example, a group of mostly European audio scientists, who in the 1980s had developed audio compression technology as part of the collaborative EU Digital Audio Broadcasting project, succeeded in getting ISO and IEC's joint Moving Pictures Expert Group (MPEG) to adopt their audio coding algorithm as the international standard ISO/IEC 11172-3, since 1995 popularly known as "MP3", the suffix given to audio data files encoded in this format. At the time, numerous other groups were investing substantial resources into developing audio compression technology, including Microsoft and other major corporations. The technical "solution" that ultimately became the ISO/IEC standard, which combined elements from a few originally separate and competing approaches (Musmann 2006:1043f), prevailed against several others in a competition described as "sometimes political as well as technical" (Ewing 2007).\(^{30}\) Embedded in the international standard are multiple pieces of software code patented (mostly) by the French electronics manufacturer Thomson (since 2010 known as Technicolor) and the German Fraunhofer Institute for Integrated Circuits, where most of the basic research had taken place. Starting in 1998, after MP3 had become established as the dominant audio compression format—and after the WTO stipulation in favor of "international standards" inhibited national regulations mandating a competing format—the patent holders started to collect licensing fees on hardware and software using the MP3 format. Individually small amounts accumulate to contribute several million Euros to the annual budget of the (public) Fraunhofer Institute alone (Brandenburg 2007), allegedly as much as €100m/year in some recent years (Kistenfeger 2005). Most of the alternative audio compression technologies, which lost out during the transnational rule-making process, to this day earn their "owners" nothing.

\(^{29}\) At least one alternative, the ODF format favored by Sun Microsystems, IBM, and other industry giants, appears to be making a comeback (Philps 2012; Vaughan-Nichols 2012). The ODF format in fact had become an ISO standard prior to Microsoft's Open XML, though the former clearly couldn't match the latter's tie to a commercial juggernaut.

\(^{30}\) Institutional complementarity was again very important from the start because national and European institutions ensure coordinated preferences among virtually all of the European participants whereas contenders from other regions were quite divided.
Ad hoc distributional consequences are also readily observable in international economic relations: Cross-national differences in standards, or even just the lack of readily understood information about competing foreign goods, long kept product markets in numerous industries fragmented along national lines. Transnational private product standard-setting reduces such non-tariff barriers to trade, thus increasing the exposure of domestic producers to foreign competitors, often putting some out of business while opening up new markets for others (e.g., de Vries 2006). As the president of the Association of German Chambers of Industry and Commerce (DIHT) put it: "He who develops the [international] standard, controls the market" (Braun 2007). Moreover, even by simply codifying "best practices," any particular transnational private regulation can have *ad hoc* distributional effects, because some (often low-cost, developing country) manufacturers may not be able to meet the specified design features or performance thresholds (e.g., Malkin 2007; Maskus, Otsuki, and Wilson 2005).

Evidence that particular transnational private regulations have been profitable for some while being costly to others—i.e., evidence that these transnational regulations have what I have called *ad hoc* distributional effects for at least some stakeholders—does not, however, allow us to conclude that the rise of transnational regulation as such has significant distributional consequences. Explicitly comparative analyses are required.

5.2. Ad Hoc Distributional Consequences in Domestic Public Regulation

The literature on regulatory capture (Bernstein 1955; Quirk 1981) and on regulation as political rent-seeking (Stigler 1971; Peltzman 1976 and the literature they inspired) suggests many reasons why traditional domestic (public) regulation might also result in rules that have major distributional effects, possibly providing the ostensibly regulated with competitive advantages or protection from competitors. Given the wealth of theoretical work coming to such conclusions, it is striking that systematic empirical work, providing more than anecdotal evidence of such distributional effects in traditional public regulation, is still, as Dal Bô puts it "well short of abundant" (2006:215), but there are by now numerous studies providing such evidence, at least for the United States.

Some of the prominent 1980s critics of what has in more recent years been called the "rise of the regulatory state" (Jordana and Levi-Faur 2004) have provided a wealth of examples of regulations that distort the economy through their distributional consequences. Yandle (1983) noted, for instance, that tiered freight rates exaggerated the social cost of some forms of shipping while underestimating those costs for other forms (resulting in geographic dislocation of production); and that fuel efficiency regulations in the early years actually undermined the incentives for car manufacturers to invest anything in the production of small cars because simultaneous regulations of fuel prices (keeping them artificially low) kept demand for small cars below the level of supply manufacturers needed to meet the fuel efficiency standards (so

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31 Lecraw (1984: esp.513), in one of the most comprehensive analyses of the correlates of standardization, albeit only domestically within the United States, finds a strongly statistically significant negative correlation between standardization and advertising intensity, which suggests firms' need for advertising is significantly lower if products are standardized.

32 Similar ad hoc distributional consequences can be shown for several of the International Financial Reporting Standards developed by the IASB. I omit their discussion here for lack of space.

33 Direct, systematic analyses of such *ad hoc* distributional consequences in other countries are still far and few between; see e.g. Francis (1993), who offers no more than a few anecdotes for the UK.
small cars became unprofitable to make until gas prices were deregulated. Yandle argued that these regulatory inefficiencies were not due to regulators' deficient understanding of economics but due to the material benefits that some reap from their distributive effects (in a "Baptist-bootlegger coalition" with regulatory zealots). Others provided more implicit evidence of distributitional effects, such as Faith (1982) who showed, in an analysis of the Federal Trade Commission's antitrust enforcement actions from 1961 to 1979 that the FTC largely avoided targeting any antitrust violators headquartered in the district of the members of Congress who oversaw the budget allocation for the FTC.

In more recent work, De Figueiredo and Edwards (2007) examine the distribution of the rents from local (regulated) phone monopolies by analyzing the "access charges" paid by long distance carriers to the local phone monopoly. These charges are set by public utility commissions at the state level. Naturally, long distance carriers prefer low charges; local phone companies prefer high charges; actual amounts vary substantially. De Figueiredo and Edwards show that the charges depend significantly on the relative campaign contributions of local and long distance phone companies to state legislators. In other words, individual regulatory decisions on the same topic (each of them nominally a general rule at the state level) have very different distributional consequences for companies vis-à-vis each other and vis-à-vis consumers, significantly as a function of resources (and a savvy understanding of state-level political institutions).

Firms with deep pockets, however, are not the only ones who can exert political influence on public regulators: Holburn and Spiller's (2002) analyze over 700 U.S. state-level public utility commissions' reviews of proposed electric utility rate increase between 1980 and 1989. They show, inter alia, that in states where Democrat-majority legislatures created consumer advocates to represent residential consumers on those Commissions, regulatory approval of electricity companies' requests for a residential electricity rate increase was often delayed and resulted in lower post-increase rates (measured here in terms of power companies' return to equity). More indirectly, analyses of U.S. non-tariff barriers at the industry level, guided by Grossman and Helpman's "Protectionism for Sale" model (1994), show that higher industry PAC contributions to legislators and better political organization increase the level of NTB-protectionism enjoyed by the industry, presumably at the expense of consumers and downstream industries (Eicher and Osang 2002; Gawande and Bandyopadhyay 2000; Goldberg and Maggi 1999). If we consider their NTB measure a reasonable proxy for the intensity of regulatory interventions, then the findings suggest that politically organized industries can prompt regulatory interventions with significant distributional consequences.

5.3. Ad Hoc Distributional Consequences in Domestic Private Regulation

Studies of particular rules drawn up by domestic private regulators similarly have shown the costs and benefits of those rules to be very unevenly distributed. An early example was Ralph Nader's classic indictment of the American automobile industry, Unsafe At Any Speed (1965), showing how improving driver/passenger safety again and again had taken a back seat to maximizing company profits in domestic private standard-setting by the Society for Automotive En. Studies of rule-making in the Financial Accounting Standards Board (FASB), the U.S. domestic private body which (thanks to SEC recognition) has been the focal point for U.S. domestic accounting and financial reporting rule-making since 1973, come to similar conclusions. They show numerous FASB accounting rules to have had ad hoc distributional
effects—unsurprisingly, since financial reporting rules have enormous implications. They affect the valuation of companies (differently depending on the condition of each company), the extent to which financial statements overcome information asymmetries between management and investors, the relative attractiveness of different modes of executive compensation, the incentives to conduct research and development and hence where a multinational corporation will concentrate R&D activities, etc. (see, e.g., D. Cooper and Sherer 1984; Leuz, Pfaff, and Hopwood 2004; Ochoa 2011). Van Riper, Miller et al, and others have provided much anecdotal evidence of what might be called the "private capture" of FASB: members of the "independent" Board over time coming to view the issues almost exclusively from the perspective of the "preparers" of corporate financial reports (i.e., corporations and their senior financial executives), at the expense of the interests of financial investors and other public or private sector "users" when their interests diverge, or a broader concern for, e.g., trust in, and the stability of, the country's financial system (Miller, Redding, and Bahnson 1998:16-30, 67ff, 157ff; Van Riper 1994; see also Sampson 1991; Schuetze 1978; Tandy and Wilburn 1992:esp. 51-54). The illustrative examples in these studies, even if most do not meet the standards of scientific evidence, are telling because the semi-official delegation of public regulatory authority to the private FASB was explicitly based on the FASB's commitment to putting the public interest and the interest of investors first (Mattli and Büthe 2005).

To be sure, private capture is far from perfect: On several occasions, the FASB has tried to adopt accounting rules opposed by most preparers but considered necessary by the accounting experts on the Board to increase the transparency and accuracy of corporate financial statements (see, e.g., Bratton 2007). Between 1992 and 1995, for instance, FASB sought to change the accounting treatment of stock options on the rationale that options constituted a liability vis-à-vis employees to which they had been granted, and that in investors' interest in transparency, stock options should be included in financial statements as a liability/expense, rather than merely being disclosed as also-ran information in the footnotes. But here as in similar cases, corporations opposed to expensing options moved quickly, using their material resources and institutional capacity—far superior to those of the inherently fragmented small investors for which the change would have made the greatest difference—to "correct" such deviations (Dyckman 1988; Fleckner 2008; Miller, Redding, and Bahnson 1998:69-77; Walker and Robinson 1993; Zeff 2008). And on issues where preparers have differed with each other, such as over whether the costs of oil and gas exploration should be generally considered "amortizable assets" or only if the exploration is successful, those who are politically organized tend to prevail, similar to what studies of political lobbying of public regulators have found (Mattli and Büthe 2005:412f; Miller, Redding, and Bahnson 1998:esp. 179-183; Newman 1981; Van Riper 1994:esp. 117ff, 123f, 165-168).34

5.4. Ad Hoc Distributional Consequences in International Public Regulation

Finally, what I have called ad hoc distributional effects have also been observed in international public regulation, as should be expected according to international relations scholars (Büthe and Mattli 2010:esp. 449-453; Drezner 2007). In winter 2008/09, for instance, the International Telecommunications Union (ITU)—the illustrative case in Krasner's classic analysis of cross-national distributional conflicts in international regulatory harmonization

34 Such political organization has variably occurred through ad hoc groups, permanent organizations such as the Business Roundtable and the Financial Executives' Institute (FEI, now Financial Executives' International), or via the major accounting firms.
(1991)—launched an initiative to develop a universal cell phone charger. The initiative was prompted by requests from several national governments in Europe and beyond, as well as the EU (European Commission 2009b), which inter alia sought the elimination of more than fifty thousand tons of electronic waste that were annually created in the EU alone due to incompatible proprietary charger connectors that often differed from one cell phone to the next, even for the same manufacturer. 35 This led to an agreement, originally within an industry group called the GSM Association, on common technical specifications for a universal charger, including Micro-USB as the connector (Parkes and Johnson 2009). 36 The participants also committed to making all of their new phones compatible with the new universal charger, starting no later than January 2012 (Ricknäss 2009). While the ITU-sponsored agreement was voluntary, the EU made compliance with the agreement a regulatory requirement for all new smart phones sold into the European market beginning in 2010 (via a MoU with the manufacturers, see European Commission 2009a), and the ITU is pushing for a corresponding worldwide commitment effective by 2014 (Abiven 2012). Even though the gains to the intellectual property rights holders for the already widely used micro-USB connectors may have been modest, making micro-USB "the standard" still had substantial distributional consequences in that it forced the phone manufacturers to give up the use of proprietary connectors, which had previously "locked in" consumers (if their previous phone had used the same connector for accessories) or required consumers to buy all new accessories with every phone (contributing to the electronic waste problem noted above). 37

In sum, it appears that all four forms of rule-making distinguished above probabilistically have ad hoc distributional consequences simply because economic actors differ from each other. That said, since most such gains and losses are predictable consequences of the specific content of the rules that affect these actors, we can and should go beyond the material distributional consequences of individual rules and ask the question whether there are systematic differences between the different forms of rule-making in how much influence different stakeholders have on the rule-making process.

6. Structural Distributional Effects of Transnational Regulation

In this final section, I seek to develop more fully the argument that delegation of regulatory authority to a transnational private body has not just "ad hoc" material distributional

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35 The real target arguably was the corresponding reduction in greenhouse gas emissions (13.6 million tons) as the UN Climate Change talks in Barcelona loomed on the horizon (Parkes and Johnson 2009). Kennedy, Suttmeier and Su (2008:23f) similarly attribute a 2007 national universal charger initiative in China to environmental protection advocates above all.

36 The agreement was reached among all the major international cell phone manufacturers except Apple (which declined) and all the operators active in Europe. Even though the ITU was the driver at the international level, the technical "common external power supply" (for mobile phones) standard eventually was adopted and published as IEC standard no. 62684.

37 No direct evidence is available, but it probably helped in reaching the agreement on micro-USB that (a) it was quite apparent that the EU was willing to impose a regulatory solutions should no agreement be reached and (b) none of the major mobile phone manufacturers had intellectual property rights invested in micro-USB (as far as I can discern; establishing even just property rights claims is fraught with difficulties in ICT). As users of Apple iPhones know, Apple (alone) interpreted its obligation vis-à-vis the European Commission as allowing for the continued use and introduction of new proprietary connectors, but Apple now includes a micro-USB adapter for charging with iPhones sold in the EU.
consequences (benefiting some more than others, possibly at the expense of others), but also political distributional consequences, which are structural in the sense that delegation systematically empowers some vis-à-vis others in ways that may be difficult if not impossible to reverse or change in the short run. I argue that regulatory delegation to transnational regulators not only might, but systematically will and indeed must have such distributional consequences if it yields the efficiency gains discussed in section 3 above. Why? Close examination of those efficiency gains shows that transnational regulation yields efficiency gains, at least vis-à-vis public regulation, because delegation to non-governmental expert bodies overcomes political "inefficiencies" by excluding certain voices or interests who otherwise would have had an opportunity to participate in the rule-making, if only as spoilers.\(^\text{38}\) Such exclusions may be achieved in two ways.

First, political efficiency gains may be achieved by *de jure* and categorical exclusion of some stakeholders from the decisionmaking, a phenomenon that is arguably quite common in economic matters (Dahl 1985) and in global governance (Grant and Keohane 2005). Central bank independence, for instance, supposedly safeguards against time-inconsistent politically opportunistic monetary policy precisely because it overtly excludes political leaders and the interests of their (potential) electoral constituency from monetary policy-making, at least in the short run.\(^\text{39}\) The categorical exclusion of generally recognized stakeholders, however, is a violation of fundamental principles of input legitimacy, for which a transnational regulator may find it difficult to compensate through output legitimacy. ISO and IEC, for instance, can only get away with not recognizing states as members because they guarantee a right of membership for each country's organization "most broadly representative" of the stakeholders in domestic standardization.\(^\text{40}\)

Second, exclusions may be achieved more quietly and de facto by systematically disadvantaging and marginalizing some vis-à-vis others. Such de facto exclusion may be an inherent and immediate characteristic of a particular form of regulatory governance or occur incrementally: If exerting influence in a particular case of regulatory governance were to require substantial financial resources but also had financial distributional consequences such as in the examples in section 5.1, then a stakeholder who in the first instance tried but failed to prevail against other, better resourced competitors would begin any subsequent rule-making disadvantaged.

When rule-making is institutionalized, as I have assumed throughout this paper, either type of exclusion may of course depend on the specific institutional configurations at hand and

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\(^{38}\) I bracket here the possibility that moving decisionmaking to the non-governmental realm may increase efficiency purely by reducing procedural or bureaucratic costs. I am not aware of any studies of global governance that have shown such costs to have been a major obstacle to achieving governance in a timely manner or at all. And reasons for such cost savings, such as non-governmental organizations' lower requirements to document and archive than is needed to comply with record-keeping requirements of public institutions may well also have political consequences by reducing accountability.

\(^{39}\) Similarly, standards consortia—cooperative ventures among a small number of firms for the purpose of jointly developing a proprietary solution to a technological problem, usually with the intent of making it the de facto industry standard (as in the case of the consortia that developed the Blu-ray and HD-DVD optical disc formats)—are almost invariably based on an overtly exclusionary model.

\(^{40}\) And in fact, both organizations have over the last two decades actively sought to broaden their membership and gain legitimacy by increasing the number of developing country member bodies (Büthe 2010b; Murphy and Yates 2008).
therefore must be analyzed rather than assumed. I therefore now return to the cases of product and financial markets regulation through international product (ISO/IEC) and financial reporting (IASB) standards, respectively, and discuss how various stakeholders fare in such transnational private regulation with a clear institutional focal point compared to the other forms specified in section 2. I organize the discussion around the power resources emphasized by the ICT framework introduced in section 4. In doing so, I first discuss financial resources and technical expertise as if they were the only pertinent power resources, then consider how recognizing the importance of institutional complementarity might lead us to qualify some of those initial arguments about resources and expertise.

6.1. Financial Resources and Technical Expertise

The above analyses have shown that exerting influence in transnational private rule-making requires both financial resources and technical expertise. The need for resources and expertise has implications both within and across countries. Within countries, the need for financial resources implies an advantage for commercial stakeholders over other stakeholders, such as consumers and civil society groups. The need for technical expertise—often literally to "speak the language" used among the participants in a regulatory body such as the International Accounting Standards Board when they present and discuss possible financial reporting rules—reinforces this structural distributional consequence by effectively limiting the chances for non-commercial stakeholders to have a voice in the transnational private rule-making process. To be sure, the requisite expertise can usually be acquired, e.g. by government agencies through hiring or training—and it can be maintained for some time after retirement—but for a given industry, it tends to be rare outside the active workforce in the private sector of the leading countries for that industry. Across countries, the need for material resource and technical expertise implies an advantage for stakeholders from more technologically "advanced," rich countries vis-à-vis their counterparts from poorer, developing countries, as both financial resources and expertise are generally far more ample in advanced industrialized countries.

Does this importance of financial resources and technical expertise suggest that the delegation to transnational private regulation has what I call structural distributional consequences? As discussed in section 5, financial resources are in fact important for exerting influence in all forms of regulatory rule-making; and technical expertise is crucial for at least some alternative ways of rule-making. Nonetheless, there are several reasons to expect that delegation to transnational private regulators gives especially the well-resourced stakeholders a more pronounced advantage—i.e., that it has political, structural distributional consequences—though the baseline matters.

41 The Forest Stewartship Council, for instance, is often praised for the elaborate institutional mechanisms that it has developed to ensure relatively equal participation by a broad range of stakeholders in its standard-setting process (e.g., Auld 2012; Cashore, Auld, and Newsom 2004). It also is not known for particularly swift decisionmaking.
42 The key "commercial stakeholders" are firms (and among firms larger over smaller firms) as well as institutional investors.
43 Recently retired private sector engineers, accountants, etc. thus have in various cases played a notable role in transnational private governance as expert advisors to civil society groups.
44 Since the pertinent expertise concerns the issue at hand, only, the distribution of this power resource need not correlate very closely with a country's general level of economic development, but the stakeholders must simultaneously be able to afford the time, travel, etc. to devote such expertise to transnational rulemaking (i.e., material resource and expertise are jointly needed), there is a clear advantage for advanced wealthy countries.
The comparison is most straightforward vis-à-vis domestic private regulation. Specialized expertise is important in private rule-making at the domestic level, too, and there is no reason why not having ample expertise should be more constraining in international than in domestic private regulation. Having limited financial resources, by contrast, should constitute a more severe constraint in transnational than in domestic private regulation due to the higher costs of monitoring new developments over long distances, possibly of participating in meetings held all around the world, and of maintaining transnational contacts and coalitions. Overall, regarding financial resources and technical expertise, shifting from domestic private to transnational private rule-making should therefore have a real but modest distributional effect.

The extent to which a shift from public regulation to transnational private regulators has structural distributional consequences is strongly a function of the political system of the country or countries in question (directly in the case of domestic public regulation, indirectly in the case of international public regulation). For stakeholders from a non-democratic regime run by the commercial elite, a shift from domestic public to transnational private regulation may bring little change. Commercial interests have of course proven adept at influencing regulatory decisions even in democratic systems, and it is important not to compare the rough and tumble reality of transnational private regulation against a public interest ideal of public regulation in an ideal democracy. That said, the fundamental principles of democracy forbid categorically denying any (domestic) stakeholder group the opportunity to voice its position and to participate in decisionmaking or at least hold decisionmakers accountable ex post by demanding that they explain how the stakeholders’ interests have been taken into account. In addition, the need for public officials in democracies to legitimate their decisions as serving the public interest, combined with opposition politicians' electoral incentives to expose failures to do so, should make any creeping de facto exclusions from public regulation more readily reversible in democracies. Relatedly, a shift from public (especially domestic public) regulation to transnational private regulation increases the importance of expertise as a power resource: Translating everyday concerns of citizens into suitable technical language is ordinarily part of a public regulator’s job description, whereas there is no one with a corresponding responsibility in transnational private regulation.

6.2. Institutional Complementarity

Büthe and Mattli’s theoretical framework emphasizes differences in the complementarity between domestic and transnational institutions. And their empirical analysis shows that having access to domestic institutions that are highly complementarity with the transnational regulatory institutions systematically advantages firms vis-à-vis otherwise comparable firms with access to less complementary institutions. I argue that the importance of institutional complementarity in transnational private regulation also systematically affects the power of other stakeholders of the regulatory outcomes, and that transnational private regulation therefore has structural distributional consequences vis-à-vis other forms of regulation, even to the point where institutional complementarity qualifies or modifies the preliminary conclusions drawn above.

The importance of domestic institutions as a conduit for domestic stakeholders to make their voices heard at the transnational level has two consequential implications for transnational private regulation. First, it suggests that differences beyond the hierarchy-fragmentation dimension warrant analytical attention. Domestic standards bodies for product and financial markets differ greatly in how open and welcoming they are to input from, or participation by,
consumers, non-institutional, small-scale investors, labor representatives, environmentalists, and other civil society groups (openness to input from commercial actors is practically universal, not least since the standards bodies extensively rely upon private sector expertise). Given that legitimate participation in IASB and ISO/IEC rule-making at the transnational level is not possible independently of the domestic standards bodies, the inclusiveness of the domestic institutions virtually determines the ability of non-commercial stakeholders to access the private rule-making process. Assuming that domestic private regulation entails rule-making by that same domestic body, this implies that a shift from domestic private to transnational private regulation has no structural distributional consequences beyond those arising from resource constraints (identified above). By contrast, a shift from domestic public to transnational private regulation entails (depending on the characteristics of the domestic private institutions) exclusions that effectively render the distributional consequences of material resources and technical expertise moot.45

Second, the logic of institutional complementarity, specifically the importance of the functional fit between domestic institutions and the rule-making institutions at the transnational level (which is not an issue in the other forms of regulation) warrants qualifying the above arguments about financial resources, expertise, etc., in line with Caffagi and Pistor's (2012:17-20) argument that teaching stakeholders technical skills may not be enough to build regulatory capacity. If a country exhibits low institutional complementarity, even stakeholders with ample financial resources and expertise will have limited influence over the transnational rules. Similarly, even domestic institutions that are relatively open to input from non-commercial stakeholders will not provide them with much voice in the transnational rule-making process unless those domestic institutions are also complementary with the inter-/transnational institutions. Conversely, if a country exhibits high institutional complementarity, the domestic institutions will (to some extent) compensate for individual stakeholders' low financial resources (but not low expertise), i.e., financial resources will be a less decisive power resource for the various stakeholders after delegation to a transnational private rule-maker, whereas expertise remains a crucial power resource. Turning to cross-national implications, complementary domestic institutions allow developing countries to be selectively significant voices in transnational private rule-making, as long as those domestic institutions enable their domestic stakeholders to overcome collective action problems and thus ensure that modest but sufficient resources are available for those issues that are of particular importance to the country's stakeholders (and where those stakeholders possess the requisite expertise). My ICT-based argument about transnational private regulation thus posits a lower threshold of expertise and especially financial resources for developing countries to be selectively significant in global governance than we would expect when rule-making takes place in traditional inter-governmental organizations.

6.3. The Empirical Record

As noted in section 2, the comparison of regulatory rule-making for the same issue under different conditions must rely on deduction and counterfactual analysis at least as much as empirical analysis since a change in the form of regulation is often accompanied by broader contextual changes that make it very difficult to obtain clean observational data. Nonetheless,

45 International public regulation may entail a different kind of exclusion due to the logic of international politics, discussed below.
available empirical information supports the arguments developed in this section, as I will illustrate here with one example, each, of distributional effects within and across countries.

Without concentrated commercial stakes, few individuals or groups have the resources—or the will—to closely monitor (and if needed attempt to influence) what are often multi-year standard-setting processes with meetings (in the case of ISO/IEC) in several major cities around the world. The direct participation of, e.g., consumer representatives in transnational private regulation is therefore even rarer in transnational private rule-making than in domestic private rule-making. The importance of those reduced opportunities varies, however, as a function of domestic institutions. Public Citizen, the group founded by U.S. consumer advocate Ralph Nader (inter alia to advance consumer interests in (U.S. domestic) regulatory matters) has for years vocally opposed delegation of regulatory tasks to transnational private bodies, claiming that the added cost of even just monitoring such rule-making made the sustained representation of U.S. consumer interests at the transnational level practically impossible.\(^{46}\) European consumer advocates, by contrast, appear to be much more content, as they can—within resource constraint—make their voices heard via national member bodies of ISO and IEC.

In the ISO, developing countries stakeholders generally play a far more marginal role than advanced industrialized countries. While many have formally attained ISO membership in recent years, most developing countries participate in the transnational rule-making far less broadly and less regularly than advanced industrialized countries, consistent with the expectations derived above. That said—and unlike in traditional inter-governmental organizations—they can selectively play a significant role in specialized technical committees that develop standards of special concern to them. The Indonesian national standards body, for example, for many years chaired the ISO Technical Committee in charge of standards for rubber and rubber products. Similarly, the standards bodies of small advanced industrialized countries such as Finland and Sweden—relatively marginalized in traditional inter-governmental negotiations and organizations—exert very substantial influence across a broad range of manufacturing industries.

7. Conclusion

In this paper, I have examined the distributional consequences of shifting—i.e., explicitly or implicitly delegating—regulatory authority to transnational private regulators. Such delegation is often legitimated by claims about efficiency gains. I therefore began by assessing those claims. To facilitate the comparison with traditional public regulation at the domestic level, where there is typically a clear institutional focal point for rule-making, I have focused my empirical analysis of transnational private regulation on two prominent transnational private regulators that constitute an institutional focal point is in their respective areas of expertise—ISO/IEC and IASB, which regulate global product and financial markets by developing standards for manufactured goods and corporate financial reporting, respectively. At least for transnational private regulation with such a clear institutional focal point, I have found substantial evidence that delegating rule-making to transnational private bodies yields efficiency

\(^{46}\) Their public pronouncements make no reference to operating in an institutional environment that is poorly structured for the effective representation of U.S. interests at the transnational level, though in interviews, representatives of Public Citizen have shown recognition that institutional fragmentation also impedes the representation of U.S. interests at large.
gains. I then turned to the distributional consequences of such delegation. Building on Büthe and Mattli’s institutional complementarity theory, I have shown that there are strong reasons to expect—conditional on the prior type of regulatory governance—an uneven distribution of the material costs and benefits (what I have called "ad hoc" distributional consequences), and there is substantial evidence that the distribution of material costs and benefits from particular transnational private rules differs from what it would have otherwise been. I have argued, however, that transnational private regulation also has deeper political consequences, which I have specified in the final section vis-à-vis each of the main alternative forms of regulatory governance discussed earlier in the paper. Since these changes systematically empower some stakeholders vis-à-vis others in ways that are difficult to reverse or change in the short run, I call these the "structural" distributional consequences of transnational private regulation.
References


