Mechanismen der Konfliktentwicklung zwischen öffentlichen und privaten Organisationen in Regimekomplexen

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Rahmenpapier

0. Formale Kriterien

Die vorliegende publikationsbasierte Dissertation erfüllt die Vorgaben und Regeln für kumulative Dissertationen der Fakultät für Sozial- und Wirtschaftswissenschaften der Otto-Friedrich-Universität Bamberg im Fach Politikwissenschaft, wie in folgenden Regelwerken definiert:

- Promotionsordnung der Fakultät Sozial- und Wirtschaftswissenschaften der Otto-Friedrich-Universität Bamberg vom 31. März 2008
- Leitlinien für kumulative Dissertationen des Promotionsausschusses der Fakultät Sozial- und Wirtschaftswissenschaften, Stand Februar 2013
- Handreichung der Fachgruppe Politikwissenschaft zur Anwendung der Promotionsordnung bezüglich kumulativer Promotionen im Fach Politikwissenschaft in der Fassung von Mai 2019

Da die Handreichung der Fachgruppe Politikwissenschaft die strengsten Kriterien formuliert, wird diese als Referenz herangezogen, um zu belegen, dass die vorliegende Dissertation die Regeln für kumulative Dissertationen erfüllt.

Zu diesem Zweck gibt Tabelle 1 einen Überblick über die Bestandteile der vorliegenden Dissertation sowie der im SSCI gerankten Fachzeitschriften, in denen die Aufsätze angenommen bzw. begutachtet wurden.

Die vorliegende Dissertation besteht aus drei Aufsätzen und erfüllt damit die Vorgabe der Handreichung, dass eine kumulative Dissertation aus mindestens drei Aufsätzen bestehen muss.

Alle drei Aufsätze durchliefen ein Begutachtungsverfahren (peer-reviewed) in englischsprachigen Fachzeitschriften, zwei wurden zur Publikation akzeptiert. Damit wird die Voraussetzung erfüllt, dass mindestens zwei Aufsätze in im SSCI gerankten Fachzeitschriften veröffentlicht sein müssen und ein Aufsatz mindestens ein Begutachtungsverfahren durchlaufen musste. Zusätzlich wird die Voraussetzung erfüllt, dass mindestens einer der akzeptierten Aufsätze in Alleinautorenschaft erstellt wurde.

Aufsatz Nr.	Bibliographische Angabe	5-Jahres-Impact-Faktor 2019 (laut InCites Journal Citation Reports)	Punkte (laut Handreichung vom 25.11.2015)
1	Becker, Manuel (2019): When public principals give up control over private agents: The new independence of ICANN in internet governance, in: *Regulation & Governance* 13:4, S. 561-576, https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12250	3,862	4
2	Becker, Manuel und Simon Linder (2020): The unintended consequences of regulatory import: The Basel Accord's failure during the financial crisis, in: *Journal of European Public Policy*, Early View, https://www.tandfonline.com/doi/full/10.1080/13501763.2020.1725096	4,366	4
3	Becker, Manuel: Externalizing internal policies via conflict: The EU's indirect influence on international institutions, Invited to Revise and Resubmit at *Journal of European Public Policy* in May 2020	4,366	1

Der zweite Aufsatz wurde in Co-Autorenschaft mit Simon Linder verfasst. Die Beiträge der Autoren des zweiten Aufsatzes gestalten sich wie folgt. Die originäre Idee des zweiten Aufsatzes ist die des Verfassers dieser Dissertation. Ebenso wurde die Theorie vom Verfasser dieser Dissertation geschrieben, während die Datenerhebung und Analyse vom Co-Autor stammt. Es bleibt aber zu betonen, dass sowohl Theorie als auch Empirie in enger Kooperation und über den Austausch von Argumenten durch beide Autoren gemeinsam entwickelt wurden.

Kein Aufsatz wurde in Co-Autorenschaft mit einem Gutachter des Promotionsverfahrens erarbeitet. Dies erfüllt die Voraussetzung, dass höchstens bei einer Publikation ein Gutachter des Promotionsverfahrens an den zur kumulativen Promotion eingereichten Publikationen beteiligt sein darf.

Darüber hinaus verlangt die Handreichung, dass die Schriften hinreichend unabhängig voneinander sind und zugleich ein schlüssiges Forschungsprogramm erkennen lassen. Dies ist durch eine den Veröffentlichungen vorangestellte inhaltliche Einordnung der Schriften zu demonstrieren. Auf mindestens 30 Seiten sind die zentralen Ergebnisse und originären Beiträge der Aufsätze zum Forschungsstand darzustellen. Diese Vorgaben werden mit dem folgenden Rahmenpapier erfüllt.

1. Einleitung

Diese kumulative Dissertation befasst sich mit den Mechanismen der regulatorischen Konfliktentwicklung zwischen öffentlichen und privaten Organisationen in den internationalen Beziehungen. Private Regulierungsorganisationen spielen eine zunehmend wichtige Rolle bei der Bereitstellung internationaler Regeln, die von Marktakteuren befolgt werden (Green 2014; Mattli und Büthe 2011; Abbott und Faude 2020; Cutler 1999; Abbott et al. 2016b). Diese Proliferation privat formulierter Regeln und Standards ist politikfeldübergreifend zu beobachten. Beispiele sind der International Accounting Standards Board (IASB) im Bereich Finanzmarktregulierung, Zertifizierungsorganisationen wie der Marine Stewardship Council (MSC) im Umweltbereich oder die Internet Corporation for Assigned Names and Numbers (ICANN) im Bereich Internet Governance. Zugleich operieren private Organisationen nicht unabhängig von klassischen intergouvernementalen Organisationen wie der Welthandelsorganisation (WTO) oder öffentlich kontrollierten Gremien wie dem Basler Ausschuss für Bankenaufsicht (BCBS), sondern interagieren mit ihnen. Diese Entwicklung wirft Fragen zu den Beziehungen zwischen öffentlichen und privaten Organisationen in den internationalen Beziehungen auf, die von dieser Dissertation aufgegriffen werden. Die drei zu der Dissertation gehörenden Aufsätze lassen sich dabei unter der folgenden allgemeinen Forschungsfrage zusammenfassen: Was sind die Bedingungen und Mechanismen für konfliktäre Wechselwirkungen zwischen öffentlichen und privaten Organisationen und inwieweit führen diese Konflikte zu institutionellen Anpassungen?

Mit der Zunahme privater transnationaler Regeln setzt sich der Trend der institutionellen Fragmentierung in den internationalen Beziehungen fort. Als Reaktion auf die starke Proliferation intergouvernementaler Institutionen nach dem zweiten Weltkrieg und den damit einhergehenden systemischen Effekten für internationale Kooperation, hat die internationale Institutionenforschung den Begriff des Regimekomplexes eingeführt (Alter und Raustiala 2018; Drezner 2008; Alter und Meunier 2009; Orsini et al. 2013b; Biermann et al. 2009; Gehring und Faude 2013). Ein Regimekomplex wird definiert als eine Reihe sich partiell überlappender Institutionen, die in einem nicht-hierarchischen Verhältnis zueinander stehen und sich dauerhaft wechselseitig beeinflussen (Raustiala und Victor 2004, S. 279). Das Konzept des Regimekomplexes wurde über die letzten 15 Jahre herangezogen, um institutionelle Wechselwirkungen zwischen Institutionen in einem Politikfeld (Hofmann 2009; Pratt 2018) oder interdependenten Politikfeldern zu analysieren (Oberthür und Gehring 2006).

Die theoretische und empirische Literatur zu Regimekomplexen fokussiert sich dementsprechend sehr stark auf die institutionellen Wechselwirkungen zwischen intergouvernementalen Institutionen (Busch 2007; Gehring und Oberthür 2009; Pratt 2018; Hofmann 2018; Alter und Raustiala 2018). Gleichzeitig hat sich die institutionelle Landschaft seit 1990 dahingehend verändert, dass die Anzahl klassischer intergouvernementaler Institutionen relativ konstant blieb, während informelle und nicht-staatliche Governance-Formen exponentiell zugenommen haben (Abbott und Faude 2020; Abbott et al. 2016b). In dieser Hinsicht spielen insbesondere private Akteure wie NGOs, Unternehmensnetzwerke und private transnationale Regulierungsorganisationen eine immer wichtigere Rolle, da sie Regeln und Standards definieren, die von anderen Akteuren befolgt werden (Cutler 1999; Mattli und Büthe 2011; Abbott et al. 2016b; Green 2014).

Die Proliferation privater Regeln und Standards in den internationalen Beziehungen führt zu neuen Fragen: Wie lässt sich die Emergenz privater Organisationen erklären? Welche Effekte ergeben sich aus privater Regulierung für bereits existierende intergouvernementale Institutionen? Sind private Regulierungsorganisationen in ihrem Handeln unabhängig oder werden sie in ihrem Handeln durch öffentliche Institutionen eingeschränkt? Eine in der Literatur häufig vorzufindende Annahme ist die der institutionellen Komplementaritäten zwischen öffentlichen und privaten Regeln. Dieser Logik folgend orientieren sich private Akteure bei ihrer Regulierung an öffentlichen Regeln und Standards und füllen öffentliche Regulierungslücken (Green 2015; Büthe 2010, S. 22; Verbruggen 2013; Abbott et al. 2016b, S. 3). Obwohl Synergien zwischen öffentlichen und privaten Regeln in Regimekomplexen durchaus häufig vorkommen, können diese auch in direktem Konflikt stehen und negative Auswirkungen innerhalb des Regimekomplexes haben.

Die Rolle privater Regulierungsorganisationen in Regimekomplexen und deren institutionellen Wechselwirkungen mit intergouvernementalen Organisationen bildet eine Forschungslücke in der Literatur. Hinsichtlich der allgemeinen Rolle privater Akteure in Regimekomplexen argumentieren Alter und Meunier (2009, S. 17), dass mit der zunehmenden Komplexität internationaler Regeln auch die Rolle von Experten und nichtstaatlichen Akteuren an Bedeutung gewinnt. Diese können ihre Expertise nutzen, um Regierungen in ihrem Sinne zu beeinflussen. Orsini zeigt anhand des Einflusses in den Regimekomplexen “Forstwirtschaft” und “Genetische Ressourcen”, dass nichtstaatliche Akteure materielle, ideelle und organisatorische Macht nutzen können, um über neu bereitgestelltes Wissen einzelne internationale Institutionen in Regimekomplexen zu beeinflussen (Orsini 2013a). Private

Akteure können weiterhin öffentliche Strategien wie Forum-Shopping (Biermann et al. 2009, S. 22; Gómez-Mera 2016, S. 571), Regimeverlagerung und Regimeverknüpfung (Orsini 2013a) in Regimekomplexen nachahmen. Obwohl diese Arbeiten demonstrieren, wie private Akteure institutionelle Fragmentierung für sich nutzen können, um eigene Interessen zu verfolgen, so geht es hierbei weniger um private Regulierung als um klassische Einflussmöglichkeiten in internationalen Institutionen (Raustiala 1997; Skodvin und Andresen 2003; Tallberg et al. 2013). Mit anderen Worten: Diese Arbeiten untersuchen, wie nichtstaatliche Akteure auf der Akteursebene in Regimekomplexen handeln, klammern jedoch private Regeln als Elemente auf der Systemebene von Regimekomplexen aus und vernachlässigen wie diese mit öffentlichen Regeln interagieren.

Obwohl die Regimekomplex-Forschung insgesamt sehr staatszentriert ist (Gómez-Mera 2016, S. 571), hat das Thema der privaten Autorität in Regimekomplexen und die inhärenten Regulierungsinteraktionen zwischen privaten und öffentlichen Regeln zuletzt wachsende Aufmerksamkeit in der Literatur erhalten. Eberlein et al. (2014) konzeptualisieren "transnationale Governance Interaktionen" und stellen einen theoretischen Rahmen bereit, der einige Bezugspunkte für Argumente kleinerer Reichweite bietet (Gulbrandsen 2014; Overdevest und Zeitlin 2014; Cashore und Stone 2014; Bartley 2014). Green (2013) untersucht, anhand einer Netzwerkanalyse, wie sich private Institutionen zu öffentlichen Institutionen im Klima-Komplex verhalten. Green kommt zu dem Schluss, dass sich private Standards zur Messung von Treibhausgasemissionen am Kyoto-Protokoll ausrichten, sodass eine öffentliche Institution das Zentrum des Komplexes einnimmt. Zelli et al. (2017) analysieren, warum private Regelsetzer in manchen Regimekomplexen eine wichtige Rolle einnehmen, während sie dies in anderen Regimekomplexen nicht tun. Sie argumentieren, dass die Existenz privater Organisationen besonders von der zugrundeliegenden Problemstruktur sowie vom Verhältnis zwischen Nachfrage und Angebot privater Regeln abhängt. Green und Auld (2017) analysieren explizit über welche Kausalmechanismen es zu positiven Wechselwirkungen zwischen privaten und öffentlichen Regeln in Regimekomplexen kommen kann. In dieser Hinsicht identifizieren sie vier Mechanismen, durch die private Autorität die Problemlösungskapazitäten öffentlicher Institutionen steigern können.

Obwohl die oben zitierten Arbeiten explizit private Regulierungsorganisationen in theoretische Ansätze institutioneller Wechselwirkung und Regimekomplexe integrieren, bleiben insbesondere die negativen Wechselwirkungen zwischen privaten und öffentlichen Regeln unerforscht (Green und Auld 2017, S. 261). Diese kumulative Dissertation leistet dahingehend

einen Beitrag zur Literatur, indem sie unterschiedliche Kausalmechanismen und Bedingungen öffentlich-privater Regulierungskonflikte in Regimekomplexen analysiert.

Das Rahmenpapier ist folgendermaßen gegliedert: Kapitel 2 präsentiert die Struktur der kumulativen Dissertation und die Schwerpunkte der einzelnen Aufsätze. Kapitel 3 präsentiert anschließend den übergeordneten theoretischen Rahmen in drei Schritten. Zunächst wird im ersten Schritt das Konzept des Regimekomplexes mit seinen zentralen Kennzeichen vorgestellt. Nachfolgend werden im zweiten Schritt die Charakteristika privater Organisationen definiert und es wird hergeleitet, warum die aktuelle Literatur Schwierigkeiten hat, öffentlich-private Regulierungskonflikte zu erfassen. Im dritten Schritt werden dann die Bedingungen formuliert, unter denen es zu Regulierungskonflikten kommen kann. Kapitel 4 präsentiert das übergeordnete Forschungsdesign der Dissertation, bevor Kapitel 5 den Beitrag der einzelnen Aufsätze zur Literatur diskutiert.

2. Struktur der Dissertation

Ausgehend von der oben skizzierten Forschungslücke, legt diese Dissertation den Fokus auf die Mechanismen öffentlich-privater Regulierungsinteraktionen. Das vordergründige Interesse liegt dabei auf den negativen Wechselwirkungen, also öffentlich-privaten Regulierungskonflikten. In allen drei Aufsätzen geht es folglich im Kern um die Emergenz einer Konfliktentwicklung zwischen einer öffentlichen und einer privaten Organisation und den daraus resultierenden Effekten. Die Aufsätze analysieren unterschiedliche Kausalmechanismen der öffentlich-privaten Konfliktentwicklung. Zunächst einmal können öffentlich-private Wechselwirkungen dahingehend unterschieden werden, ob eine private Organisation Auslöser oder Ziel einer Interaktion mit einer öffentlichen Organisation ist (siehe Gehring und Oberthür 2009). Ausgehend davon ergeben sich unterschiedliche abhängige Variablen für die drei Aufsätze. Während in den Aufsätzen 1 und 3 öffentliche Organisationen Auslöser eines Regulierungskonflikts mit privaten Organisationen sind, geht es in Aufsatz 2 darum, wie private Organisationen die Effektivität öffentlicher Organisationen unterminieren können.

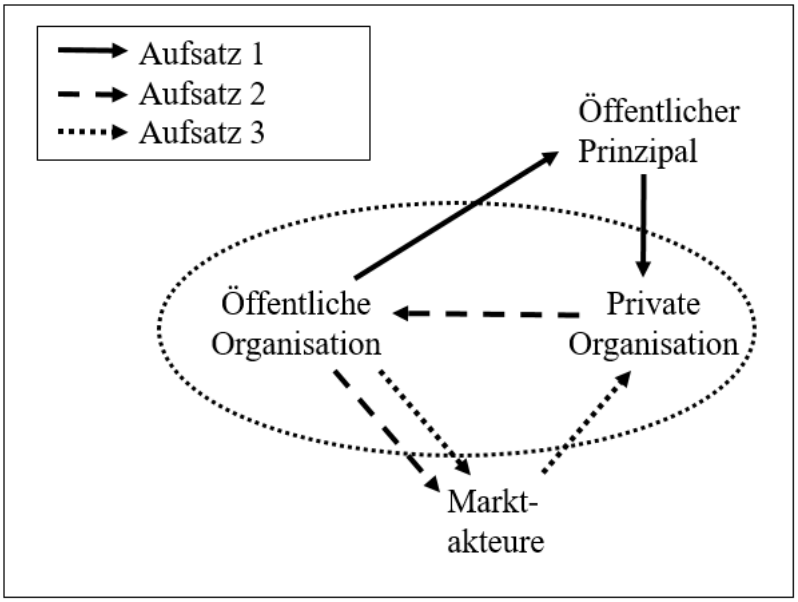
Aufsatz 1 untersucht, inwiefern Dynamiken in externen öffentlichen Organisationen wie der Internationalen Telekommunikationsunion (ITU) institutionelle Veränderungen in der privaten Internet Corporation for Assigned Names and Numbers (ICANN) ausgelöst haben. Obwohl ICANN eine private Regulierungsorganisation ist, bestand bis 2016 ein Delegationsverhältnis

zur US-Regierung. Dieses sicherte den USA als alleinigem Prinzipal ein wichtiges institutionelles Privileg in der Kontrolle von ICANN und eine wichtige Machtressource im Bereich Internet Governance. Das Aufgeben dieser Machtressource im Jahr 2016 stellt somit einen wichtigen, erklärungsbedürftigen Fall dar. Der Aufsatz argumentiert, dass Prinzipal-Agenten-Beziehungen nicht unabhängig von ihrer Umwelt bestehen, sondern auch durch externe Dynamiken beeinflusst werden. Wenn Delegationsverhältnisse manchen Staaten institutionelle Privilegien einräumen, haben außenstehende Staaten einen Anreiz, die Legitimität und Effektivität des privaten Agenten zu unterminieren, um privaten institutionellen Wandel durchzusetzen. Um die Legitimität und Effektivität des privaten Agenten aufrechtzuerhalten, haben öffentliche Prinzipale Anreize, die Kontrolle aufzugeben und privaten Stakeholdern zu überlassen.

Der dritte Aufsatz untersucht ebenfalls wie Dynamiken in öffentlichen Organisationen zu institutionellem Wandel in privaten Organisationen führen. Jedoch liegt hier das Augenmerk auf einem anderen Mechanismus. Indem öffentliche Organisationen auf das Verhalten wichtiger Marktakteure einwirken, welche für die Effektivität von privaten Regeln funktional relevant sind, können inhaltliche Veränderungen in einer öffentlichen Organisation zu privatem institutionellen Wandel führen. Ein durch eine öffentliche Organisation entstandener Regulierungskonflikt kann demnach die Effektivität einer privaten Organisation so untergraben, dass letztere Anreize hat, sich neu an der öffentlichen Organisation auszurichten und anzupassen. Dies wird an einem Regulierungskonflikt zwischen der EU und ICANN illustriert. Dieser Fall wird mit einem Regulierungskonflikt der EU mit dem UN-Sicherheitsrat verglichen, um zu überprüfen, ob der Mechanismus in gleicher Weise Regulierungskonflikte zwischen öffentlichen Organisationen erklären kann.

Anders als die Aufsätze 1 und 3 untersucht Aufsatz 2, inwiefern private Regulierungsorganisationen die Effektivität öffentlicher Organisationen beeinträchtigen können. Der Aufsatz argumentiert, dass öffentliche Organisationen in bestimmten regulatorischen Teilbereichen oftmals von privater Governance abhängig sind, was zu unbeabsichtigten Konsequenzen führen kann. Da private Organisationen dazu neigen, eigene private Ziele unabhängig von Gedanken institutioneller Komplementaritäten zu verfolgen, kann diese Abhängigkeit zu negativen Folgen für die Effektivität der öffentlichen Organisation führen. Dieses Argument wird anhand des Basler Ausschusses für Bankenaufsicht (BCBS) getestet, dessen Abhängigkeit vom International Accounting Standards Board (IASB) und privaten Ratingagenturen zu Verstärkungen der Finanzkrise 2008 führte.

Grafik 1 fasst die allgemeine Struktur der kumulativen Dissertation, die Schwerpunkte der einzelnen Aufsätze sowie deren inhaltliche Beziehung zueinander zusammen. Zudem werden die unterschiedlichen Kausalmechanismen öffentlich-privater Konfliktentwicklung gezeigt, welche in den einzelnen Aufsätzen analysiert werden. Der gestrichelte Kreis verdeutlicht, dass es im Kern jedes Aufsatzes um die Beziehung zwischen einer öffentlichen und einer privaten Organisation geht. Aufsatz 1 untersucht demnach wie konfliktäre Dynamiken in einer öffentlichen Organisation zu Präferenzänderungen eines öffentlichen Prinzipals führen, wodurch dieser als Reaktion darauf private institutionelle Änderungen einläutet. In Aufsatz 3 wird ein regulatorischer Konflikt durch eine öffentliche Organisation ausgelöst, indem sie durch ihre Regeln das Verhalten von Marktakteuren so ändert, dass dies die private Organisation unterminiert. Aufsatz 2 fokussiert sich darauf, wie die Abhängigkeit von privater Governance die Effektivität einer öffentlichen Organisation, Marktakteure zu regulieren, negativ beeinflusst.



Grafik 1: Übersicht und Struktur der Dissertation

Somit befassen sich alle drei Aufsätze mit der Emergenz und den Effekten öffentlich-privater Konfliktentwicklung und sind somit thematisch hinreichend miteinander verbunden. Gleichzeitig analysieren die Aufsätze jeweils originäre Kausalmechanismen konfliktärer Wechselwirkungen, sodass sie zudem hinreichend unabhängig voneinander sind.

3. Theoretischer Rahmen

Dieses Kapitel stellt den übergeordneten theoretischen Rahmen der Dissertation vor. Alle drei Aufsätze teilen bestimmte theoretische Überzeugungen über die Rolle von internationalen Institutionen in den internationalen Beziehungen. Der übergeordnete Rahmen sowie die spezifizierten theoretischen Argumente der Aufsätze sind der Theorieschule des neoliberalen Institutionalismus zuzuordnen. Ausgehend von rationalen Akteuren, die der Logik der Konsequenzen folgen und Kosten-Nutzen Kalkulationen betreiben, folgen alle drei Aufsätze dem neoinstitutionalistischen Argument, dass internationale Institutionen aus einem funktionalen Kooperationsinteresse heraus gegründet werden. Internationale Institutionen steigern demnach die Erwartungssicherheit in den internationalen Beziehungen und stabilisieren durch die Einschränkung der Handlungsalternativen Kooperation zwischen den Akteuren (Keohane 1984; Koremenos et al. 2001; Axelrod und Keohane 1985; Koremenos 2016).

Darüber hinaus folgen alle Aufsätze einem Prinzipal-Agenten-Modell internationaler Organisationen (Hawkins et al. 2006; Pollack 1997; Tallberg 2002), welches ebenfalls der Theorieschule des neoliberalen Institutionalismus zuzuordnen ist. Dieses Modell konzipiert Organisationen als Agenten, die im Auftrag ihrer Mitglieder bestimmte Funktionen erfüllen. Die Mitglieder stellen folglich den Prinzipal dar, welcher bestimmte Aufgaben und Kompetenzen an die Organisation delegiert (Nielson und Tierney 2003, S. 245). Zentrale Annahme des Prinzipal-Agenten Modells ist, dass Agenten eigene, von den Prinzipalen unabhängige Präferenzen, verfolgen. Aus diesem Grund installieren Prinzipale Kontrollmechanismen, um ein Abweichen des Agenten von ihren Präferenzen einzuschränken.

Der theoretische Rahmen wird in drei Schritten entwickelt. Im ersten Schritt wird auf das Konzept des Regimekomplexes und die zentralen Effekte eingegangen, die mit Regimekomplexen einhergehen. Im zweiten Schritt werden die zentralen Charakteristika privater Regulierungsorganisationen vorgestellt. Zudem wird hergeleitet, warum es der aktuellen Literatur zu Regimekomplexen schwerfällt, private Regulierungsorganisationen zu integrieren. Im dritten Schritt wird das übergeordnete Argument dargelegt.

3.1. *Regimekomplexe und institutionelle Wechselwirkungen*

Regimekomplexe werden definiert als eine Reihe sich partiell überlappender Institutionen, die in einem nicht-hierarchischen Verhältnis zueinander stehen und sich dauerhaft wechselseitig beeinflussen (Raustiala und Victor 2004, S. 279). Ausgehend von dieser in der Literatur dominanten Definition können Regimekomplexen zwei zentrale Attribute zugeschrieben werden: eine funktionale Überlappung zwischen den elementaren Institutionen, die zu einem Komplex gehören, sowie die fehlende rechtliche Hierarchie zwischen ihnen.

Eine funktionale Überlappung zwischen den Elementen eines Regimekomplexes ergibt sich zum einen durch eine partielle Überlappung in der Mitgliedschaft, welche laut Literatur eine notwendige Bedingung für institutionelle Wechselwirkungen darstellt. So ist zwar möglich, dass Institutionen ohne überlappende Mitgliedschaft kognitiv voneinander lernen (Gehring und Oberthür 2009, S. 134), jedoch ist die gegenseitige Beeinflussung der Effektivität unwahrscheinlich (Gehring und Faude 2014, S. 474). Insbesondere Regulierungskonflikte sollten nicht auftreten, da potentiell widersprechende Regeln und Standards von unterschiedlichen Mitgliedern implementiert werden. Zum anderen ergeben sich funktionale Überlappungen dadurch, dass Institutionen im selben Politikfeld (Busch 2007), bzw. in interdependenten Politikfeldern operieren (Eckersley 2004; Oberthür und Gehring 2006).

Aus der Definition von Raustiala und Victor ergibt sich mit der fehlenden Hierarchie zwischen den Elementen ein weiteres zentrales Merkmal von Regimekomplexen. So wird im Völkerrecht einzelnen Institutionen kein rechtlicher Vorrang vor anderen Institutionen eingeräumt (Alter und Meunier 2009, S. 13). Dadurch kommen konkurrierende Regelungsansprüche zwischen Institutionen und deren Mitgliedstaaten um den Vorrang bestimmter Regeln im Regimekomplex auf (Alter und Raustiala 2018, S. 332).

Regimekomplexe haben sowohl Auswirkungen auf der Mikroebene für die Akteure als auch systemische Effekte. Auf der Akteursebene ergeben sich durch Regimekomplexe neue strategische Handlungsmöglichkeiten. Hier wird gemeinhin zwischen Forum-Shopping, Regimeverlagerung sowie der kompetitiven institutionellen Neugründung unterschieden. Da den Akteuren unterschiedliche Foren zur Verfügung stehen, die variierende Regeln definieren, haben sie die Möglichkeit, zwischen ihnen auszusuchen (Mondré 2015). Forum-Shopping wird definiert als Strategie „where actors select the international venues based on where they are best able to promote specific policy preferences, with the goal of eliciting a decision that favors their interests“ (Alter und Meunier 2009, S. 16). Aufgrund der unterschiedlichen Regeln sich

überlappender Institutionen kann demnach erwartet werden, dass sich die Akteure bei der Auswahl hinsichtlich der Entwicklung und Implementierung von Regeln an ihren jeweiligen Kosten und Nutzen orientieren (Henning 2017; Murphy und Kellow 2013, S. 140).

Regimeverlagerungen und kompetitive institutionelle Neugründungen unterscheiden sich dahingehend von Forum-Shopping, dass erstere das Ziel haben, neue institutionelle Überlappungen inklusive Regelungskonflikte zu etablieren. Regimeverlagerung beschreibt Situationen, in denen „states and nonstate actors relocate rulemaking processes to international venues whose mandates and priorities favor their concerns and interests“ (Helfer 2009, S. 39). Steht Staaten kein Forum zur Verfügung, welches sich in seinem Ziel und seinen Regeln anpassen lässt, können Akteure immer noch eine neue Institution gründen und damit einen bewussten Regelkonflikt herbeiführen (Morse und Keohane 2014, S. 398). Regimekomplexe ermöglichen damit forenübergreifende Strategien, welche neue institutionelle Wechselwirkungen herbeiführen.

Hinsichtlich institutioneller Wechselwirkungen legt die Dissertation den Fokus auf regulatorische Interaktionen und klammert bewusst Wechselwirkungen zwischen operativen Organisationen aus. Regulatorische Interaktionen ergeben sich, wenn sich Institutionen über ihre formulierten Regeln und Standards gegenseitig in ihrem Inhalt, Operationen und Performanz beeinflussen (Bradnee et al. 2008, S. 3). Regulatorische Wechselwirkungen können dabei anhand unterschiedlicher Mechanismen ablaufen (Gehring und Oberthür 2009) und zu institutionellen Synergien oder Konflikten führen (Biermann et al. 2009).

Die Komplexität der Themenbereiche, die Interdependenz zwischen ihnen sowie die unterschiedlichen Interessenkonstellationen der Akteure erschweren es, eine gewisse Kohärenz und Koordination zwischen sich überlappenden Institutionen aufrechtzuhalten (Raustiala und Victor 2004, S. 300). Daraus folgt, dass Regimekomplexe zu Regulierungskonflikten tendieren (Abbott et al. 2015, S. 7). Diese Dissertation zieht die Definition von Rosendal heran, welche Konflikte definiert als Situationen, in denen „the overall policy objectives as well as the obligations emanating from overlapping international agreements fail to complement and enhance each other - or worse, when they are mutually exclusive“ (2001, S. 97). Regulatorische Konflikte treten somit in den Überlappungsbereichen zwischen den Institutionen auf, die sich negativ auf die Steuerungswirkung einzelner Institutionen und somit auf Kooperation auswirken können (Gómez-Mera 2016, S. 574).

3.2. *Die Charakteristika privater Regulierungsorganisationen*

Private Regulierungsorganisationen besitzen die Autorität Regeln und Standards zu definieren, die von relevanten Akteuren in den internationalen Beziehungen befolgt werden (Green 2014, S. 29). Dadurch unterscheiden sich private Regulierungsorganisationen von anderen Formen des privaten Einflusses wie Lobbying. Gleichzeitig werden Fälle ausgeklammert, in denen private Akteure zwar in einzelnen Phasen des Regulierungsprozesses, wie Überwachung oder Durchsetzung, involviert sind (siehe Abbott und Snidal 2009), jedoch keine eigenen Regeln und Standards definieren, die von anderen Akteuren befolgt werden.

Es lassen sich zwei Arten privater Autorität unterscheiden: delegierte und unternehmerische private Autorität. Delegierte private Autorität besteht in Fällen, in denen eine private Organisation die Autorität der Regelsetzung von öffentlicher Seite, wie z.B. Staaten oder intergouvernementalen Organisationen, delegiert bekommt. Fehlt diese Delegation, dann liegt unternehmerische private Autorität vor, welche Ähnlichkeiten zur privaten Selbstregulierung aufweist (Green 2014, S. 33ff.).

Einige Arbeiten in der Literatur ziehen Angebot-Nachfrage Modelle heran, um die Emergenz privater Regeln zu erklären. So muss zunächst einmal eine Nachfrage nach privaten Regeln bestehen, die sich beispielsweise aus einer höheren Flexibilität privater Organisationen gegenüber öffentlichen Institutionen ergibt (Büthe 2010, S. 11). Gleichzeitig muss es auf der Angebotseite private Akteure geben, die die notwendige Expertise in einem Politikfeld besitzen und als potentielle Regulierer fungieren können (Green 2014, S. 40).

Es gibt drei systematische Unterschiede zwischen privaten Regulierungsorganisationen und klassischen intergouvernementalen Organisationen, die für diese Dissertation relevant sind. *Erstens* werden private und öffentliche Organisationen von unterschiedlichen Prinzipalen kontrolliert. Während öffentliche Organisationen und öffentliche Gremien wie der Basler Ausschuss für Bankenaufsicht (BCBS) von Staaten als kollektivem Prinzipal kontrolliert und haftbar gemacht werden (Grant und Keohane 2005; Nielson und Tierney 2003; Hawkins et al. 2006), besteht der Prinzipal bei privaten Organisationen aus privaten oder zivilgesellschaftlichen Akteuren. So wurde beispielsweise der Marine Stewardship Council (MSC) vom World Wide Fund for Nature (WWF) und Unilever gegründet und bringt unterschiedlichste private Stakeholder aus den Bereichen Meeresfrüchteindustrie, Naturschutzgemeinschaft, dem Marktsektor, Wissenschaft sowie NGOs aus dem

Umweltbereich zusammen.[1] Der International Accounting Standards Board (IASB) ist ein privates Gremium, welches sich aus Rechnungslegungsexperten zusammensetzt. Die Internet Corporation for Assigned Names and Numbers (ICANN) ist eine Multistakeholder-Organisation, die unterschiedlichste Akteure aus der Internetgemeinschaft zusammenbringt, darunter z.B. Internetprovider, Wirtschaftsakteure und nicht kommerzielle Interessen (Kleinwächter 2000, S. 554).

Für private Agenten, die ihre Autorität der Regelsetzung von Staaten erhalten, ergibt sich die Situation, dass sie zwei Prinzipalen, einem öffentlichen und einem privaten, gleichzeitig antworten (Mattli und Büthe 2005a, 2005b). Unternehmerische Organisationen, die ihre Autorität nicht von der öffentlichen Seite delegiert bekommen, antworten wiederum ausschließlich einem privaten Prinzipal. Hieraus ergeben sich für private Organisationen bestimmte Anreize, öffentliche Ziele zu unterstützen oder von ihnen abzuweichen, die im nächsten Kapitel erläutert werden.

Zweitens nutzen private Organisationen teilweise andere Instrumente, um ihre Regeln und Standards durchzusetzen. So können sie die Kraft der Märkte nutzen "to influence company evaluations through economic carrots (the promise of market access or potential price premiums) and sticks (public and market campaigns aimed at pressuring companies to support certification)" (Cashore et al. 2004, S. 4). Sind private Organisationen nicht in der Lage, ihre Regeln selbstverantwortlich durchzusetzen, dann sind sie meist auf Staaten und öffentliche Organisationen und deren Kollaboration angewiesen (Abbott und Snidal 2013, S. 97; Büthe 2010, S. 22).

Ein *dritter* Unterschied ist, dass private Organisationen in der Regel spezialisierter sind als öffentliche Organisationen. Die Literatur zur Organisationsökologie betont, dass limitierte Kapazitäten in einem Politikfeld dazu führen, dass diese dahingehend aufgeteilt werden, dass übergreifende und spezialisierte Organisationen unterschiedliche Nischen besetzen (Carroll und Swaminathan 2000; Carroll et al. 2002). Dieses Argument steht im Einklang mit der Beobachtung, dass eine zentrale Quelle der Legitimität privater Organisationen ihre Expertise ist (Green 2014, S. 40). Private Organisationen können mitunter über Expertenwissen und Ressourcen in sich schnell ändernden Politikbereichen verfügen, die öffentliche Organisationen nicht besitzen (Cafaggi und Renda 2012, S. 5). Spezialisierte Organisationen können jedoch gleichzeitig zu Isolation von ihrer institutionellen Umwelt neigen, sodass sie sich ausschließlich

[1] https://www.msc.org/about-the-msc/our-governance.

auf ihr eigenes Ziel fokussieren, während Sekundäreffekte auf andere Politikbereiche ausgeblendet werden.

Obwohl die oben genannten Faktoren dazu führen können, dass private Organisationen von öffentlichen Zielen abrücken, so stellt die Regimekomplex-Literatur keine Erklärung bereit, wie konfliktäre Wechselwirkungen zwischen privaten und öffentlichen Regeln zustande kommen. Aufgrund der fehlenden Überlappung in der Mitgliedschaft sollten Konflikte ausbleiben, da inkonsistente Regeln nicht von den gleichen Mitgliedern entwickelt werden. Um das Phänomen öffentlich-privater Regulierungskonflikte zu erfassen, bietet diese Dissertation deshalb eine neue Perspektive, welche sich weniger auf Überlappungen in der Mitgliedschaft konzentriert, sondern auf Überlappungen in den Marktakteuren, die von öffentlicher und privater Seite reguliert werden.

3.3. *Öffentlich-private Regulierungskonflikte in Regimekomplexen*

Wie in Abschnitt 3.1. ausgeführt, haben Regimekomplexe und die in ihnen inhärenten institutionellen Wechselwirkungen Auswirkungen auf die Effektivität einzelner Institutionen und bieten den Akteuren neue strategische Handlungsoptionen auf der Mikroebene. Jedoch hat die Regimekomplex-Literatur Probleme, private Regulierung zu integrieren, da zwischen privaten und öffentlichen Organisationen keine Überlappungen in der Mitgliedschaft bestehen. Auf der Systemebene ist es schwer, öffentlich-private Regulierungskonflikte zu erklären, da widersprüchliche Regeln von unterschiedlichen Akteuren definiert werden. Auf der Akteursebene ist es wiederum auf Basis der vorhandenen Literatur schwierig, die Delegation an private Organisationen als Instrument strategischen Handelns innerhalb eines Regimekomplexes zu erfassen.

Diese Dissertation führt eine Perspektive auf institutionelle Wechselwirkungen ein, welche den Fokus auf Überlappungen der Regulierungsziele legt statt auf Mitglieder, um regulatorische Konflikte zwischen privaten und öffentlichen Organisationen auf der Systemebene zu erfassen. Gemäß dieser Perspektive können öffentlich-private Konflikte entstehen, wenn beide Governance-Formen dieselben Marktakteure regulieren und sich dementsprechend in ihren Regulierungszielen überlappen.

Öffentliche Organisationen verfolgen bestimmte inhaltliche Ziele wie internationale Finanzstabilität, den Schutz bedrohter Fischarten oder Sicherheit am Arbeitsplatz. Während

öffentliche Organisationen in der Regel Kooperation zwischen Staaten ermöglichen sollen, können sie nur Effektivität erreichen, wenn ihre Mitgliedstaaten private Marktakteure regulieren (Abbott und Snidal 2013, S. 99). Beispiele für jene privaten Marktakteure sind Privatbanken und Versicherer im Bereich der internationalen Finanzstabilität, Industriekonzerne im Bereich des globalen Klimaschutzes oder Fischereien im Bereich des Schutzes von Fischbeständen.

Private Regulierungsorganisationen adressieren Regulierungsziele entweder direkt oder indirekt. Direkte Regulierung erfolgt, wenn private Organisationen auf Instrumente wie "Naming und Shaming" oder Marktsanktionen zurückgreifen können, um Marktakteuren Anreize zu schaffen, sich an private Regeln und Standards zu halten (Abbott et al. 2016b, S. 25). Indirekte Regulierung erfolgt hingegen, wenn private Organisationen nicht auf diese Instrumente zurückgreifen können und stattdessen auf öffentliche Implementation angewiesen sind (Büthe 2010, S. 22). In beiden Fällen kann es vorkommen, dass private und öffentliche Organisationen dieselben Marktakteure entsprechend ihrer individuellen Ziele und Regeln regulieren.

Wie bereits in Abschnitt 3.1. dargelegt, müssen Überlappungen nicht zwangsläufig zu regulatorischen Konflikten führen, sondern können sich auch durch Synergien auszeichnen. Sollte eine öffentliche Organisation beispielsweise Probleme haben, wichtige Marktakteure zu regulieren, können private Organisationen von sich aus einspringen (Green 2014, S. 34), und versuchen, jene Akteure über andere Instrumente zu beeinflussen. So bestehen beispielsweise Synergien zwischen der öffentlichen Food and Agriculture Organization (FAO) und dem privaten MSC. Der FAO fehlen effektive Instrumente, um das Ziel des nachhaltigen Fischfangs zu erreichen, sodass sie auf "Soft Governance"-Instrumente wie den nichtbindenden "Code of Conduct for Responsible Fisheries" zurückgreifen muss. Der MSC schafft Synergien mit der FAO, indem er Marktanreize für Fischereien schafft, sich stärker am Ziel der Nachhaltigkeit auszurichten, um das MSC-Siegel zu erhalten (Constance und Bonanno 2000).

Die gleichzeitige Regulierung derselben Marktakteure kann jedoch auch zu Regulierungskonflikten führen, wenn sich öffentliche und private Regeln nicht komplementieren. Wenn private Regulierung nicht mit den Zielen öffentlicher Organisationen koordiniert ist, kann sie von Marktakteuren ein Verhalten einfordern, welches nicht im Einklang mit einem öffentlichen Ziel ist. Die gleichzeitige Einhaltung durch Marktakteure verändert dann die Wirkung öffentlicher Regeln, bzw. private und öffentliche Regeln

widersprechen sich derart, dass sie nicht gleichzeitig von den Marktakteuren eingehalten werden können.

Alle drei Aufsätze gehen davon aus, dass die Emergenz von Synergien oder Konflikten zwischen privaten und öffentlichen Organisationen maßgeblich von der Konvergenz der inhaltlichen Ziele abhängt (Mills 2016, S. 45). Wenn private Organisationen die inhaltlichen Ziele öffentlicher Organisationen teilen (z.B. die Reduzierung von Treibhausgasen in der Atmosphäre), dann haben sie Anreize, Regeln zu setzen, welche öffentliche Regulierung komplementieren. Private Regulierung führt dann zu einer Verhaltensveränderung von Marktakteuren, die positive Externalitäten verursacht. Die Wirkung öffentlicher Regeln wird dann maximiert oder es werden sogar öffentliche regulatorische Defizite ausgeglichen. Überlappen sich private und öffentliche Organisationen hinsichtlich der adressierten Marktakteure, verfolgen jedoch divergierende inhaltliche Ziele, dann steigt die Wahrscheinlichkeit der unkoordinierten Regelsetzung, die zu einem Konflikt führen kann. Private Regulierung erwartet dann ein Verhalten von Marktakteuren welches ein öffentliches Regulierungsziel unterlaufen würde. Zwei Aspekte sind in dieser Hinsicht wichtig: *Erstens*, private Organisationen adressieren in der Regel nur eine Teilmenge an Marktakteuren, die für ein öffentliches Ziel essentiell sind. Private CO_2-Labels versuchen beispielsweise Anreize für Industrieunternehmen zu schaffen, umweltfreundlichere Produktionsweisen zu installieren (Duran 2015). Sie regulieren jedoch keine weiteren Akteure, die für den globalen Klimaschutz wichtig sind. *Zweitens* ist es möglich, dass der Einfluss privater Regulierung auf Marktakteure von Staat zu Staat unterschiedlich stark ist (siehe Schleifer und Sun 2018), da sich einzelne Staaten beispielsweise weigern, private Regeln zu implementieren oder private Organisationen Probleme haben, bestimmte Staaten zu umgehen.

Abschnitt 3.2. hat bereits Faktoren abgeleitet, welche erklären können, warum private Organisationen von öffentlichen Regulierungszielen abrücken und es zu beabsichtigten oder unbeabsichtigten Konflikten mit öffentlichen Regeln kommen kann. Da private Organisationen von privaten Prinzipalen kontrolliert werden, haben sie Anreize, private inhaltliche Ziele auf Kosten öffentlicher Ziele zu verfolgen, wodurch es bei Überlappungen in den Marktakteuren zu Konflikten kommen kann. Außerdem handelt es sich bei privaten Organisationen in der Regel um Akteure mit Spezialwissen über bestimmte regulatorische Teilfragen, sodass sie zur Isolation von ihrer institutionellen Umwelt neigen. Fokussieren sich private Organisationen hauptsächlich auf ihr eigenes Ziel, dann können sie Regeln definieren, welche zwar für ihr eigenes inhaltliches Ziel funktional sind, jedoch negative Sekundäreffekte für öffentliche

Organisationen zur Folge haben oder sogar einen offenen Konflikt auslösen. Dieses Argument der privaten Isolation wird explizit in Aufsatz 2 entwickelt.

Auf der Akteursebene wird in Aufsatz 1 argumentiert, dass die Delegation von Autorität an unabhängige private Regulierungsorganisationen eine strategische institutionelle Wahl (Jupille et al. 2013) in einem Regimekomplex darstellen kann. Es ist bekannt, dass internationale Institutionen die Machtverhältnisse der Mitgliedstaaten widerspiegeln (Krasner 1991). In dieser Hinsicht können auch Delegationsverhältnisse Macht wiederspiegeln, indem sie mächtigen Staaten Privilegien bei der Kontrolle privater Agenten einräumen. Dies kann jedoch zu Versuchen der Regimeverlagerung von herausfordernden Staaten führen, die diese Privilegien nicht akzeptieren (Zangl et al. 2016; Morse und Keohane 2014).

Um die Erfolgsaussichten von Regimeverlagerung in eine intergouvernementale Organisation einzuschränken, können etablierte Mächte die Kontrolle und damit die institutionellen Privilegien aufgeben und in den Händen des privaten Prinzipals lassen. Sie gehen damit das in Abschnitt 3.2. dargelegte Risiko ein, dass der unabhängige private Agent von öffentlichen Zielen abrückt, um die Interessen des privaten Prinzipals zu verfolgen. Dies kann jedoch eine strategische Inkaufnahme darstellen, wenn die Delegation an eine intergouvernementale Organisation mit größeren Kosten verbunden wird. Staaten sollten dann Autorität in den Händen unabhängiger privater Agenten gegenüber intergouvernementalen Organisationen bevorzugen, wenn sie davon ausgehen, dass eine größere Kontrolle von Staaten mit anderen Präferenzen in einer öffentlichen Organisation zu stärkeren inhaltlichen Veränderungen führt als Autorität in den Händen eines unabhängigen Privatakteurs. Somit kann die institutionelle Wahl für einen privaten Agenten nicht als Entscheidung interpretiert werden, die unabhängig von der institutionellen Umwelt getroffen wird. Vielmehr können Staaten unabhängige Privatorganisationen aus strategischen Gründen nutzen, um einen „Lock-in“ bestimmter Politikinhalte zu erreichen und die Rolle konkurrierender Organisationen in einem Regimekomplex zu schwächen.

4. Forschungsdesign

Die kumulative Dissertation wählt ein deduktives Vorgehen der Theoriebildung für die einzelnen Aufsätze. Im Vordergrund des Erkenntnisinteresses stehen kausale Mechanismen. Der Begriff des kausalen Mechanismus wird in der Literatur nicht einheitlich definiert

(Mahoney 2015, S. 206). Die Dissertation greift auf die von Beach und Pedersen (2013, S. 29) bereitgestellte Definition zurück, welche Kausalmechanismen definieren „as a theory of a system of interlocking parts that transmits causal forces from X to Y“, wobei Y die Wirkung und X die erklärende kausale Ursache darstellen. Auf Basis dieses Verständnisses sollten kausale Mechanismen sparsam entwickelt werden, sodass theoretisierte Mechanismen nur diejenigen Schritte beinhalten, welche essentiell dafür sind, dass eine Ursache eine bestimmte Wirkung entfalten kann (Beach und Pedersen 2013, S. 31).

Die Untersuchungseinheit in allen Aufsätzen ist ein Mechanismus der regulatorischen Konfliktentwicklung zwischen einer öffentlichen und einer privaten Organisation, wobei die Aufsätze unterschiedliche Mechanismen identifizieren. Die Dissertation nutzt dabei ein Forschungsdesign mit kleiner Fallzahl. Ein solches Forschungsdesign hat bestimmte Vor- und Nachteile gegenüber Designs mit großer Fallzahl, welche hauptsächlich auf inferenzstatistische Methoden zurückgreifen. Da das Erkenntnisinteresse der Dissertation jedoch auf den Kausalmechanismen öffentlich-privater Konfliktentwicklung liegt, ist ein Design mit geringer Fallzahl vorzuziehen, da die Analyse von Kausalität zwischen zwei Variablen tiefgreifendes Fallwissen erfordert (Gerring 2007, S. 43ff.).

Innerhalb der Fallstudien wird in allen drei Aufsätzen auf die qualitative Methode des Process Tracing zurückgegriffen, um die Mechanismen öffentlich-privater Konfliktentwicklung zu testen, bzw. um diese zu illustrieren (Beach und Pedersen 2013, 2019; Mahoney 2015). Anders als weitere qualitativen Methoden, die den Fokus auf das Testen von kausalen Effekten von Variablen legen (King et al. 1994), wird Process Tracing herangezogen, um die kausalen Mechanismen zwischen unabhängigen Variablen und deren Wirkung offenzulegen (George und Bennett 2005, S. 206f.). Dadurch unterscheidet sich Process Tracing von anderen fallstudienbasierten Methoden „[as it] seeks to make within-case inferences about the presence/absence of causal mechanisms […], whereas most small-n methods attempt cross-case inferences about causal relationships“ (Beach und Pedersen 2013, S. 4). Process Tracing interessiert sich also weniger für potentielle Korrelationen zwischen zwei Variablen, sondern vielmehr dafür zu identifizieren, wie eine Ursache und Wirkung kausal miteinander verbunden sind (Beach und Pedersen 2013, S. 4f.).

Während alle drei Aufsätze der Dissertation Process Tracing nutzen, um Mechanismen öffentlich-privater Regulierungskonflikte in Regimekomplexen zu identifizieren, so nutzen die Aufsätze aufgrund ihrer variierenden Forschungsabsichten unterschiedliche Varianten des Process Tracing. Da Aufsatz 1 das Ziel verfolgt, einen besonders interessanten und

erklärungsbedürftigen Fall zu analysieren (Warum hat die US-Regierung die hierarchische Kontrolle über ICANN abgegeben?), nutzt er die „Explaining-outcome“ Variante des Process Tracing. Das Ziel dieser Variante besteht darin

> „[to] craft a minimally sufficient explanation of a particular outcome, with sufficiency defined as an explanation that accounts for all of the important aspects on an outcome with no redundant parts being present“ (Beach und Pedersen 2013, S. 18).

Explaining-outcome Process Tracing stützt sich stark auf die Kombination unterschiedlicher Mechanismen, um einen erklärungsbedürftigen Fall so gut und ausreichend wie möglich zu erklären. Dies führt oft dazu, dass sich nur Teile des theoretischen Arguments auf andere Fälle generalisieren lassen, da einzelne Aspekte des Mechanismus fallspezifisch sind. Die Analyse eines erklärungsbedürftigen Einzelfalls macht es zudem notwendig auf Alternativerklärungen zu testen, um die in der Analyse gezogenen Schlussfolgerungen zu stärken (Beach und Pedersen 2013, S. 19f.).

Aufsätze 2 und 3 nutzen wiederum die „Theory-testing“-Variante des Process Tracing, um das Potential weiterer deduktiv hergeleiteter Mechanismen öffentlich-privater Konfliktentwicklung zu untersuchen. Diese Variante setzt im ersten Schritt voraus, dass Ursache und Wirkung definiert werden, bevor der Mechanismus zwischen ihnen theoretisiert wird (Beach und Pedersen 2019, S. 257). Anschließend werden empirische Implikationen aus der Theorie abgeleitet, die dann die Analyse der Fallstudien leitet. In dieser Hinsicht schlagen Beach und Pedersen vor, typische Fälle auszuwählen, um zu identifizieren, ob und wie ein Mechanismus zwischen X und Y operiert (Beach und Pedersen 2019, S. 246). Aufsätze 2 und 3 wählen deshalb jeweils zwei typische Fälle für die jeweiligen Mechanismen aus, in denen Ursache und Wirkung sowie die Bedingungen vorhanden sind, welche es den Mechanismen erlauben zu wirken.

5. Forschungsergebnisse und zentrale Implikationen

In diesem fünften Kapitel werden die einzelnen Aufsätze und die zentralen Forschungsergebnisse präsentiert. Hierzu wird zunächst auf die Aufsätze im Einzelnen inklusive ihrer Forschungsfragen, ihren spezifischen theoretischen Argumenten und ihren Ergebnissen eingegangen. Anschließend werden die zentralen Implikationen für Regimekomplexe zusammengefasst. Im dritten Unterkapitel werden die zentralen Implikationen für weitere theoretische Debatten diskutiert, die aus den drei Aufsätzen abgeleitet

werden können. Abschließend gibt das Rahmenpapier einen Ausblick darüber, inwieweit die Dissertation Ansatzpunkte für weitere Forschung liefert.

5.1. *Forschungsergebnisse der einzelnen Aufsätze*

Der Ausgangspunkt des ersten Aufsatzes ist ein empirisches Puzzle: Im Jahr 2016 ließ die US-Regierung einen Delegationsvertrag mit der privat organisierten Internet Corporation für Assigned Namens and Numbers (ICANN) auslaufen, wodurch ICANN vollprivatisiert wurde (Wyatt 2014). Dies ist besonders erklärungsbedürftig, da die USA hiermit auf ein wichtiges Machtinstrument in einem immer wichtigeren Politikfeld, Internet Governance, verzichtet. Auch aus theoretischer Sicht ist die Privatisierung ICANNs erklärungsbedürftig. Mit der Privatisierung verliert die USA als öffentlicher Prinzipal die Möglichkeit, ICANN zu kontrollieren, und geht somit das Risiko ein, dass eine unkontrollierte private Organisation von den vorigen Politikinhalten abrückt. Der Fall kann somit nicht von der Prinzipal-Agenten-Theorie (Hawkins et al. 2006; Nielson und Tierney 2003; Pollack 1997) erklärt werden.

Der Aufsatz argumentiert, dass Prinzipal-Agenten Beziehungen nicht als separate institutionelle Designs erfasst werden können, da sie Teil einer institutionellen Umwelt sind und mit anderen Institutionen interagieren. Delegationsverhältnisse können bestimmten Staaten institutionelle Privilegien bei der Kontrolle des Agenten einräumen. Mächtige Staaten, die nicht Teil des Prinzipals sind, könnten dann in externen Organisationen versuchen, die Legitimität und Effektivität des privaten Agenten in Form von Regimeverlagerung herauszufordern, um Druck auf den Status-Quo auszuüben und institutionelle Reformen durchzusetzen (Zangl et al. 2016; Morse und Keohane 2014; Urpelainen und van de Graaf 2015). Öffentliche Prinzipale befinden sich dann in einem Dilemma: Geben sie den Herausforderern mit konträren Präferenzen die gleichen institutionellen Kontrollprivilegien über den Agenten, könnten diese das als Hebel nutzen, um auf den Agenten einzuwirken; geben sie ihre Kontrollprivilegien auf, dann erhält der private Agent größeren Spielraum, seine eigenen, bzw. die Präferenzen des privaten Prinzipals zu verfolgen (Mattli und Büthe 2005a, 2005b). Bestehende Mächte sollten sich dann für eine Aufgabe ihrer Privilegien entscheiden, wenn sie davon ausgehen, dass ein unkontrollierter Agent weniger zu regulatorischen Änderungen neigt als ein Agent, der zusätzlich durch andere Staaten kontrolliert wird. Privatisierung wird also dann zur Option, wenn die Präferenzunterschiede zwischen dem öffentlichen Prinzipal und den privaten

Stakeholdern der privaten Organisation kleiner sind als die Präferenzunterschiede zwischen dem öffentlichen Prinzipal und den herausfordernden Staaten.

Das Process Tracing ergab, dass ICANN keine globale Legitimität besaß. Hauptkritikpunkt waren die einseitigen Kontrollprivilegien der USA über ICANN, weshalb Staaten wie Brasilien, Russland, China aber auch die EU die Strategie der Regimeverlagerung nutzten, um über öffentliche Organisationen wie der Internationalen Telekommunikationsunion (ITU) Druck auf ICANN und die einseitigen Kontrollprivilegien der USA auszuüben. Der externe Druck war insbesondere nach den Enthüllungen Edward Snowdens über geheime Überwachungsprogramme der National Security Agency (NSA) gestiegen, und veranlasste die USA, institutionellen Reformen zuzustimmen, um externen Druck zu minimieren. Um eine größere Rolle von autoritären Staaten wie China und Russland im Bereich Internet Governance zu verhindern, schlossen die USA aus, Kompetenzen von ICANN an eine intergouvernementale Organisation zu transferieren. Gleichzeitig hatten die institutionellen Wechselwirkungen den Effekt, dass die USA bereit waren Kontrollprivilegien abzugeben, nachdem interne Reformen innerhalb ICANNs die Möglichkeit der Abweichung von früheren Politikinhalten einschränkten. Somit war es ein konfliktäres Verhältnis mit öffentlichen Organisationen wie der ITU, das zu privaten institutionellen Anpassungen von ICANN führte.

Der zweite Aufsatz führt das originäre Konzept des regulatorischen Imports in die Literatur ein, um dessen Rolle in der globalen Finanzkrise 2008 zu untersuchen. Regulatorischer Import beschreibt eine Governance-Form, bei der ein Regulierer explizit extern formulierte rechtliche Standards übernimmt, die funktional wichtig für den Regulierer sind. Daraus ergibt sich, dass der Regulierer seinen eigenen Output von externer Governance abhängig macht. Öffentliche Regulierer importieren externe Standards oftmals aus Spezialisierungsgründen. Hier spielen besonders private Organisationen eine hervorgehobene Rolle, die über größere Expertise in besonders technischen und komplexen Politikfeldern verfügen.

Obwohl öffentliche Regulierer funktionale Gründe haben, um auf regulatorischen Import zurückzugreifen, kann der Import externer Governance zu unbeabsichtigten Konsequenzen führen. Der Aufsatz verbindet zentrale Argumente der Literatur zur indirekten Governance (Abbott et al. 2019; Abbott et al. 2017) mit der Regimekomplex-Literatur und argumentiert, dass Dynamiken in externen Foren zu disruptiven Wechselwirkungen mit dem Regulierer führen können. Dabei werden zwei Kausalmechanismen identifiziert. Der funktionale Mechanismus geht davon aus, dass externe Foren zu isoliert vom Regulierer agieren können (Barnett und Finnemore 1999, S. 722). Dadurch nehmen externe Foren inhaltliche

Veränderungen vor, die Komplementaritäten zu den Regeln des Regulierers aufheben (Gehring und Faude 2014, S. 482). Der Regulierer importiert dann nicht-komplementäre Standards, welche die Wirkung der Regeln des Regulierers auf unbeabsichtigte Weise verändern. Der „Failure"-Mechanismus wird wiederum ausgelöst, wenn externe Foren regulatorisches Scheitern produzieren, weil sie beispielsweise von Spezialinteressen zu stark eingenommen wurden (Mattli und Woods 2009). Der Regulierer importiert dann dieses Scheitern, was auch seine Effektivität negativ beeinflusst. In beiden Fällen ist die Gefahr negativer Sekundäreffekte dann groß, wenn es sich bei den externen Foren um private Organisationen handelt, da diese die Interessen des privaten Prinzipals vertreten und somit im Vergleich zu öffentlichen Organisationen dazu neigen, isolierter vom Regulierer zu agieren.

Das Argument wird auf den öffentlichen Basler Ausschuss für Bankenaufsicht (BCBS) angewendet, welcher externe Governance vom privaten International Accounting Standards Board (IASB) und privaten Ratingagenturen importierte. Das Process Tracing findet Belege dafür, dass der regulatorische Import von Rechnungslegungsstandards und privaten Risikobewertungen die Eigenkapitalregulierungen des BCBS negativ beeinflusst und die Finanzkrise 2008 verstärkt hat. Inhaltliche Veränderungen innerhalb des IASB hin zu Zeitwertbilanzierung (Fair Value) hat die prozyklische Wirkung der Basler Regulierungen verstärkt und eine Kreditklemme ausgelöst. Gleichzeitig hatten Ratingagenturen Anreize gegen eine objektive Risikobewertung von Vermögenswerten. Dies führte dazu, dass der BCBS regulatorisches Scheitern importierte, was seine Möglichkeiten internationale Finanzstabilität bereitzustellen, weiter einschränkte.

Im dritten Aufsatz wird untersucht, durch welche Mechanismen die Europäische Union (EU) indirekt Einfluss auf internationale Organisationen nehmen kann, in denen sie nicht direkt an Entscheidungsprozessen beteiligt ist. Dabei soll unter anderem untersucht werden, ob sich von der EU ausgehende Wechselwirkungen zwischen öffentlichen und privaten Organisationen unterscheiden, oder ob die EU über den gleichen Mechanismus Einfluss auf beide Governance-Formen nehmen kann.

Der Aufsatz argumentiert, dass die EU ihre internen Politikinhalte externalisieren kann (Damro 2015; Lavenex und Schimmelfennig 2009; Müller et al. 2014), indem sie über ihren internen Entscheidungsprozess einen Regulierungskonflikt mit einer externen Organisation herbeiführt, welcher die externe Organisation dazu veranlasst sich an europäische Ziele anzupassen. Da die EU durch ihren Binnenmarkt über eine regulatorische Hierarchie über wichtige private Marktakteure besitzt, kann sie durch ihre internen Politikinhalte dafür sorgen, dass europäische

Marktakteure die Einhaltung extern definierter Regeln aussetzen, um negative Konsequenzen seitens der EU zu vermeiden. Dadurch büßt die externe Organisation an Effektivität ein und ist gezwungen sich an europäische Regeln anzupassen, um europäischen Marktakteuren die gleichzeitige Einhaltung zu ermöglichen.

Um auf Unterschiede in den Wechselwirkungen der EU mit privaten und öffentlichen Organisationen zu testen, werden zwei Fälle ausgewählt. Die Externalisierung europäischer Persönlichkeitsrechte auf die private ICANN sowie die Externalisierung europäischer Standards der Gerichtsbarkeit auf den UN-Sicherheitsrat. Die Analyse stellt fest, dass die EU ihre internen Politikinhalte über einen Regulierungskonflikt auf externe Organisationen ausweiten kann, unabhängig davon, ob es sich dabei um eine private oder öffentliche Organisation handelt. Im ersten Fall hat die EU durch ihre Datenschutzgrundverordnung einen unbeabsichtigten Konflikt mit ICANN ausgelöst. Während ICANN registrierende Akteure (Registries und Registrars) dazu verpflichtete, weitreichende persönliche Informationen von Domain-Haltern in eine öffentliche Datenbank (WHOIS) einzuspeisen (ICANN 2013, Para 3:3), wurde dies von der EU untersagt (Vaughan-Nichols 2018). Der Konflikt zwischen ICANN und der EU führte zu institutionellen Anpassungen von ICANN gegenüber europäischen Datenschutzzielen (Mueller 2019; ICANN GNSO 2019, S. 13f.), nachdem registrierende Akteure ICANNs Regeln aussetzten und ICANN seine Rolle als globaler Regulierer gefährdet sah. Im zweiten Fall hat der Europäische Gerichtshof einen intendierten regulatorischen Konflikt ausgelöst, welcher den UN-Sicherheitsrat dazu veranlasste, sein System der Listung terrorverdächtiger Personen und Unternehmen zu reformieren. Die Entscheidung des Gerichtshofs, dass die UN Listungsregeln nicht mit europäischen Grundrechten vereinbar sind, brachte die UN in eine schwierige Situation (Heupel 2009), da europäische Banken Vermögenswerte von gelisteten Personen und Unternehmen freigeben mussten. Um die Effektivität des Sanktionsregimes aufrechtzuhalten, sah sich der Sicherheitsrat dazu gezwungen, europäische Grundrechte zu integrieren und das Sanktionsregime dementsprechend anzupassen (Búrca 2010; Gehring und Dörfler 2013). Somit bestehen hinsichtlich des theoretisierten Mechanismus der Externalisierung keine systematischen Unterschiede in den Wechselwirkungen mit öffentlichen oder privaten Organisationen in einem Regimekomplex.

5.2. *Zentrale Implikationen für Regimekomplexe*

Die drei Aufsätze haben breitere Implikationen für intergouvernementale Organisationen, private Regulierungsorganisationen sowie für die Beziehungen zwischen ihnen in Regimekomplexen.

Obwohl private Organisationen gerade im Umweltbereich Regulierungslücken schließen und Anreize haben, öffentliche Institutionen zu komplementieren, so neigen sie in anderen Fällen dazu, sich weniger an inhaltlichen Zielen öffentlicher Institutionen zu orientieren. Ein zentraler Unterschied zu Regulierungskonflikten zwischen öffentlichen Institutionen besteht darin, dass öffentliche und private Organisationen keine Überlappung in ihren Mitgliedschaften aufweisen. Bei Konflikten zwischen öffentlichen Institutionen sind es die „double members", die einen Anreiz haben, interinstitutionelle Konflikte zu überwinden und institutionelle Anpassungen voranzutreiben. Dieses Steuerungselement institutioneller Wechselwirkungen fehlt jedoch für Interaktionen zwischen öffentlichen und privaten Organisationen. Private Organisationen besitzen private Prinzipale und haben somit einen inhärenten Anreiz, sich an deren Präferenzen auszurichten. Daraus folgt, dass private Organisationen in Regimekomplexen zur institutionellen Isolation neigen, wenn sie durch externe Institutionen keine Anreize erhalten, sich an öffentlichen regulatorischen Zielen auszurichten. Dies zeigte sich zum einen im Fall des IASB, welcher seine Rechnungslegungsstandards änderte, ohne die negativen Sekundäreffekte auf Eigenkapitalregeln des BCBS zu beachten. Zum anderen zeigte sich dies im Fall von ICANN, welche erst bereit war, ihr WHOIS System zu reformieren, nachdem ICANNs Status als globaler Regulierer gefährdet war. Ebenso kann fehlende öffentliche Kontrolle dazu führen, dass private Organisationen durch falsche interne Anreize regulatorisches Scheitern produzieren, welches sich dann negativ auf öffentliche Organisationen auswirkt. Dies zeigte sich am Beispiel privater Ratingagenturen und deren Rolle in der globalen Finanzkrise 2008.

Da private Organisationen nicht durch „double members" auf ein inhaltliches Ziel einer überlappenden öffentlichen Organisation eingeschworen werden können, ergibt sich hieraus, dass öffentliche Organisationen Kontrollmöglichkeiten installieren sollten, um eine verstärkte Isolation privater Organisationen zu verhindern. Wenn hierarchische Kontrollinstrumente nicht etabliert werden können, dann sind zumindest horizontale Instrumente eine Alternative, die interinstitutionelle Kooperation wahrscheinlicher machen. Hierzu könnten die Organisationen sich gegenseitigen Beobachterstatus einräumen, welcher den Akteuren zwar keine formale externe Entscheidungsgewalt gewährt, den Organisationen jedoch die Möglichkeit gibt, eigene Standpunkte einzubringen. Gleichzeitig könnten Organisationen inhaltliche

Absichtserklärungen vereinbaren, welche die externe private Organisation gegenüber Sekundäreffekten auf die öffentliche Organisation sensibilisiert.

Während die Dissertation deutlich macht, warum private Regulierungsorganisationen zur Isolation neigen, bedeutet dies nicht zwangsläufig, dass öffentliche Organisationen keinen Einfluss auf private Organisationen nehmen können. Selbst in Fällen, in denen weder eine hierarchische Kontrolle über, noch eine horizontale Kooperationsvereinbarung mit einer privaten Organisation etabliert wurde, haben öffentliche Organisationen die Möglichkeit, indirekt auf private Regulierung einzuwirken. Da öffentliche und private Organisationen oftmals in den Marktakteuren überlappen, die sie regulieren, stellt dies ein Hebel für öffentliche Organisationen dar, um Einfluss auf private Regulierung zu nehmen. Wenn öffentliche Organisationen in der Lage sind, das Verhalten von Marktakteuren so zu beeinflussen, dass die Effektivität privater Organisationen unterminiert wird, bekommen letztere einen Anreiz sich stärker auf die öffentlichen Regulierungsziele zuzubewegen und sich neu auszurichten. Diese Erkenntnis deckt sich mit der Vermutung in der Literatur, dass der Handlungsspielraum privater Organisationen durch öffentliche Regeln und Standards definiert wird.

5.3. *Zentrale Implikationen für weitere theoretische Debatten*

Neben den Implikationen für Regimekomplexe haben die Forschungsergebnisse zudem Implikationen für weitere Debatten in der Global Governance-Forschung. Die Dissertation macht deutlich, dass die Regimekomplex-Literatur, die im Zuge der zunehmenden institutionellen Fragmentierung entstanden ist, viele Anknüpfungspunkte zu anderen theoretischen Ansätzen bietet. Auf zwei theoretische Verknüpfungen soll hier explizit eingegangen werden.

Die Dissertation zeigt, dass sich die zentralen Argumente der Regimekomplex-Literatur sehr gut mit jenen der Literatur zur indirekten Governance verknüpfen lassen, um Fragen zu beantworten, die beide Literaturstränge separat nicht beantworten können. Weder die Literatur zu Delegation (Tallberg 2002; Hawkins et al. 2006; Majone 2001) noch zu Orchestration (Abbott et al. 2015, 2016a) berücksichtigt, dass Intermediäre (z.B. Agenten) nicht unabhängig von ihrer institutionellen Umwelt operieren, sondern von ihr beeinflusst werden können. Somit muss ein Abweichen von den inhaltlichen Präferenzen des Regulierers kein klassisches „shirking“ durch den Intermediär darstellen, sondern kann das Ergebnis von Wechselwirkungen des Agenten mit überlappenden Institutionen sein. So bestand beispielsweise zwischen der

World Intellectual Property Organization (WIPO) und ICANN eine Beziehung der indirekten Governance (Abbott et al. 2017), da WIPO ICANN ideelle Unterstützung dabei gab, geistige Eigentumsrechte der WIPO auf das Domain Name System zu übertragen (Kleinwächter 2000, S. 558). Die Abweichung ICANNs von den Vorstellungen der WIPO im Jahr 2018 war jedoch nicht das Resultat eines Präferenzwechsels innerhalb von ICANN, sondern eine Reaktion auf den von der EU etablierten Regulierungskonflikt, der eine institutionelle Anpassung erforderte. Gleichzeitig hat Aufsatz 1 gezeigt, wie die Delegation an einen privaten Agenten sowie die Vergrößerung dessen Autonomie gegenüber öffentlicher Kontrolle aus strategischen Überlegungen erfolgen kann, um einen „Lock-in" bestimmter Politikinhalte herbeizuführen und die Erfolgsaussichten von Regimeverlagerung in andere Institutionen einzuschränken. Die Dissertation bietet daher einen wichtigen Startpunkt für weitere Forschung zu den Effekten institutioneller Fragmentierung auf indirekte Governance-Beziehungen.

Neben der Literatur zur indirekten Governance kann auch die Debatte um die Akteursfähigkeit der EU in den internationalen Beziehungen (Bretherton und Vogler 2006; Jupille und Caporaso 1998; Gehring et al. 2017) von zentralen Argumenten der Regimekomplex-Literatur profitieren. So zeigt die Regimekomplex-Literatur neue Perspektiven, wie die EU Einfluss auf internationale Regulierungsorganisationen nehmen kann, in denen sie nicht direkt am Entscheidungsprozess beteiligt ist. Durch ihren internen Entscheidungsprozess oder durch das Handeln eines Agenten wie der Kommission oder dem Europäischen Gerichtshof, kann die EU einen Regulierungskonflikt mit einer externen Organisation auslösen. Dieser kann dann dazu führen, dass sich die externe Organisation an europäische Standards anpasst. Bei den externen Organisationen kann es sich um private als auch um intergouvernementale Organisationen handeln. In dieser Hinsicht stellt die Dissertation einen wichtigen Kausalmechanismus indirekten Einflusses der EU auf externe internationale Organisationen bereit und liefert wichtige Anregungen für weitere Verknüpfungen der beiden Literaturstränge.

5.4. *Ausblick für weitere Forschung*

Die Forschungsergebnisse der kumulativen Dissertation liefern Ansatzpunkte für weitere Forschung. Zunächst einmal kann das allgemeine Argument, dass eine Überlappung der zu regulierenden Marktakteure zu Konflikten führen kann, auf weitere Politikfelder angewendet werden. So schaffen beispielsweise private Zertifizierungsorganisationen wie der Marine Stewardship Council (MSC) oder Forest Stewardship Council (FSC) Sekundäreffekte für die Welthandelsorganisation (WTO), indem sie indirekt Handelsrestriktionen für Produkte

schaffen, die private Standards nicht einhalten und deshalb nicht zertifiziert wurden. Ein solcher Diskriminierungseffekt trifft insbesondere Unternehmen aus Entwicklungsländern, die Probleme haben, private Standards einzuhalten und von wichtigen Märkten in Industrieländern verdrängt werden (Mavroidis und Wolfe 2017).

Zusätzlich lassen sich die spezifischen Argumente der Aufsätze auf weitere Fälle anwenden. Das Argument aus Aufsatz 1, dass die Delegation an einen privaten Agenten aus strategischen Gründen erfolgen kann, um eine stärkere Rolle anderer Staaten in einem Politikfeld zu verhindern, kann beispielsweise auf den IASB angewendet werden. Hier kann argumentiert werden, dass gerade die USA die Unabhängigkeit des IASB befürworteten, da dessen Präferenzen jenen der USA ähnelten. Es war deshalb unwahrscheinlich, dass der IASB von US-amerikanischen Präferenzen im Bereich Rechnungslegung abrücken würde. Erst im Zuge der Finanzkrise 2008 sah man sich gezwungen, mit der Gründung des Überwachungsrats (Monitoring Board) stärkere öffentliche Kontrollmechanismen zu installieren, in dem allerdings auch China einen offiziellen Sitz erhielt. Hier ist erneut das in Aufsatz 1 beschriebene Dilemma zwischen einer zu starken Unabhängigkeit eines privaten Agenten und stärkeren Kontrollmöglichkeiten externer Akteure zu erkennen.

Das in Aufsatz 2 entwickelte Argument der unbeabsichtigten Konsequenzen regulatorischen Imports liefert ebenfalls Anregungen für weitere Forschung. Zum einen lässt sich das Argument auf weitere Fälle in unterschiedlichen Politikfeldern anwenden. Zum anderen liefert der Aufsatz Ansatzpunkte für weitere Forschung zu öffentlich-privaten Wechselwirkungen. Da sich wie in Abschnitt 3.2. öffentliche und private Organisationen in wichtigen Aspekten unterscheiden, stellt sich die Frage, ob der Import privater Standards häufiger zu unbeabsichtigten Konsequenzen führt als der Import öffentlicher Standards. Gleichzeitig gibt es Fälle, in denen private Regulierer öffentliche Standards importieren. So nutzt der MSC unter anderem öffentliche Listungen des Washingtoner Artenschutzübereinkommens (CITES) als Maßstab für sein Ökolabel (MSC 2018, S. 28). Zukünftige Forschung sollte deshalb untersuchen, inwieweit der Import öffentlicher Standards durch einen privaten Regulierer einer anderen Logik folgt als der Import privater Standards durch einen öffentlichen Regulierer.

Zuletzt erhebt die Dissertation nicht den Anspruch sämtliche Mechanismen der regulatorischen Konfliktentwicklung zwischen öffentlichen und privaten Organisationen zu erfassen. Somit kann zukünftige Forschung auf den Ergebnissen der Dissertation aufbauen. Da sich die Dissertation hauptsächlich mit Politikfeldern auseinandersetzt, in denen fokale private Organisationen bestehen, bleibt z.B. die Frage offen über welche Mechanismen öffentliche

Institutionen den Wettbewerb zwischen unterschiedlichen privaten Organisationen in einem Politikfeld beeinflussen. Da damit zu rechnen ist, dass der Trend der Proliferation privater Regeln anhalten wird, wird das Thema der öffentlich-privaten Regulierungsinteraktionen daher auch in Zukunft eine wichtige Rolle in der internationalen Institutionenforschung einnehmen.

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Aufsatz 1:

When public principals give up control over private agents: The new independence of ICANN in internet governance

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When public principals give up control over private agents: The new independence of ICANN in internet governance

Abstract:

In October 2016, the US government relinquished its long-standing delegation contract with ICANN, a private organization that governs the technical infrastructure of the internet. This presents a puzzle since the USA gave up a power resource and, as a public principal, relinquished control over a private agent, thus enabling ICANN to deviate from public interests. I argue that public principals have incentives to give up control when a delegation contract is credibly challenged by outsiders and the probability of regulatory capture of the private agent is limited. The analysis shows that the privileged U.S. delegation role and the legitimacy of ICANN were challenged by other states and private actors, thus creating incentives for adaptations. Instead of granting a greater role to rising powers in internet governance, the U.S. gave up its unilateral influence after internal reforms limited the risk an independent ICANN being captured by special interests.

Key Words: Contested Multilateralism, ICANN, Internet Governance, Principal-Agent, Private Authority

1. Introduction

In 2014, the US government announced that it would give up its long-standing delegation contract with the private *Internet Corporation for Assignment of Names and Numbers* (ICANN) which lasted almost 20 years (Wyatt 2014). The US government created ICANN in 1998 and delegated the important *Internet Assigned Numbers Authority* (IANA) that, inter alia, included the management of IP addresses and domain names which make ICANN the central institution for maintaining the stability and interoperability of the internet (Easton 2012, p. 273).

The institutional design of ICANN is based on the multistakeholder approach which unifies different internet community stakeholders including internet service providers, business actors, or non-commercial interests (Kleinwächter 2000, p. 554). The power of ICANN is exercised by a Board of Directors which exerts management, control and representation (ICANN 2016, 2:1). Its work is accompanied by three supporting organizations that represent different stakeholders. National governments or public international institutions have only advisory functions through the Governmental Advisory Committee (GAC) and thus play only a secondary role within the decision-making process (Kalinauskas & Barčys 2013, p. 444). However, as its public principal, the U.S. government had the ability to deprive the IANA-functions from ICANN and transfer them to another body. Through the delegation contract, the U.S. enjoyed important institutional privileges which gave them unilateral control over ICANN and an important source of influence in internet governance[1] that other states never possessed (Pohle & Morganti 2012, p. 37).

The U.S. government implemented its announcement in October 2016 and relinquished its unilateral control over ICANN. The decision to give up control over ICANN illustrates a

[1] The term Internet Governance is used differently in the literature. While some authors understand the term in a broad sense including different policy fields as the technical infrastructure of the internet, e-commerce, cyber security, intellectual property etc., this paper associates the term solely with the regulation of the internet infrastructure.

puzzling case that cannot be explained by conventional theoretical accounts. While neorealism argues that power is the central factor explaining the polity and policy of transnational regulation (Drezner 2007; Krasner 1991), it cannot explain why states would give up an important instrument of global power. The outcome can also not be explained by the institutionalist Principal-Agent (P-A) approach which explains why states delegate governance functions to International Organizations (IOs) or to other agents, and how principals must design delegation contracts to prevent negative consequences such as shirking or slippage (Hawkins *et al.* 2006; Nielson & Tierney 2003; Pollack 1997), or to commit themselves credibly to a long-term policy goal (Ennser-Jedenastik 2015; Majone 2001). Thus, we know when principals prefer tight control over the agent instead of a higher degree of autonomy (Franchino 2002) or when principals have low incentives to activate control mechanisms (Delreux & Kerremans 2010). However, little is known on how external factors might cause a change of control mechanisms. Within the P-A framework, an emerging attention is given to private agents that were delegated regulatory authority by states. This strand has increased knowledge on when states prefer delegating to private instead of public agents (Green 2014; Mattli & Büthe 2005a) and what kind of regulatory functions states are more willing to delegate to them (Abbott & Snidal 2009; Green 2017). However, all these works do not provide explanations for when and why public principals may give up control over private agents that fulfill their delegated functions dutifully. Because a fully independent agent is prone to shirking, the P-A literature would predict that principals would not give up control as it contradicts the underlying delegation logic.

The guiding research question of this work is why the US government relinquished the delegation contract with ICANN which ended its unilateral influence over the private organization. The argument developed in this paper is based on an interaction of two factors: *external pressure* and the *probability of regulatory capture*. *External pressure* is high if powerful outside states challenge an institutional status-quo and claim institutional

adaptations and if their claims are backed by private and civil society actors. The *probability of regulatory capture* asks whether an independent private agent would deviate from public interests towards regulation according to narrow interests. If the probability of capture is low, a public principal can cede accountability functions to private stakeholders in order to reduce external pressure. The empirical analysis shows that ICANN was exposed to high pressure from powerful outsiders including China, Brazil, Russia and the EU that pushed for institutional reforms and were supported by private and civil society actors. However, instead of granting these actors greater institutional influence, the US government relinquished the delegation contract and left control over ICANN in the hands of private stakeholders after they credibly pledged not to deviate from general US interests.

The findings of this article contribute to three strands of global governance literature. *First,* it contributes to the literature on the relationship between public and private authority in internet governance. This strand evaluated the legitimacy of ICANN to other public institutions (Take 2012), analyzed the role and authority of states in internet governance (Christou & Simpson 2009; Drezner 2004, 2007), and investigated the role states played concerning the institutional fragmentation of internet governance (Mueller *et al.* 2007). However, little is known about the mechanisms of interaction between these different types of institutions and how dynamics within its environment caused change in ICANN. *Second*, it extends the knowledge on principal-agent relationships. Whereas the IR-delegation literature has so far analyzed principal-agent relations in isolation, this article connects it to the literature on institutional interaction (Busch 2007; Gehring & Oberthür 2009) and institutional choice (Jupille *et al.* 2013; Morse & Keohane 2014; Zangl *et al.* 2016), to account for how delegation contracts are externally influenced. It illustrates that contested multilateralism can be a factor explaining delegation reforms. *Third*, it contributes to the growing literature on private authority in international relations. While it is argued that private authority can be exerted by either

private agents or independent entrepreneurs (Green 2014), this article shows that the design of private authority might change over time and provides a mechanism of institutional change.

The article proceeds as follows: section 2 develops the theoretical argument of when public principals give up control over private agents. The argument is tested in sections 3-5. While section 3 gives an overview of the institutional design of ICANN and the control mechanisms of the U.S., section 4 traces the external pressure on the institutional status-quo. Section 5 analyzes regulatory capture as a factor influencing the U.S. decision. Section 6 addresses prominent alternative explanations, before concluding and discussing the central findings.

2. Theory

2.1. The causes and risks of delegation to private agents

Global governance structures increasingly include the delegation of regulatory functions to international organizations (Nielson & Tierney 2003; Tallberg 2002). Delegation describes the "conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former" (Hawkins *et al.* 2006, p. 7). Delegation in global governance is primarily associated with two or more states that delegate regulatory functions to an international body (Bradley & Kelley 2008, p. 5), but it may also occur if single states delegate regulatory functions to an agent that has direct effects on other actors.

It is widely assumed that delegation to public agents like international organizations follows a functional logic, whereby states might have different reasons for delegation (Hawkins *et al.* 2006; Pollack 1997; Tallberg 2002). These include the delegation of regulatory oversight functions to monitor the behavior of the principals, delegation to solve problems of incomplete contracting, delegation of agenda-setting functions to simplify decision-making (Pollack 1997, pp. 103–04) and delegation to an independent trustee to achieve credible

commitment (Franchino 2002; Majone 2001). Furthermore, principals might try to lock-in their preferred policies. For instance, as power constellations in international relations might change over time, states have an incentive to lock-in their preferences today by delegating to a policy-biased agent (Hawkins *et al.* 2006, pp. 19–20).

In recent years, global governance has experienced a proliferation of private forms of governance including informal institutions, transgovernmental networks, and private transnational regulatory organizations (Abbott *et al.* 2016; Dingwerth 2008), all of which shift governance from the public to the private sphere (Genschel & Zangl 2014; Pattberg 2005). Private governance might emerge on its own initiative to fill public regulatory gaps (Cashore *et al.* 2004; Gulbrandsen 2004) or to preempt public regulation (Büthe 2010, p. 12), but one central cause for its proliferation lies in the increased delegation of governance functions from states to private actors (Büthe 2010; Green 2014). The reasons for states to delegate to private agents differ from the public delegation logics mentioned above. Because delegation is a question of institutional choice, rational actors only prefer a private over a public agent if they are related to specific benefits that cannot be realized by a public agent. We can thus expect the delegation to private bodies if they can achieve a regulatory goal more effectively than public agents (Cafaggi & Renda 2012, p. 15).

Private regulatory organizations draw their legitimacy mainly from their expertise in a specific issue-area which helps them solve governance problems in an effective way (Finnemore 2014, p. 222). Thus, states oftentimes delegate to private actors to reduce transaction costs (Green 2014, p. 41) by making use of the special private expertise that would be too costly for them or public agents to generate. Instead of investing in the costly and time-intensive setup of such expert knowledge, states delegate these functions to private organizations that already developed epistemic expertise. Delegation to private agents should therefore be most common in overly complex and technical issue-areas in which reason-based

regulation depends on expert knowledge (Antonova 2011, p. 426; Green 2014, p. 32). Delegating to private agents also increases the chances to maintain expertise, because private actors have an ex-ante expertise and economic incentives to increase the expertise that public agents do not possess (Mattli & Büthe 2005b, pp. 230–31). This is especially important for those issue-areas that experience fast-moving changes owing to technical developments, (Mattli & Büthe 2005a, pp. 402–03).

Expertise-driven delegation to private agents raises questions of public control. Because states lack expertise in a specific issue-area, they might have trouble identifying whether the agent is still pursuing their (public) interests. The P-A literature has shown that the general problem within delegation relationships is a conflict of interests that causes the agent to deviate from the principal's preferences (Kiewiet & McCubbins 1991, p. 24). Thus, agents might try to shift "policy away from its principal's preferred outcome and towards its own preferences" (Hawkins *et al.* 2006, p. 8).

Concerning this risk of policy shirking, whether states delegate authority to a public or a private actor makes a big difference, as these delegation relationships vary systematically. Private agents are more prone to shift policy away from the public interest because most private institutions such as NGOs or business networks are collective actors depending on private stakeholders. Therefore, a private agent sees itself in the position to answer to two different principals at the same time, one public and one private. If goals of the public and private principals diverge, the agent has incentives to deviate from the public principal's guidelines to implement private preferences instead (Mattli & Büthe 2005a, pp. 404–05). Consequently, regulation by private agents that are not publicly controlled is accompanied by a high probability of regulatory capture which is defined as "the control of the regulatory process by those whom it is supposed to regulate or by a narrow subset of those affected by regulation, with the consequence that regulatory outcomes favor the narrow 'few' at the

expense of society as a whole" (Mattli & Woods 2009, p. 12). Hence, regulatory capture exists if regulation does not aim to promote the common good, but instead the special interests of those that are directly affected by regulation (Carpenter & Moss 2014, p. 13). Since private agents always depend to some degree on stakeholders, they will have incentives for policy shirking within public-private delegation relationships if the public principal is not able to influence the agent's behavior via control mechanisms. These underlying conflicts of interests might explain why states are generally cautious on delegating extensive regulatory functions to private actors (see Green 2017).

2.2. When do public principals give up control over private agents?

Why would a principal give up public control over a private agent? The argument developed in this section assumes that such an outcome of reform depends on the interaction of two factors: *External Pressure* and *the probability of regulatory capture*.

External Pressure is a necessary condition for a public principal to implement institutional adaptations to a delegation contract as it undermines the legitimacy of a private regulator. It asks whether a public-private delegation contract is credibly challenged by institutional outsiders. One frequent reason for challenging is that some actors possess specific institutional privileges. As designs of international institutions frequently reflect power constellations of states at the time of their creation (Krasner 1991), conflict will arise when emerging powers claim for themselves "the same institutional privileges that established powers already enjoy" (Zangl et al. 2016, p. 173). While institutionally privileged actors prefer to keep the biased status-quo, dissatisfied actors will try to challenge it (Urpelainen & van de Graaf 2015, pp. 802–03). The challenging actors may try to convince the defender to adapt the status-quo by using the strategy of contested multilateralism (Morse & Keohane 2014). This might include regime shifting, describing the relocation of "rulemaking processes

to international venues whose mandates and priorities favor their concerns and interests" (Helfer 2009, p. 39) as well as the relocation to newly created regimes (Jupille et al. 2013; Morse & Keohane 2014). The aim of contested multilateralism is to undermine the efficiency and legitimacy of an institution in order to incentivize established powers to sacrifice institutional privileges (Zangl et al. 2016, p. 176).

The degree of external pressure depends on the ability of outsiders to undermine the function exerted by a private agent. Even if a coalition of actors is not powerful enough to enforce immediate change, but can exert symbolic pressure, it may in the long-run delegitimize an institutional status-quo (Morse & Keohane 2014, p. 389). However, incentives for adapting the institutional status-quo are highest if external pressure from outsider states is credible and backed by the support of civil society actors. If civil society actors support claims for adaptations, they might make public that an institutional status-quo is not in line with fundamental public interests and norms, thus creating domestic audience costs (Daßler et al. 2018, pp. 6–7) to a principal and producing additional pressure.

The outcome of adaptations is dependent on a second factor: the probability of regulatory capture of the agent. The probability of regulatory capture is low when the public and private principals share the same general goals and the institutional design of private regulation limits the opportunities for the agent to deviate from public goals. If a private delegation contract is challenged by outsiders, a public principal has different alternatives of adapting the status-quo to lower external pressure. On the one side, a principal might grant challengers a greater role of influence over the private agent. On the other side, a public principal could also sacrifice its own institutional privileges and give up control. This would mean greater independence from public control and influence, for the private agent.

As noted above, an independent private agent is associated with a high probability of being captured by special interests. However, giving up control becomes an option, if the public

principal is convinced that the private agent will nonetheless follow its preferred policy in the future. This will be the case if the agent's private stakeholders share the long-term policy goals of the public principal and can credibly assure that the agent will not change its future behavior. This leads to four causal pathways illustrated in figure 1.

-Figure 1 about here-

1) If external pressure is low, which means that the delegation contract is not credibly challenged by outsiders, and the probability of regulatory capture is low, than we should see that the public principal has no incentives to give up control over the agent as this is not necessary.

2) If external pressure is low and the probability of regulatory capture is high, then we should see again that the public principal does not give up control. Since the public principal is not challenged to adapt the delegation contract, reducing public control mechanisms is risky as regulation by the private agent could be captured and deviate from public towards private interests.

3) Institutional adaptations towards granting privileges to outsiders are likely if the delegation contract is credibly challenged, and a high probability of regulatory capture of an independent agent is given. In such a case, reforming the delegation contract has two effects: *first*, it lowers external pressure as it reduces incentives for challengers to seriously undermine the private agent's authority and legitimacy, but only at the expense of regulation closer to the challengers' preferences; *second*, it prevents the agent from deviating from public interests as public control mechanisms are still in place.

4) The necessary condition for public principals to give up control over private agents is the presence of *exernal pressure* by outside challengers that puts the institutional status-quo under pressure. This might be backed by civil society actors. Instead of granting outsiders institutional privileges, a public principal might give up its own privileges and release the private agent. This should only be a serious option when the probability of regulatory capture is low so that the public principal can be sure that private regulation will not deviate from public interests. If these conditions are met, giving up control is an opportunity for the public principal to lower *exernal pressure* and to lock-in its preferred policies.

3. The IANA-function and the Institutional Design of ICANN

The internet requires technical standards that enable the global exchange of data packages. The internet protocol enables the transmission of information across computer networks by assigning individual IP-addresses like 192.0.32.7 (the address of ICANN) to email addresses and websites (Lindsay 2007, p. 4). The domain name system (DNS) maps names like www.icann.org to the respective IP-address which simplifies the use of the internet immensely. IP-addresses and domain names must be unique to function as an address (Goldsmith & Wu 2006, p. 168), so the need for global assignment rules arose. To ensure the stable and secure operation of the internet, the U.S. government delegated to ICANN the authority to "rule the root" which included the following functions: the coordination of the allocation and assignment of domain names, internet protocol addresses and protocol port and parameter numbers; the coordination of the operation and evolution of the DNS root name server system; and the coordination of policy development (IANA contract 2003).

The control over the IANA-functions has significant economic and political impacts in the today's global political economy (Kalinauskas & Barčys 2013, p. 439) and thus causes economic distribution conflicts and power politics (Bradshaw & DeNardis 2018). For

instance, the management of the domain name system must handle trademark conflicts over rights to domain names that touch on the sensitive subject of intellectual property. Besides trademark conflicts, political conflicts may also arise concerning the management of country-code top-level domains like .uk or .de. For instance, ICANN had to decide whether it should create the top-level domains .ps (Palestine) and .eu (European Union), thus indirectly defining Palestine and the European Union as states (Hartwig 2010:579-580). China might also have a problem with new top-level domains for Taiwan or Hong Kong. When ICANN intended to create the top level-domain .amazon and to assign it to the American company, Latin American countries opposed this and wanted to see the name protected as a geographical indicator (Kurbalija 2014, p. 44).

Figure 2 gives an overview of the institutional structure of ICANN. It is managed by a Board that consists of 16 directors who get elected by different bodies and sub-structures (ICANN 2016, 7:1). Three supporting organizations have exclusive competence in elaborating and recommending policy recommendations within their specialized area of expertise. The Address Supporting Organization (ASO) is responsible for the evolution and allocation of IP-addresses, the Country-Code Names Supporting Organization (ccNSO) is responsible for policy recommendations concerning country-code top-level domains and the Generic Names Supporting Organization (GNSO) is responsible for generic top-level domains within the DNS. ICANN furthermore includes different advisory committees that have no legal authority but can bring in their expertise by reporting their findings and making recommendations to the Board.[2]

-Figure 2 about here-

[2] See Homepage of ICANN: https://www.icann.org/resources/pages/groups-2012-02-06-en.

The Governmental Advisory Committee (GAC) represents states and other public organizations, and was not originally an organ of ICANN but rather a governmental forum cooperating with ICANN. Its role was expanded with changes in ICANN's bylaws in 2002, making it an organ within ICANN's structure. The GAC has no voting rights but can make recommendations that must be taken into account by the Board. The Board is not required to follow these recommendations but has to justify itself (Hartwig 2010, pp. 583–84).

While the influence of other states on ICANN was limited to the GAC, the U.S. government possessed important institutional privileges that provided a unilateral control mechanism over ICANN. The U.S. hegemony in internet governance was based on two contracts between the U.S. Department of Commerce and ICANN: the IANA-contract and the Memorandum of Understanding. The IANA-contract delegated the authority to exert the IANA-functions to ICANN, and had to be renewed on a regular basis.[3] The delegation relationship made the US a de-facto veto power as all changes to the content of the root zone (like the creation of a new top-level domain) required approval by the National Telecommunications and Information Administration (NTIA) before it was implemented. The second source of control was the Memorandum of Understanding, an agreement that allowed the US government to oversee ICANN's performance, as it defines goals and principles ICANN committed itself to (i.e. stability, competition, private coordination and representation) (Memorandum of Understanding 1998: para. C).[4] Thus, owing to the control mechanisms, ICANN could not deviate too much from US interests if it wished to maintain regulatory authority over the root.

The unilateral influence of the U.S. government over the DNS system had a real impact on the global economy. As such, the U.S. frequently used its influence to seize hundreds of domains across the globe because they allegedly did not comply with U.S. copyright and trademark

[3] https://www.icann.org/resources/pages/history-resources-usg-2017-05-04-en.
[4] The Memorandum of Understanding was later followed by the Joint Project Agreement and complemented by an Affirmation of Commitments.

laws (Kravets 2012, 2013). Therefore, the special role of the U.S. within the institutional design of ICANN illustrated a central challenge for the legitimacy of ICANN.

4. Externally induced incentives for institutional reforms: ICANN and contested multilateralism in internet governance

ICANN as a private organization that performs central governance functions was the focal point for conflicts between different camps of states in internet governance. Those conflicts can be roughly divided into three issues: *first*, there was the central conflict on the status-quo of the delegation contract that gave the U.S. unilateral influence on ICANN while all other states felt in a disadvantaged position (DeNardis 2016, p. 33; Pohle & Morganti 2012, p. 37). *Second*, there is conflict about the institutional design of ICANN. While some states prefer private authority within the multistakeholder approach, other states oppose this departure from the conventional designs of global governance institutions in which authority is solely exerted by states or publicly controlled bodies (Lewis 2016, pp. 126–27). *Third*, states differ in terms of general policy preferences in internet governance. While some states uphold the freedom and openness of the internet, other (mainly authoritarian) states consider a free and open internet as a potential threat and use censorship and restrictions at the national level (Drezner 2007, p. 95).

4.1. External Pressure at the World Summit on the Information Society (WSIS)

The delegation contract was opposed by outsiders directly after ICANN's creation in 1998 as the International Telecommunication Union (ITU), a specialized UN agency responsible for telecommunication issues, pushed for a World Summit on the Information Society (WSIS). The ITU knew that such a summit would exceed its own competences, so the UN General

Assembly took up that issue and approved the idea of a World Summit in 2001. The General Assembly mandated the ITU to realize the Information Summit in two conferences: the first conference in Geneva 2003 and the second in Tunis 2005 (Kleinwächter 2006, p. 38). After a period of private regulation by ICANN and other private organizations, WSIS illustrated the first case in which internet governance was issued within a public forum. Such a shift to the UN framework meant that states that played only a minor or no role in internet governance thus far (especially developing countries) enjoyed an institutional upgrade.

Although WSIS was supposed to address several issues (Chenou & Radu 2014, p. 8), internet governance soon became the dominating issue and the center of political conflict. The summit illustrated the first opportunity for opponents to create external pressure on ICANN. Thus, states including China, Brazil, Russia and South Africa who fear the political effects of the internet (Lewis 2016, p. 120) challenged the legitimacy of the institutional status-quo and were supported by other developing countries. They were also supported by the ITU which claimed a more important role in internet governance for itself (Take 2012, p. 506). These challengers made clear that a private organization like ICANN should not have authority over central governance functions, and criticized the unilateral US influence (Mueller *et al.* 2007, p. 240). Furthermore, they criticized the technical dominance of industrial countries within the issue-area in general and stated that domain names were assigned arbitrarily (Pickard 2007, p. 126). Those states made clear that they favored internet governance to be handled within an intergovernmental instead of private/multistakeholder framework, so they could influence regulations. As such, developing countries were convinced that they would benefit if internet governance was handled within the ITU which is characterized by UN bloc politics (Nye 2014, p. 4). As a consequence, they called for a transfer of authority from ICANN to the intergovernmental ITU (Kleinwächter 2004, p. 233).

The Geneva Declaration of 2003 did not change the internet governance structure, but it reflected the challengers' perspective. It criticized the institutional privileges of the U.S., stating that internet management "should be multilateral, transparent and democratic, with the full involvement of governments, the private sector, civil society and international organizations" (Geneva Declaration: B6:48). It furthermore criticized the centralization of authority within a private organization. Although the declaration recognizes the important function of the private sector and civil society (Geneva Declaration: A:17), it recommended reversing the private-public authority relationship. Arguing that internet governance comprises both technical as well as public policy issues, the declaration recommended that private actors play an important part in terms of technical questions, but that authority over public policy issues should be transferred to the public realm (Geneva Declaration B6: 49).

In response to the lacking progress, the UN Secretariat established the Working Group on Internet Governance (WGIG) in 2004 which was supposed to develop recommendations for WSIS 2005 in Tunis. It consisted of 40 individual representatives from business, government and civil society (Mueller *et al.* 2007, p. 241). The WGIG report confirmed the critique of the Geneva Declaration in terms of two aspects: *first*, that no single government should have unilateral influence and *second*, that governments should be responsible for public policy issues while technical issues should be in the hands of private stakeholders. The WGIG could not come to an agreement on how to change the institutional status-quo, but outlined four models of institutional change, all focusing on replacing the institutional privileges of the U.S. government (Mueller 2010, pp. 67–68).

The institutional status-quo of the DNS was not only challenged by authoritarian states but also by actors who actually preferred the DNS to be regulated by private stakeholders. The delegation contract between ICANN and the U.S. government created a problematic situation for states that also preferred private internet governance and feared that growing state control

could have negative effects on the freedom of the *world-wide web*. Milton Mueller (2010, pp. 69–70) argues that

> "defenders of the ICANN status quo […] were caught in a severe logical bind. If a nongovernmental model was the best and most appropriate one for the Internet, then what was the United States government doing with its hand on the tiller? In the context of WISIS, it was difficult to criticize U.S. oversight without aligning oneself with the sovereigntists. On the one hand, if one conceded the need for some kind of governmental oversight, why should this oversight function be held exclusively by one national government given the globally distributed nature of the Internet and the strong effects that administration of domain names and IP addresses could have on Internet as a whole?"

This ambivalent situation created further political conflict that escalated at the preparatory meetings before the Summit 2005 in Tunis. In addition to the challengers China, Russia, Brazil and Iran, the European Union (EU) broke with the U.S., calling for changes in the status-quo (Kruger 2012, p. 11), and backed it with the threat to split the root (Goldsmith & Wu 2006, p. 171). As such, the European IT commissioner Viviane Reding said that "if they [other states] have the impression that the internet is dominated by one nation and it does not belong to all the nations then the result could be that the internet falls apart" (Wray 2005).

The European critique mainly focused on the unilateral U.S. control over ICANN, causing the EU Commission, at the second WSIS 2005, to call for a different governance system that included international and governmental accountability (Wikileaks 2009). The Commission proposed to internationalize the ICANN oversight function (Mueller 2010, p. 74) by creating a new cooperation model in which governments exert supervision while the day-to-day administration remains in the hands of private actors. EU negotiators called their model a lightweight governance structure "where the government oversight of internet functions is limited just to the list of essential tasks" (Wray 2005).

This position shift came unexpectedly for the U.S. government which criticized the EU sharply for giving up the multistakeholder approach and for supporting states that were interested in constraining the freedom of the internet (Kleinwächter 2006, p. 42). The

challenging states, like Brazil, Iran and Saudi Arabia, applauded the new EU position and continued to call for a transfer of authority from ICANN to an intergovernmental body (Mueller 2010, p. 74). The U.S. reacted to the new European position by lobbying the EU not to break with them at WSIS 2005. As such, George W. Bush discussed the issue with José Manuel Barroso, while Condolezza Rice lobbied the president of the European Council Jack Straw, arguing that changing the status-quo would have unpredictable risks for the security, stability and freedom of the internet (Kleinwächter 2006, p. 43).

With the EU now challenging the status-quo, external pressure increased immensely as the US got further isolated (Pickard 2007, p. 128). However, the group of challenging states was not homogenous, as most of the European states were critical of the delegation contract between ICANN and the U.S., but did not wish to transfer governance authority from the private to the public realm. For instance, the French ambassador and head of the Foreign Ministry office for WSIS preparation assured that France was "not in the same boat as Iran and Cuba" (Wikileaks 2005). EU negotiators stated that

> "none of this is about content and that is a big difference between the EU position and the position of China and Brazil. The proposal that came from Brazil and the others to amend our own proposal were not acceptable, they were trying to drag us closer to their position. We are very alive to that" (Wray 2005).

Canada also shared this position, rejecting unilateral U.S. power but also criticizing overall state control over the internet (Wray 2005). European states preferred the evolution over revolution in internet governance, rejecting oversight over ICANN by the UN or another intergovernmental organization that would give authoritarian states a greater role in influencing public internet policies (Wikileaks 2009). The aim of European states was therefore to strengthen accountability mechanisms within the multistakeholder approach. Despite the overall cleavages within the challenging camp, it was united in claiming that the U.S. should not have unilateral control over ICANN, thus creating the biggest pressure on this specific issue.

The EU did not maintain its sharp attacks on the U.S., so WSIS 2005 did not change the institutional status-quo. However, the U.S. compromised, accepting the newly created Internet Governance Forum (IGF), to which conflicts on the institutional status-quo were referred to (Maurer 2011, p. 46).

4.2. The IGF and World Conference on International Telecommunications (WCIT)

Political conflict was passed from WSIS 2005 to the IGF which had an original mandate for five years but was extended until 2025. The forum brings together different stakeholders representing governments, the private sector and NGOs (Kleinwächter 2016, p. 70). The IGF can be interpreted as a form of *regime creation* because it gave challenging states another forum to undermine the institutional status-quo.

The IGF was designed as an institution to further discussions on the different cleavages in internet governance without being authorized to make binding decisions. Thus, the actors could use the IGF to pursue their preferences, knowing that they did not commit themselves to binding institutional changes. For the challenging states, especially those who prefer transferring authority from the private to the public realm, the IGF presented a forum where countries could search for new political allies and maintain pressure on the institutional status-quo of ICANN. The U.S. could agree to this new institution because those states that pushed for an intergovernmental approach had to accept the multistakeholder design of the IGF. Within the IGF, private stakeholders were able to represent their own interests, forcing authoritarian states like China and Russia to interact with them (Mueller 2010, pp. 108–09).

The fact that the challenging camp accepted the IGF as a multistakeholder institution did not mitigate conflict surrounding the governance approach. Besides the new IGF, the future of the internet and as such the role of ICANN was again challenged at the World Conference on International Telecommunications (WCIT) 2012 in Dubai, where states negotiated an update

on the International Telecommunication Regulations. Although the original WCIT mandate did not include internet-related issues, China, Russia, Iran and other developing countries tried hard to extend the ITU mandate to deprive the unilateral US control over ICANN (Kiss 2012) and to reverse the private-public authority relationship. These states also sought to influence internet policies by introducing language "that would facilitate government interference with Internet content" (Klimburg 2013, p. 3), thus challenging internet freedom. For instance, Arabic and African states demanded that governments gain full control over IP-addresses and domain names as well as the opportunity to identify any internet user (Betz & Kübler 2013, p. 54). However, preferences of the different camps diverged as western states including Australia, Japan and most of the EU states still preferred private governance within the multistakeholder approach and therefore refused to sign the accord (Lewis 2016, p. 126; Raustiala 2016, p. 500). As a result, the ITRs were not universally implemented.

4.3. The Snowden revelations as a multiplier

Although not directly connected to ICANN and the regulation of internet infrastructure, the conflict surrounding the institutional status-quo escalated when Edward Snowden revealed materials in 2013 on the spying and internet surveillance activities of the U.S. intelligence service NSA (Bradshaw *et al.* 2016, p. 48; Raustiala 2016, p. 501), which also targeted western officials, including German chancellor Angela Merkel. The Snowden revelations weakened the U.S. position on shaping the future of the internet and undermined its credibility as a protector of internet freedom. Strong criticism came from civil society actors. Kenneth Roth, the executive director of Human Rights Watch, stated that "it may seem anomalous that the U.S. government would have such influence over a global network like the internet, and now […] the United States have proven […] an unreliable guardian of our privacy" (Roth 2013).

The lacking legitimacy of the status-quo and ICANN was enhanced by the Snowden revelations as it brought the different challenging camps closer together and increased the threat of reactions that might cause a greater fragmentation of the internet infrastructure.

> "The NSA's actions have shifted that debate, alienating key internet-freedom allies and emboldening some of the most repressive regimes on the planet. Think of it as an emerging coalition between countries that object to how the United States is going about upholding its avowed principles for a free internet, and countries that have objected to those avowed principles all along" (Meinrath 2013).

The separation between those states including the European states and Canada that supported the multistakeholder approach but criticized the unilateral US control over ICANN, and those states that wanted to see authority transferred to an intergovernmental organization became blurred. For instance, Germany and Brazil, two countries that thus far could be assigned to different camps "submitted a joint UN resolution entitled "Right to Privacy in the Digital Age", which was adopted by the UN General Assembly in December 2013" (Pohle & van Audenhove 2017).

External pressure against the US government and its role in internet governance was also intensified by private actors. Thus, public pressure was backed by the private stakeholders of ICANN themselves and other internet organizations that publicly propagated to end the unilateral influence of the US to prevent negative consequences for the internet. In October 2013, ICANN, together with its important stakeholders including all five regional internet address registries and other regulatory organizations, adopted the Montevideo Statement which warned against a more fragmented internet at a national level as result of the undermining of trust of internet users owing to the surveillance measures by the NSA and signified support for the IANA-transition (*Montevideo Statement on the Future of Internet Cooperation* 2013).

The institutional status-quo was exposed to contested multilateralism, including *regime shifting* (WSIS/ITU) and *regime creation* (IGF), which put pressure on ICANN and its delegation contract with the U.S. The Snowden revelations acted as a multiplier because it blurred the cleavages separating different challenging camps and caused pressure by private and civil society actors, thus creating domestic audience costs to the US. Hence, *external pressure* was high and credible, and was the main factor driving the U.S. government to adapt the status-quo. However, the specific outcome of adaptations was influenced by an internal factor: the probability that a privatized ICANN could be captured, leading to policy deviation.

5. Internally induced incentives to privatize: The institutional constraints of regulatory capture

When the legitimacy of ICANN and its special relationship to the US was challenged, the US government primarily sought to prevent the creation of a multilateral principal by transferring the authority of ICANN to an intergovernmental organization which would have given a stronger position to states like Russia and China in internet governance. The second alternative of giving up its institutional privileges, however, was not without risks as it meant taking away public accountability from private regulation. The IANA-contract and the Memorandum of Understanding ensured that ICANN was committed to U.S. interests and created incentives for ICANN not to deviate substantially from them. Thus, one of the main questions for the U.S. was whether or not this would change without a public shadow of hierarchy.

The broader U.S. goal of an open and free internet was shared by the stakeholder community of ICANN, which is dominated by US actors ”for path dependent and technical expertise reasons” (Nye 2014, p. 13). Thus, the composition of ICANN’s stakeholders itself increased

the likelihood of future goal convergence. The composition includes companies, academics and nongovernmental organizations like the Internet Society (ISOC) that are headquartered in the US (Raustiala 2016, p. 502). Therefore, from a U.S. perspective, "the diverse array of nongovernmental actors represented in ICANN make that global body a more suitable traffic cop than the United Nations or another organization that's made up exclusively of state governments" (Fung 2016).

Even if a broader goal convergence concerning the openness of the internet was given, the main question for the U.S. government was if the stakeholder community would be able to hold ICANN accountable or if it would become "a richly self-funded organization that effectively answers to no one" (Corwin 2013) and opens opportunities for regulatory capture by special interests. When the US government announced that it would be willing to give up control, it requested that the institutional design must ensure that ICANN supports and enhances the multistakeholder model; maintains the security, stability, and resiliency of the DNS; meets the needs and expectation of the global customers and partners of the IANA services; and maintains the openness of the internet.[5] In order to ensure accountability and prevent ICANN from being captured and departing from its mission to regulate in the public interest as a result, the community proposed extensive changes in ICANN's bylaws after the US announcement. The aim of these institutional reforms was to create a private "checks and balances" system that would guarantee the same regulatory outcome as the public control by the US government (Teleanu 2016). ICANN therefore committed itself to the core values that were part of the former Memorandum of Understanding (ICANN 2016, 1:2).

Two reforms were at the centerpiece to enhance accountability and to reduce the risk of regulatory capture: *First,* ICANN would delegate the operation of the IANA-functions to a newly created nonprofit public benefit corporation (PTI), thus creating a division of labor

[5] https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions.

between policy-making (Board) and the implementation of technical functions (PTI). Because it would be the sole member of the PTI, the new bylaws would provide for the Board of ICANN to control the new agent (e.g. by electing its directors). At the same time, the bylaws would constrain the Board's capability of reforming the PTI towards a deviation from the principles defined by the US (ICANN 2016, p. 16). Hence, changes in the root zone file would then require approval by the Board instead of the US government (Teleanu 2016).

The second main reform was to create a new actor that represents the entire stakeholder community and that has effective instruments to hold the Board accountable. The new bylaws created the "empowered community" (EC), a nonprofit association under California law that is composed of the three supporting organizations (ASO, ccNSO and GNSO) and the advisory committees (At-large Advisory Committee and GAC) (ICANN 2016, 6:1). As the main actor enforcing compliance with core principles defined in the bylaws, the EC has different instruments to hold the Board accountable: it can appoint and remove individual directors, recall the entire Board, reject ICANN budgets, it has the right to reject bylaw amendments, respectively must approve fundamental bylaw amendments, it might reject PTI governance actions, and has the right to inspect and investigate as well as to initiate a review process concerning the Board's actions (ICANN 2016, 6:2).

The reforms limited the probability of ICANN being captured by special interests when it is fully privatized. While all private stakeholders agree on fundamentals (the openness of the internet), regulatory capture is limited by creating a complex system of authority and accountability that incentivizes decision-making based on consensus. The division of labor between the Board and the newly created PTI separates policy-making from policy-implementation, while the EC would cast a similarly strong shadow of accountability over ICANN as the U.S. government did, providing strong incentives for the Board to regulate in

the interests of the entire community instead of in the interests of a subset of states or private actors.

The reforms received broad support by private and civil society actors. For instance, in a letter to the U.S. Congress, ISOC stated that the reforms will ensure that ICANN will not deviate from core principles, as many of the private stakeholders are U.S. based and share the values of the U.S. government. It also warned that not reacting to external pressure would alienate the U.S. from allied states who always supported the multistakeholder approach, and bring it closer to states that prefer the intergovernmental approach (ISOC 2016). It was also supported by the internet association, a trade association that represents the interests of the leading global internet companies including Google, Amazon and Paypal, which publicly backed the IANA-transition after the proposed reforms to protect internet freedom (Carpenter 2016).

The U.S. government accepted the new accountability mechanisms within ICANN and relinquished unilateral control in October 2016 by not renewing its delegation contract. It was able to increase the legitimacy of ICANN by reducing external pressure from other states and reducing the risk of creating parallel DNS systems that would have had immense negative consequences for the internet as a global public good. At the same time, the U.S. demand for internal reforms enabled it to reduce conflict in internet governance without risking the possibility of a privatized ICANN deviating from U.S. interests.

6. Alternative Explanations

Tracing dynamics within ICANN and its institutional environment provides empirical support for the argument that the interaction between external pressure and the low probability of regulatory capture caused the U.S. government to give up unilateral influence over ICANN and leave control in the hands of private stakeholders. To increase the validity of these

findings, this section discusses two prominent alternative explanations and whether and how they weaken the argument of this article.

The first alternative explanation, based on a liberal narrative, could argue that the U.S. government's decision to give up control over ICANN was caused by a specific constellation of preferences in US domestic politics. Thus, the transition owed itself to the liberal Obama-administration, but would not have happened if the government was led by the Republican party that had different preferences on that issue. This is supported by the fact that it was mainly republicans who openly criticized the plan to relinquish control and tried to stop it. As such, republican senator Ted Cruz was one of the leading critics of the IANA-transition, arguing in a senate floor speech that

> "the Obama administration intends to give away control of the Internet to an international body akin to the United Nations" […]. I rise today to discuss the significant, irreparable damage this proposed Internet giveaway could wreak not only on our nation, but on free speech across the world."[6]

When the blockage of the transition failed in the Senate, the four republican attorney generals of the states Arizona, Texas, Oklahoma and Nevada sought to enforce a temporary restraining order against the privatization of ICANN but were rejected.[7]

The article recognizes that there were different actors in U.S. politics with different preferences concerning the relinquishment of control, yet there are reasons to believe that the domestic preference constellation was not the driving independent variable that caused the outcome of the privatization of ICANN. *First*, the Obama administration seized hundreds of domains in its terms in office, and thus benefited from its influence in internet governance. This raises the question of why it should voluntarily give up control if it was not externally incentivized. *Second*, domestic actors shared fundamental beliefs in internet governance, which is characterized by a free and open internet without content regulation, but disagreed on

[6] https://www.cruz.senate.gov/?p=press_release&id=2795.
[7] https://www.usatoday.com/story/tech/news/2016/09/30/judge-denies-block-internet-address-transfer-icann-iana-ip-address-texas/91349184/.

the question of how digital freedom can be preserved. Hence, the fact that domestic political conflict about that issue arose, indicates that it was externally and not internally induced.

Another prominent alternative explanation is that giving up unilateral control over ICANN was rather symbolic as it was not associated with costs for the U.S. and will in fact change very little (Lipscy 2017, pp. 195–96). Although the U.S. did not give in to external pressure by agreeing to enhance the influence of states like Russia and China, it nevertheless gave up institutional privileges and an important source of power. U.S. control over ICANN is now limited to the Governmental Advisory Committee (GAC) and is thus constrained in two different ways: *first*, the Board shall take advice from the GAC into account, but is still not obliged to implement it (ICANN 2016, 12:2). *Second*, the reforms of ICANN's bylaws in 2016 require that advice from the GAC on public policy matters follow a non-objection procedure which requires full consensus among all states (ICANN 2016, 12:2). Owing to the deep cleavages among states, the role of the GAC is highly constrained (Mueller 2017, p. 146). Therefore, the decision to give up control over ICANN was not symbolic but had important implications for the regulation of the internet infrastructure. There are strong indications that the U.S. government did not agree to institutional changes voluntarily, but that it was externally incentivized in the first place.

7. Conclusion

Against the backdrop of the IANA stewardship transition implemented by the U.S. government in September 2016, this article examined under which conditions public principals might reduce or even give up control over private agents. States commonly delegate authority to private agents to make use of their expertise in complex issue-areas but must consider control mechanisms to limit deviations from public interests. However, if control is asymmetrically distributed, disadvantaged states might claim institutional

adaptations and create external pressure on the delegation contract to undermine the legitimacy of the private agent. However, instead of granting outside states the same power, a public principal might give up its own privileges and leave control in the hands of the private principal, if it can be sure that this will not cause regulatory capture and the agent will keep regulating in the public interest.

The analysis of the process before the privatization showed that ICANN lacked global legitimacy. At the center of criticism was the unilateral control over ICANN by the U.S. government which caused political conflict and outside states to make use of contested multilateralism. However, the challenging camp was also divided, as some states including China, Russia, Saudi-Arabia and Iran not only challenged the delegation contract but also sought to transfer ICANN's governance functions to an intergovernmental organization such as the ITU. This position was not shared by states like Canada, Australia, Japan and all European States which preferred governance within the multistakeholder approach but also questioned the legitimacy of unilateral US control. External pressure intensified when Edward Snowden revealed the extensive surveillance activities of the NSA, and claims for the IANA-transition were backed by private and civil society actors, inducing the US government to react to reduce external pressure. Yet, although the private stakeholders of ICANN shared the US preferences of an open and free internet, the US government only agreed to relinquish control when ICANN strengthened internal accountability mechanisms to credibly ensure future regulation in the public interest.

The findings of this article have three broader implications for the role of international institutions in global governance. *First,* the article has important implications for principal-agent relationships. It shows that delegation contracts do not exist in isolation but are part of a larger and highly fragmented institutional environment. Regulation by an agent might be influenced by overlapping institutions with direct effects on its legitimacy and authority.

Dynamics within external forums might influence the preferences of a principal, causing it to make institutional adaptations. Thus, the design of delegation contracts must not solely be determined by internal, i.e. functional logics, but could also be influenced externally. *Second,* the findings have broader implications concerning the legitimacy of international institutions. While international institutions commonly reflect the distribution of power among its member states at the time of their creation, changes in power can undermine an institution's legitimacy to exert authority. If a delegation contract gives specific institutional privileges only to a subgroup of actors, an agent's authority might be considered illegitimate by other states and the public, even if it produces efficient outputs. *Third,* the findings have important implications for the general relationship between states and private regulators not only in global governance but also in domestic politics. Concerning the question of how much independence states are willing to give to private regulators, the privatization of ICANN illustrates a hard case. Although the transition of the IANA-functions was originally envisaged, and the private stakeholders of ICANN are dominated by U.S. actors, it required high pressure and far reaching internal reforms before the U.S. government was willing to reduce direct control. Therefore, it can be assumed that states in general are very careful in not granting private regulators too much independence.

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Figure 1

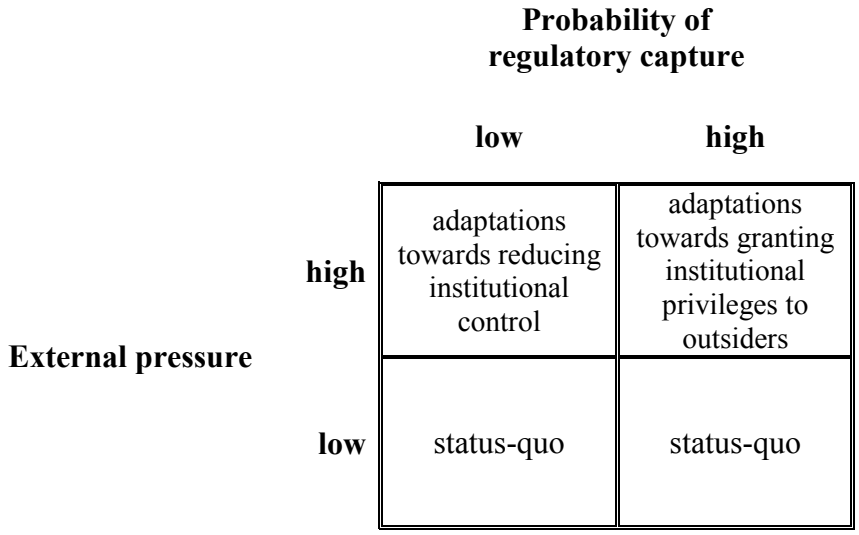

Figure 1: A theoretical model of (non-) changes of delegation contracts

Figure 2

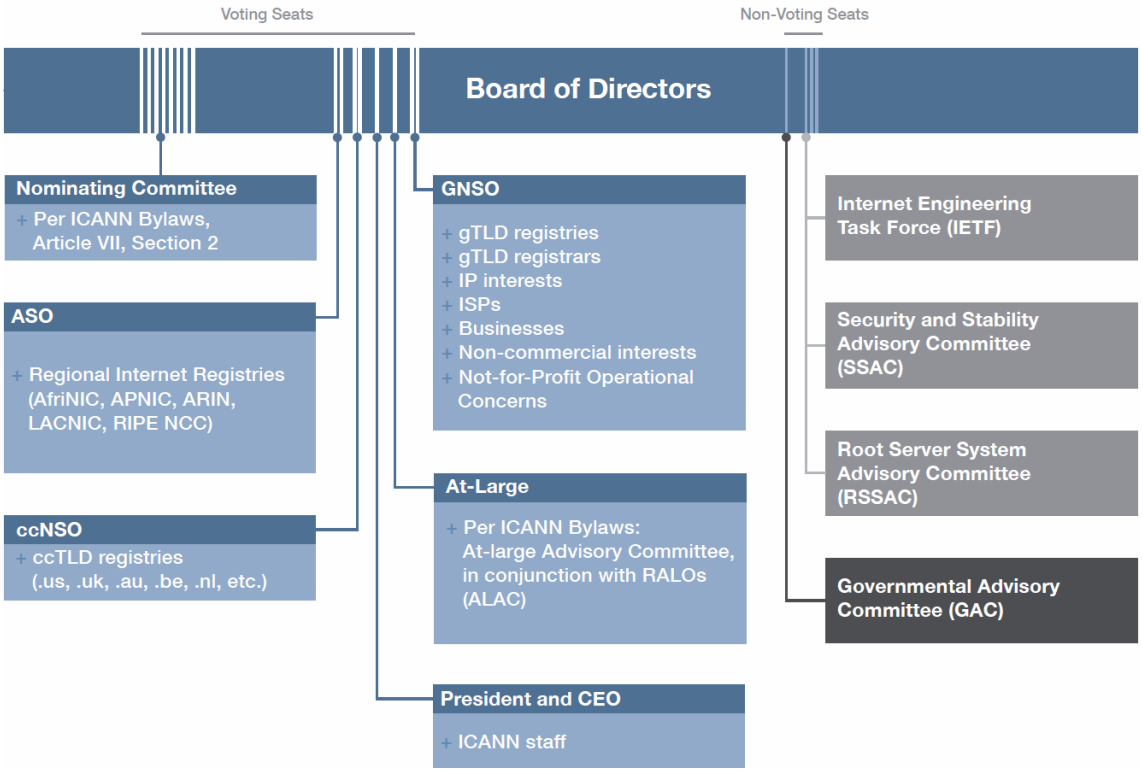

Figure 2: The institutional Structure of ICANN, source: ICANN Homepage (slightly adapted): https://www.icann.org/resources/pages/chart-2012-02-11-en

Aufsatz 2:

The unintended consequences of regulatory import: The Basel Accord's failure during the financial crisis

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The Unintended Consequences of Regulatory Import: The Basel Accord's Failure during the Financial Crisis

Abstract:

This article examines to what extent regulatory import (RI), a common, but understudied mode of governance in regime complexes, was a separate factor of the global financial crisis in 2008. RI describes a specific mode of governance that occurs when regulators explicitly incorporate functionally important governance from an external forum to their own regulations, thus making their own performance dependent on external agency. While RI is associated with benefits, such as specialisation, it could cause unintended consequences. The one-sided dependence on external authority could result in the import of non-complementary governance or regulatory failures and undermine the regulator's performance. We illustrate our argument with the Basel Committee on Banking Supervision that imported governance authority from the International Accounting Standards Board and credit rating agencies. The paper finds two negative consequences of RI for the Basel Committee's regulatory performance in the 2008 financial crisis. First, uncoordinated changes of accounting rules increased pro-cyclical effects that exacerbated the banking crisis. Second, import of credit risk measurement from credit rating agencies led to misjudgement of risk exposure.

Keywords:

Regime Complexes; Indirect Governance; Basel Committee on Banking Supervision, Global Financial Crisis, International Accounting Standards Board, Credit Rating Agencies

Introduction

This article examines the question to what extent regulatory import (RI) was a separate factor of the financial crisis in 2008. RI describes a mode of governance where a regulator explicitly incorporates external legal definitions that are of functional importance for the regulator's issue, thereby making the regulatory output dependent on proper governance of the external forum.

RI as a mode of governance frequently emerges in fragmented issue areas. For instance, the World Trade Organisation (WTO) imports harmonised food safety standards from the Codex Alimentarius Commission, the International Office of Epizootics and the International Plant Protection Convention (Hoekman and Kostecki 2009: 252; Sykes 1995: 58–60) to limit the protectionist effects of different practices among its member states. The European Union (EU) imports common wine standards on the conditions of grape production and methods for analysing and assessing vine products from the International Organisation of vine and wine (OIV) (EU 2014) as part of its agricultural market. The private Marine Stewardship Council (MSC) seeks to incentivise fisheries towards minimising their impact on endangered species. In this context, it uses listings of the Convention on International Trade in Endangered Species (CITES) (MSC 2018: 28) as a benchmark for its eco-labelling, thus, making itself dependent on proper external governance.

RI is a widely used regulatory instrument, yet its implications are hardly analysed. The literature on indirect governance analyses the relationship between a regulator and an intermediary (Abbott *et al.* 2017b; Abbott *et al.* 2019), excluding interactions among them. Thus, it does not take into account that regulators sometimes import authority over specific sub-issues from external forums while regulating targets themselves. This raises questions of how relying on third parties (negatively) affects the regulator's direct governance performance. The regime complex literature predominantly lacks dynamic aspects and uses

inter-institutional inconsistencies as a static analytic point of departure (Alter and Meunier 2009; Drezner 2008; Helfer 2009; Raustiala and Victor 2004). Gehring and Faude (2014) and Pratt (2018) deviate from this static perspective, arguing that legal inconsistencies can be replaced by a division of labour when one institution explicitly accepts another institution's authority over a specific issue, without explicitly theorising and analysing the consequences of ex-post import of authority. Hence, little is known about the dynamics after RI is established and the literature entirely lacks an analysis of empirical cases.

This article addresses this gap by theorising the unintended consequences of RI. Connecting core ideas of the indirect governance and regime complex literature, we argue that regulators cannot fully anticipate the consequences of RI due to the dynamics in external forums. We identify two mechanisms of how RI can trigger disruptive interactions that undermine the regulator's performance. First, external actors can reform policies to achieve their sub-goal more efficiently, thus abolishing complementarities and triggering negative effects on the regulator. Second, the external forum can be characterised by governance failures, resulting in the import of inappropriate governance.

We illustrate our argument for the Basel Committee on Banking Supervision (BCBS) that imported authority from the International Accounting Standards Board (IASB) and private credit rating agencies (CRAs). We find evidence that RI undermined the BCBS's performance during the 2008 Financial Crisis in two distinct ways. First, uncoordinated policy changes in the IASB produced unintended negative externalities for Basel's banking regulation. Second, import of risk sensitivity assessment from CRAs created false incentives against objective credit risk evaluation, thus further exacerbating the crisis.

Beyond our theoretical contribution to the indirect governance and regime complex literature, this article contributes to a better understanding of the weak performance of the BCBS during the financial crisis. Existing studies focused predominantly on Basel's internal regulatory

shortcomings (Goldbach 2015; Lall 2012; Rixen 2013; Tarullo 2008; Thiemann 2014). As an exemption, Mügge and Perry (2014) identify how minimal capital requirements calculation is influenced by external standard setters, yet their focus on 'reflexive finance' as explanation is issue-specific and does not provide generalisable mechanisms. Illustrating that the BCBS's import of governance from external financial institutions constituted a separate factor of the financial crisis, we conclude that the future stability of the international financial system not only depends on whether regulatory loopholes within the Basel Accord are closed, but also whether the vulnerabilities inherent in RI can be overcome. In particular, it raises the question if the BCBS is able to incentivise the IASB to consider effects on banking regulation and CRAs to remove inappropriate incentive structures.

A theory of regulatory import (RI)

Based on general tenets of rational-choice institutionalism (Koremenos *et al.* 2001), we argue that regulators favour RI as a mode of governance when it promises specific benefits. However, we also depart from the standard rationality assumption towards a bounded-rationality model by arguing that regulators cannot fully anticipate the consequences of RI due to incomplete information about future dynamics in external forums. We develop our argument in three steps: First, we illustrate the specific characteristics of RI by comparing it to other concepts of inter-institutional relationships. Second, we discuss rationales on why regulators would import external governance. Third, we theorise how RI can cause negative secondary effects that undermine the regulator's performance.

The characteristics of RI

The concept of RI is based on three central characteristics: First, external governance must be explicitly accepted which implies that a regulator refrains from governing that sub-issue itself and instead incorporates external governance in its regulatory output. Second, the imported governance must have an influence on the impact of the regulator's output. Consequently, RI leads to a one-sided dependence of the regulator towards the external forum.

National rules of key states can play an important role in regime complexes (Raustiala and Victor 2004: 279). Like institutional interactions that can take place between different international rules and between international and national rules (Zürn *et al.* 2018), RI can be horizontally or vertically designed. In the first case, the (international) regulator refrains from the claim to govern a specific sub-issue, and imports governance of a functionally important sub-issue from another international regulatory institution. Vertical RI occurs when international (national) regulators import governance of a functionally important sub-issue from the national (international) level, thus making them dependent on national (international) governance.

Although RI builds on ideas from the indirect governance literature, it is also conceptually distinct from governance modes like delegation (Green 2018; Hawkins *et al.* 2006; Tallberg 2002) and orchestration (Abbott *et al.* 2015). As shown in figure 1, the defining characteristic of indirect governance is that the intermediary is located between regulator and targets, consequently excluding possible interaction effects between regulator and intermediary. In RI situations, regulators import external governance of a functionally important sub-issue from an external forum while still regulating targets (T) directly. Therefore, the main focus of analysis is the established interaction between the governance of the external forum and the regulator. This asks how imported external agency affects the regulator's ability to achieve its own objective. Hence, RI includes both an indirect governance relationship (between the

regulator and the intermediary) as well as a direct governance relationship (between the regulator and its targets).

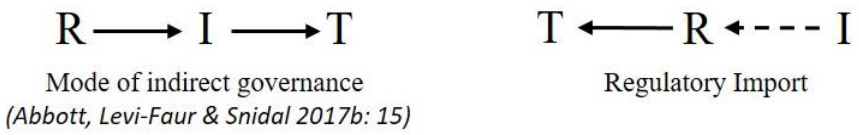

Figure 1: Indirect Governance vs. Regulatory Import

Furthermore, RI is conceptually distinct from sectoral specialisation (Gehring and Faude 2014), which describes a different mode of division of labour in regime complexes. Sectoral specialisation exists when one institution retreats completely from an area of functional overlap with the effect that 'all institutions involved can govern their respective domains independently from each other' (Gehring and Faude 2014: 480). Thus, by transforming overlapping to parallel institutions (Alter and Meunier 2009: 15), sectoral specialisation will suspend inter-institutional dependencies and interactions among them instead of creating a one-sided dependency towards external agency.

The rationales for RI

Regulators are only interested in importing external authority if this is associated with specific benefits. We distinguish between four different rationales for RI in regime complexes, without ruling out that RI could follow different rationales at the same time in reality.

First, RI can be an explicitly used instrument to reduce the negative effects of functional overlaps within regime complexes. Legal inconsistencies among different institutions are a key characteristic of regime complexes (Alter and Meunier 2009; Alter and Raustiala 2018; Orsini *et al.* 2013; Raustiala and Victor 2004). They are either the result of unintentional rule expansion of an institution into the domain of another institution or the strategic behaviour of

states (Helfer 2009; Morse and Keohane 2014; Urpelainen and van de Graaf 2015). However, Gehring and Faude (2014) and Pratt (2018) show that inconsistencies are not static conditions but can be followed by dynamics caused by states that are members of both institutions. Those 'multiple members' have incentives to limit costs of inefficiencies and low productivity, thus pushing for adaptations to reduce legal conflict. The outcome could be RI, in which one institution abandons the claim to regulate the specific sub-issue of conflict and leaves it to the authority of external forums in order to import governance afterwards.

Second, RI could be used by a regulator for specialisation reasons. The organisational ecology literature points out that limited capacities within a broader domain might result in their partitioning with generalist and specialist organisations occupying different niches (Carroll *et al.* 2002; Carroll and Swaminathan 2000). We expect that partitioning occurs particularly in complex and technical issue-areas that experience fast-moving changes and developments, where reason-based regulation requires high amounts of expertise (Mattli and Büthe 2005a: 402–03). Regulators that lack capacities to govern every sub-issue of relevance in a problem-adequate way could make use of RI. They will limit the expense of scarce capacities by focusing on certain areas while importing governance over sub-issues from forums with greater expertise.

Third, member states of an international institution could make use of RI to overcome diverging preferences in regulatory sub-areas that cause blockade. Searching for and bargaining over solutions for a contested sub-issue can be costly and time-intensive. Thus, it might make sense for an institution to focus on a specific domain where regulations can be achieved while retreating from regulating a specific sub-issue and instead importing governance from other forums or the national level where blockade can be more easily dissolved.

Fourth, regulators might also make use of RI in order to increase the input-legitimacy of their authority. For instance, for private regulators the question of whether they are considered legitimate by third parties is crucial (Büthe 2010: 20; Cafaggi and Renda 2012: 13; Cashore 2002). To demonstrate that private authority is embedded into or constrained by public governance, private regulators could make use of public standards for specific sub-issues and abandon the claim to create their own standards in these niches.

The unintended consequences of RI

Besides the benefits of RI, the import of external agency could also generate problems for the regulator that cannot be fully anticipated ex-ante. As argued above, the indirect governance part in RI creates a one-sided dependence towards an external forum, which could result in the import of negative secondary effects when the external forum does not consider the effects on the regulator. Thus, the relationship between both institutions is potentially vulnerable (Genschel and Jachtenfuchs 2018: 191), since the direct governance performance of the regulator is dependent on proper external governance (Gehring and Faude 2014: 481; Trachtman 2003: 31). We identify two mechanisms of how RI can lead to unintended consequences, which we call *functional* and *failure* mechanism. Both mechanisms are based on our assumption that the regulator's performance is dependent on proper governance by the external actor. Hence, in both mechanisms, importing of negative secondary effects is caused by inconsiderate behaviour of the external forum.

The *functional* mechanism is activated if the established policies within the external forum are based on efficiency considerations, but abolish regulatory complementarities with the output of the regulator. Importing governance from expert forums or the resulting specialisation after RI could create secondary effects when RI leads to an increasing insulation of the external

actor (Barnett and Finnemore 1999: 722). Based on a functional logic, external actors could put their focus on achieving their own goal of the specific sub-issue while neglecting the relationship to the regulator. Thus, while policies of the regulator and the external actor could be in equilibrium at t_0 (Gehring and Faude 2014: 482), the external actor could reform governance for functional reasons in order to achieve the sub-goal more efficiently at t_1 (Koremenos *et al.* 2001), not considering the secondary effects for the importing regulator. Policies aimed at increasing the performance of the external actor will then accidentally abolish complementarities and undermine the performance of the importing regulator. This proposition is supported if we can observe that policy changes in the external forum were explicitly implemented to achieve the goal of that sub-issue more efficiently. We should also observe that the importing regulator identifies external policies as an obstacle to achieve its own regulatory goals.

Within RI relationships, importing regulators not only make their performance dependent on whether external actors govern in a complementary, but also in a problem-adequate way. Thus, the *failure* mechanism is activated if the external forum does not establish governance on a functional logic, but instead establishes governance not able to achieve the determined objective. Governance failure might have diverse causes. For instance, an external forum might establish functionally inferior or suboptimal governance due to parochial or rent-seeking incentives. Special interest groups or even the regulated industry itself could try to capture the external forum in order to prevent appropriate governance that is not in their narrow interests (Abbott *et al.* 2017a: 285; Mattli and Woods 2009: 12). Resulting from inappropriate incentive structures in the external forum, the regulators import governance failures within functionally related sub-issues that will undermine their ability to achieve their own goals. This proposition is supported if we can observe that the external forum is not governed in a problem-adequate way in relation to the objective of the sub-issue. We should

also observe that the importing regulator identifies external failures as an obstacle to achieve its own regulatory goals.

The Basel Accord's import and its unintended consequences

The BCBS' import of accounting and credit risk measurement constitute two typical cases that systematically demonstrate the essential vulnerabilities in RI situations. In this regard, the cases fulfil three important characteristics: First, the BCBS externalised sub-issues, accounting and credit risk measurement, that are of functional importance for its objective of global banking stability. Second, it established a one-sided dependence on external forums since the performance of banking regulation is dependent on accounting and credit risk measurement but not vice versa. Third, the BCBS has limited control mechanisms to influence governance in the IASB and CRAs, leaving them autonomy for inconsiderate behaviour. While our BCBS cases are typical concerning the independent variable and causal mechanisms, we must not generalise that unintended consequences of RI always exhibit the same severance. The linkage and resulting multiplication of pro-cyclicality through Basel II regulations are special to the case.

In this section, we show how the BCBS's reliance on external accounting and credit risk measurement increased the pro-cyclicality of the Basel regulations and, thus, acted as a crisis multiplier. We first show how functional changes in accounting standards affected the impact of banking regulations. Then we trace the effects of rating failures of private CRAs on Basel. In the third part, we will explain how the individual pro-cyclical effects of the twofold import unintentionally interacted during the 2008 financial crisis and further exacerbated the pro-cyclicality of banking regulation by stalling interbank lending and destabilising the banking sector.

Pro-cyclicality I: How functional change in accounting rules affects banking regulation

This section presents how the import of and subsequent dependence on external accounting rules impacts Basel's banking regulation. This requires first that we understand why accounting rules matter for banking regulation before analysing how changes in accounting policies affected the Basel Accord.

Externalization of accounting rules in the Basel Accords

The 1988 Accord (Basel I) is a short and rudimentary document, both in content and structure. It develops a simple ratio-based approach on how minimum capital requirements (MCRs) are to be calculated by banks and exclusively tackles the subject of credit default risk, also referred to as counterparty failure. The first part of the Accord defines what constitutes capital, the numerator (c) of the ratio. The capital base (c) must be held by a bank as safeguard for potential credit defaults. The second part deals with the denominator, the risk-weighted assets (rwa).

Basel I does not require banks to hold reserves for every asset in their books equally. Some asset classes are deemed riskier than others. Under Basel rules, sovereign debt of OECD member countries is weighted with 0%, which means they are regarded as save, and banks need not hold capital for this asset class. Basel I employs five risk weights (0%, 10%, 20%, 50%, 100%). The third part defines the minimal capital requirement ratio: $\frac{c}{rwa} \geq 8\%$. Thus, a risk-weighted approach means that banks need to hold 8% capital in relation to a fraction of their total assets.

Determination of *capital* and *risk-weighted assets* is derived from balance sheet information (Basel I §12). Consequently, regulations of balance sheets affect the outcome of the

calculation process of minimum capital requirements. Paragraph 9 of the Accord proves that the BCBS is aware of the functional dependence on accounting rules for this process. The BCBS explicitly abstains from formulating its own accounting rules, citing a lack of competence.

> 'The Committee is aware that differences between countries in the fiscal treatment and accounting presentation for tax purposes of certain classes of provisions for losses and of capital reserves derived from retained earnings may to some extent distort the comparability of the real or apparent capital positions of international banks. Convergence in tax regimes, though desirable, lies outside the competence of the Committee and tax considerations are not addressed in this paper. However, the Committee wishes to keep these tax and accounting matters under review to the extent that they affect the comparability of the capital adequacy of different countries' banking systems.'

The 'differences in (…) accounting presentation' refers to the cleavage between Anglo-Saxon and continental European accounting practices. Harmonisation of these practices between the member countries was not possible at the time, due to the different preferences. Nevertheless, even in the hypothetical case that BCBS member states were not divided in terms of accounting methods, the BCBS, as a network of central bankers, not accountants, would lack expertise to formulate appropriate rules. The rationale for externalising the sub-issue of accounting can be attributed both to the rationale to overcome diverging preferences and to the benefits of specialisation. Since there was no international standard setter in accounting comparable to the BCBS in 1988, the BCBS resumed leaving the details of balance sheet composition to the expertise of national regulatory authorities.

The far more comprehensive Basel II Accord from 2004 does not deviate from this externalisation of accounting practices with minor exceptions. Basel II introduces guidelines for private banks for financial disclosure (Pillar 3), thereby entering the realm of regulating financial statements. It intends to give market participants information about banks' capital adequacy (§809 Basel II), providing exactly the same function as accounting rules. However,

Basel II abstained from defining methodology and technical details of financial disclosure by leaving it in the hands of national and international accounting authorities (§§12, 813-817 Basel II).

By explicitly refraining from governing the functionally important sub-issue of accounting, the BCBS created a one-sided dependence on external standard-setters in accounting, like the International Accounting Standards Committee (IASC). In 1988, the IASC already had published International Accounting Standards (IAS). However, the IASC was not as well institutionalised and not recognised by the member states as standard-setter. This changed drastically in the late 1990's, when the United States Securities & Exchange Commission pushed for a reform of the IASC to make it more fit to serve as international standard setter, while the EU simultaneously was searching for its own accounting practices for the common market, making the IASC's readily available standards a feasible option (Zeff 2012: 817). As a result, the IASC reconstituted itself in 2001 as a seemingly independent private standard setter, called the International Accounting Standards Board (IASB) under the non-profit umbrella of the newly formed International Financial Reporting Standards Foundation (IFRSF). This reform was heavily influenced by the US Securities & Exchange Commission and other accounting bodies in the Anglo-Saxon tradition, known as the G4+1 countries (Zeff 2012: 816)[1]. Hence, it comes as no surprise that the G4+1 countries endorsed the IASB standards. More surprisingly, the EU made the International Financial Reporting Standards (IFRS) mandatory as of 2001, despite the differences in accounting practices compared to the Anglo-Saxon tradition. Since the EU, as a large jurisdiction, plays a central role in making international standards relevant (Newman and Bach 2014; Quaglia 2014: 328), the EU's endorsement gave the IASB the necessary leverage to generate global recognition (Mattli and Büthe 2011: 72).

[1] The G4+1 comprise the accounting authorities of Australia, Canada, New Zealand, the United Kingdom and the United States.

Uncoordinated policy change in the IASB

One major difference between Anglo-Saxon and European accounting practices was the evaluation process of assets on the balance sheet. It was practice in the UK and US to rate at least some assets according to the current market value, from here on referred to as fair value accounting (FVA). The alternative used, for example in France and Germany, is known as historic cost accounting (HCA), which means that assets keep the value that they had upon purchase. Once an asset enters the books, its value is fixed. HCA does not mirror business cycle fluctuations on the balance sheet. In FVA, the values on the balance sheet change with the economic up- and downturns, because their evaluations are market-based (Perry and Nölke 2006: 562).

This difference in accounting practice is vital for the minimum capital requirements calculation process (see formula in the former section) (Mügge and Perry 2014). For example, in FVA, the numerator capital (c) of the minimum capital requirements ratio reflects market development. In economic booms, capital increases due to rising stocks, resulting in an increase of capital. Thus, banks need to hold less capital to meet the 0.08 ratio in boom phases. The opposite is true during recessions. Suddenly, the assets on the banks' balance sheets decrease, which means they need to hold more capital to fulfil the 8% criterion. This phenomenon is known as pro-cyclicality and can aggravate economic fluctuations. The pro-cyclical effect of FVA leads to an overestimation of banks' financial soundness during economic booms and an underestimation during downturns.

Basel I treats historic cost as the norm and FVA as the exception. The IASB's introduction of International Accounting Standard 39 (IAS 39) in 2005 changed that drastically, since it required that companies list their financial instruments according to the FVA method. This standard became mandatory for stock-listed companies in the EU in 2005, therefore making FVA the dominant accounting form for banks in one of the world's major financial markets.

The eventual shift to FVA was fiercely contested among accounting experts in the IASB, which made IAS 39 one of the latest published standards (McGregor 2012: 228). The advantages of FVA lie in its provision of information for investors (Mattli and Büthe 2005b: 255–56). The goal of IAS 39 was to introduce transparency into a bank's financial status, giving investors valuable information about an actor's solvency and reducing uncertainty of business decisions. Largely, one can argue that the whole purpose of IAS 39 is to determine the probability of default (PD) or solvency of financial market actors, which contrasts the taxation-focused perspective of HCA (Perry and Nölke 2006).

The shift to FVA by the IASB was issue-specific to accounting and an effort to increase transparency of financial statements. Thus, the policy change by the IASB followed a functional logic towards the objective of the specific sub-issue, but it did not pay enough attention to its caused effects on the broader complex of international financial stability. As a result, the reliance of the BCBS on the IASB created the problem of external insulation in the pre-crisis phase, since the accounting experts of the IASB did not consider unintended consequences for banking regulation (see also Mügge and Stellinga 2015). This is strongly indicated by the post-crisis institutional reforms that created a system of inter-institutional exchange between the IASB and BCBS, which will be further discussed in the third section.

Pro-cyclicality II and further rating failures of CRAs

Basel II introduced a second major import by externalising risk assessment. The simple approach of Basel I with fixed risk weight categories received considerable criticism after its release by the financial industry. The main argument by the financial industry was that the fixed risk weights of Basel I did not reflect the 'real' risk exposure. Therefore, they lobbied for a more flexible risk weighting rule that would allow them to use state of the art statistical

methods, which could increase their profitability, while simultaneously guaranteeing an adequate capitalization according to the 'real' risk exposure (Newman and Posner 2015; Young 2012).

In order to address these criticisms, Basel II was set to include a weighting system that allows change in risk assessment. This dynamic risk weighting system would require constant updates about the current probability of default (PD) and other risk parameters of each financial asset in the bank's possession. Such detailed and regular updating requires specialised knowledge and considerate capabilities that lie outside the BCBS' competence as a periodic committee with little resources. The lack of capacities to govern the sub-issue of risk assessment itself caused the BCBS to make use of governance over this functionally important sub-issue of credit rating agencies (CRAs).

Basel II introduced the *standardised approach*, a risk assessment system that would replace the fixed risk weights of Basel I with dynamic risk parameters. The approach externalises the actual assessment of risk weights of borrowers to CRAs. These assessments can change over time and are subject to the evaluation of the licenced CRAs. Hence, the Basel Committee decided to use the expertise of CRAs as providers for probability of default estimates in the standardised approach, while not prescribing any detailed methodological means on how CRAs have to rate assets. The Accord only specifies soft criteria of what properties a CRA must fulfil to receive a license. Thus, the Accord gave CRAs much discretion in their rating system. The relationship between the BCBS and private CRAs reflects the governance mode of RI instead of delegation, because CRAs do not regulate banks as an intermediary for the BCBS. Instead, the BCBS only imports governance from CRAs, still regulating banks directly.

In the post-crisis literature, CRA rating systems have attracted attention recently (Helleiner and Wang 2018; Kruck 2017). Rating behaviour of CRAs has been identified as generally too

pro-cyclical by overestimating solvency during boom phases and dropping ratings abruptly with sights of economic downturns (Ferri *et al.* 1999). However, critique of CRAs is much more fundamental and goes beyond technical questions of dealing with pro-cyclicality and assessment methodology.

The widespread observation is that CRAs do not govern on a functional basis, but tend to produce governance failures due to wrong incentive structures. Like the IASB, CRAs are private entities, with their own agendas and interests. However, while the IASB operates under the umbrella of a non-profit foundation, CRAs are large profit-oriented corporations with multibillion-dollar annual revenues. The business model of the large CRAs rests on the issuer-pay model, which means that banks and other stock-listed companies pay CRAs for ratings. The critique here is that this tends to produce 'severe and economically costly perceived rating mistakes or failures' (Kruck 2016: 753), because it incentivises CRAs to be 'issuer-friendly' and rate them higher as warranted.[2] In this regard, CRA's have been considered responsible for repeated rating failures before (e.g. Frost 2007), during (e.g. Pagano and Volpin 2010), and after the 2008 financial crisis (e.g. Kruck 2016). While the exact degree of CRA's responsibility for financial market disruptions is hard to determine, it clearly underlines the effects of entrusting important sub-issues to external actors with own interests without establishing hierarchical control to balance wrong incentives. The intended use of external 'expertise' could then end in the import of governance failures and, undermining the regulator's performance.

[2] However, the evidence on the negative effect of the issuer pay method on rating behaviour in the economic literature is mixed, e.g. Bonsall (2014); Xia (2014).

The multiplication of pro-cyclicality: The interaction between Fair Value Accounting and Risk Assessment

As shown above, the scientific literature identified two major problems with respect to CRAs during the financial crisis. Political scientists predominantly point to the false incentive structure, economists emphasised the strong pro-cyclicality of risk measurements. The paper previously also discussed the pro-cyclicality of FVA, which is also a topic of debate among scholars in the accounting profession (Fiechter 2011; Novotny-Farkas 2016). We bring these different strands of literature together by showing that the pro-cyclical nature of FVA and dynamic risk assessment were linked by Basel II regulations, which caused a multiplication of their pro-cyclicality.

In order to assess the probability of default (PD), credit rating agencies use statistical models that are based on various parameters, like past experience of default, expected economic development and also accounting-based parameters, meaning they use balance-sheet information to calculate the probability of default of borrowers (Altman and Saunders 1997; Treacy and Carey 2000). The most commonly used models in that period, like Z''-Scores and the KMV model, used by credit rating agencies such as Moody's or Standard & Poor's, build on balance sheet information (Altman and Hotchkiss 2005; Crouhy *et al.* 2000; Frey and McNeil 2003; Kealhofer 2003). This fact ties FVA to the calculation of minimum capital requirements. As explained before, the value of assets will fall in economic downturns under a fair value accounting regime. The fall in value will show an increased probability of default in the models of CRAs, leading to a sudden drop of ratings. Under the standardised approach of Basel II, banks are then forced to hold more capital, because they now are exposed to a greater risk of counterparty failure.

The *multiplicative* aspect here is that Basel II not only exposed the value of financial assets to market developments, but also the related risk weights. Under former Basel I rules, the pro-

cyclical influence of FVA would have been limited to the actual value of the assets, but the risk weights were fixed and risk assessment would not have changed with the business cycle. However, the introduction of dynamic risk weights and the import of risk assessment from CRAs in the standardised approach connected the pro-cyclical nature of both policies, thereby multiplying their pro-cyclicality.

While some of the post crisis scientific literature finds that the issue of accounting induced pro-cyclicality was overestimated (Laux and Leuz 2010; Xie 2016), the analysis by the relevant political and regulatory authorities at the time identified the amplifying effect of FVA as one of the main accelerators for the crisis (Claessens and Kodres 2014: 18; Financial Stability Forum 2009: 26; IMF 2008: 65–66; Paananen *et al.* 2012). This is best made evident by the latest reform of the Basel Accord in 2013 (Basel III). Reducing pro-cyclicality of Basel II regulations is one of the major objectives of Basel III (§§18-22). Specifically in §18, Basel III recognises that '*[t]he tendency of market participants to behave in a pro-cyclical manner has been amplified through a variety of channels, including through accounting standards (...)*'. Furthermore, §23 states that

> 'The Committee strongly supports the initiative of the IASB to move to an EL (*expected loss*, *authors' note*) approach. (…). It has issued publicly and made available to the IASB a set of high level guiding principles that should govern the reforms to the replacement of IAS 39. The Committee supports an EL approach that captures actual losses more transparently and is also less procyclical than the current "incurred loss" approach'.

The BCBS recognises the dependence on external accounting standards, identifies the policy change towards FVA in IAS 39 as problematic for its goal, and seeks reform in its favour. The BCBS can only 'strongly support the initiative of the IASB' which perfectly illustrates the non-hierarchical relationship between the two institutions. Another option for the BCBS would be to extend the disclosure requirements of Pillar 3 into fully detailed accounting rules.

This would introduce regulatory competition, most likely inducing a multitude of other negative consequences.

The import of risk assessment from CRAs and balance sheet regulations from the IASB caused this negative interaction of unintended multiplicative pro-cyclicality under the Basel II framework. In hindsight, it is not surprising that issuer-friendly assessments of CRA's could lead to an inappropriate underestimation of credit default risk. The negative interaction between Basel and IASB is more puzzling. There are indications that the IASB was too insulated, causing experts to pursue accounting objectives without considering the effects for the overlapping BCBS (IMF 2008: XIV). This becomes evident if we investigate the post-crisis reforms. First, the BCBS became an observer in the IFRSF Monitoring Board and a member in the IFRS Advisory Council. The Monitoring Board is a public oversight organ that was only introduced in 2009 after it became evident that the IFRSF was too powerful and relevant in global financial regulation to be left unchecked. Before that, the IFRSF was completely private from its reconstitution in 2001 until 2009, which was the time-period when the disputed IAS 39 was in effect. The Advisory Council assists the IASB in policymaking. Thus, the Council gave the BCBS a possibility to sensitise the IASB for issues that are relevant for banking regulation.

In return, the BCBS realised its vulnerability towards policy changes in external accounting for its own performance and founded the Accounting Experts Group (AEG). The AEG is a committee that serves as a forum for policy exchange between the BCBS and the IASB in order to avoid future coordination problems. Lastly, both institutions agreed upon a memorandum of understanding in 2017, where they mutually acknowledged the legitimacy and authority of each other and formalise their cooperation.[3]

[3] https://www.bis.org/bcbs/ifrs_bcbs_mou.htm.

Conclusion

Against the backdrop of the Basel Accord's performance during the financial crisis, this paper examined the unintended consequences of regulatory import (RI). A regulator's import of governance in a functionally important sub-issue from an external forum creates a one-sided dependence and vulnerabilities towards external dynamics. First, the external forum could establish regulations to achieve the sub-goal more efficiently, thereby abolishing complementarities with the regulator and creating negative secondary effects. Second, the external forum might be characterised by governance failures, thus, providing the regulator with inappropriate governance for a functionally important sub-issue. Our analysis finds that RI by the Basel Accord was a separate factor of the 2008 global financial crisis. The Basel Accord imported functionally important governance of accounting and risk assessment from the IASB and CRAs, thus creating one-sided vulnerabilities. Policy changes in the IASB towards Fair Value Accounting multiplied the pro-cyclicality of Basel regulations and caused a credit crunch in the crisis. Furthermore, CRAs had incentives against objective credit risk evaluation. Thus, they caused the BCBS to import regulatory failures, which further undermined its ability to provide financial stability.

In general, RI is a common and overlooked phenomenon. For instance, it was argued that the WTO's import of external food safety standards could lead to unintended consequences. In this regard, concerns were raised that organisations like the Codex Alimentarius Commission follow their own goals and could ignore the trade perspective, thus providing standards that are not complementary with WTO objectives (Trachtman 2003: 31). Although RI is common, our definition delivers some important cut-off points, making sure not everything that is defined externally is automatically a case of RI. First, the import must be explicit, thus excluding cases where dependence on related issues is ignored or unrecognised. Second, the imported governance must have an influence on the impact of the regulator's output, thus

excluding the adoption of common standards and definitions that are necessary in every regulatory operation.

The article extends the knowledge about the role of indirect governance in regime complexes. While RI might be an important instrument to overcome legal inconsistencies, we show that it is also vulnerable for unintended consequences. Therefore, the importing regulator must pay attention to interaction aspects when establishing RI to prevent insulation of the external forum from the regulator's objective or inappropriate incentive structures. In cases in which the regulator lacks opportunities to extend hierarchical control over the external forum, soft coordination mechanisms could help to avoid negative interaction effects. However, since the regulator does depend on the intermediary but not vice-versa, the success of coordination mechanisms hinges on the goodwill of the external provider. In this respect, the BCBS's adaptations of its regulations to cushion disruptive interactions with Fair Value Accounting, as well as the implementation of a mutual system of representation between the BCBS and IASB might have been important steps to overcome external insulation, however the one-sided dependence of the BCBS on accounting authorities remains a challenge. With respect to CRAs, public attempts to limit their autonomy were also not effective. Thus, the 'issuer-friendly' incentive structure of private CRAs still constitutes a vulnerability of the BCBS and its ability to provide international financial stability in the future.

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Aufsatz 3:

Externalizing internal policies via conflict: The EU's indirect influence on international institutions

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Externalizing internal policies via conflict: The EU's indirect influence on international institutions

Abstract:

Is the EU able to shape policies in international institutions in which it is not involved in decision-making? This paper proposes an innovative mechanism of how the EU's internal policies could lead to policy adaptations within international institutions. Having authority over the single market, the EU regulates important market actors whose behavior is oftentimes crucial for the effectiveness of global cooperation projects. By intentionally or unintentionally creating regulatory conflict with an overlapping international institution, the EU might influence the behavior of European market actors in a way that it undermines the effectiveness of the international institution. To preserve its effectiveness, the external institution is forced to adapt towards European internal policies to dissolve conflict and to enable mutual compliance for European market actors. The potential of the mechanism is tested for two typical cases: The EU's externalization of data protection to the Internet Corporation for Assigned Names and Numbers (ICANN) and the externalization of European fundamental rights to the UN Security Council. The process tracing finds that the EU is able to carve out authority from external institutions under specific conditions.

Keywords: European Union; externalization; Market Power Europe; regulatory conflict; ICANN; Kadi case

Introduction

This article analyzes how the European Union's (EU) internal decision-making indirectly leads to institutional adaptations within international institutions. The literature widely recognizes that the EU possesses substantial market power in the global economy, and thus, is a key player shaping international regulation (Damro 2012; Drezner 2007; Young 2014). In this regard, the EU frequently engages in regulatory externalization, or policy export, which describes the EU' ability to project its internal policy objections and regulations beyond its borders (Damro 2015; Lavenex and Schimmelfennig 2009; Müller *et al.* 2014: 1106).

The literature has broadly analyzed the active role of the EU in international institutions. One strand finds that the EU can play a role as a formal or de-facto member in international organizations such as the World Trade Organization or the Food and Agricultural Organization (Debaere *et al.* 2014; Gehring *et al.* 2013; Krüger 2013). Another strand analyzes the performance of the EU in international institutions in which it lacks membership by coordinating its EU member states (Baroncelli 2011; Blavoukos and Bourantonis 2011; Jørgensen *et al.* 2011). Another strand finds that internal cohesiveness might influence the success of the European Commission and other EU representatives in negotiations over international regimes such as the Cartagena Protocol (da Conceição-Heldt and Meunier 2014; Delreux 2014). Other works emphasize that the EU could externalize its internal policies in an indirect way by creating negative externalities for third parties (Birchfield 2015; Lavenex 2014).

This paper contributes to the externalization literature by proposing an innovative causal mechanism of indirect externalization not identified by the literature so far. It uses core ideas of the Market Power Europe framework by Damro (2015) and connects them to the literature on institutional interaction and regime complexes (Alter and Meunier 2009; Pratt 2018; Raustiala and Victor 2004). I argue that internal decision-making of the EU may intentionally or unintentionally create a regulatory conflict with an international institution that leads to

externalization. If European regulatory policies cause important European market actors to suspend the rules and obligations of the international institution, the latter's effectiveness is undermined. In order to preserve its role as a regulator, the external institution has incentives to internalize European objectives and to adapt towards European internal policies.

The process analysis of two typical cases, the EU's externalization of data protection to the Internet Corporation for Assigned Names and Numbers (ICANN) and the externalization of European fundamental rights to the UN Security Council, finds that an established regulatory conflict by the EU may change the environment of overlapping international institutions in a way that it undermines their effectiveness. Causing important European market actors to suspend compliance with international rules, international institutions face problems to achieve their goal. As this challenges the institutions role as a regulator, they are forced to internalize European objectives and to adapt to European policies if they seek to dissolve conflict.

The article contributes to three important debates. First, the article contributes to the Market Power Europe debate by providing a new causal mechanism of how the EU can use its market power to externalize its internal policies to international institutions. Second, it adds to the important literature on EU actorness (Bretherton and Vogler 2006; Jupille and Caporaso 1998). This paper shows that the EU must not necessarily be a member of international institutions and take part of negotiations to influence their policies. Having regulatory authority over important market actors, the EU may force other international institutions to recognize it as an important actor if its internal regulatory policies undermine the institutions' effectiveness. Third, the findings contribute to debates about great power politics in general as the mechanism is not only applicable to the EU but also to other regulatory great powers including the US and potentially China.

The rest of this article is divided in 5 sections. The next section briefly discusses the EU as a market power and why this matters for global cooperation. Section three will then formulate the causal mechanism of how regulatory conflict leads to externalization. The potential of the

mechanism will be explored in two case studies in sections 4 and 5, before discussing the findings in the conclusion.

The EU as a market power

The EU is widely recognized as a global regulatory power (Young 2014, 2015). It possesses exclusive legislative competences over single market policies as well as concurrent legislative competences in other communitarized areas connected to the single market. This wide-ranging transfer of competences to the EU level gives the European Commission, the European Parliament, the Council (with its majority voting) as well as the European Court of Justice a strong role in these policy areas. As European member states cannot act independently anymore in these areas (Gehring *et al.* 2017: 730), the EU makes up an important power in international relations.

The single market is the major resource that provides the EU with the material power and regulatory capacities to export its internal policies to third parties (Damro 2012: 683). Due to the importance of the European single market for the global economy (Meunier and Vachudova 2018: 1635), the EU can provide both positive incentives (e.g. offering market access) as well as negative incentives for third parties to adapt to European standards (e.g. banning market entry or imposing fines) (Damro 2012: 688). Thus, conceptualizing the EU as a market power rests more on the coercive use of market power instead of persuading third parties based on normative arguments to adapt to European standards (Manners 2002).

Market size is a core factor that determines whether a regulator is able to externalize its internal policies to third parties including other states or international organizations (Damro 2012: 686). For instance, Drezner argues that market power is the prerequisite for using economic coercion so that "market size affects the material incentives governments face in choosing whether to coordinate regulatory standards" (Drezner 2007: 32). Due to their market

size, great powers can influence the beliefs of third parties, causing them to adapt to their objectives and rules (Drezner 2007: 32–33).

While controlling access to the single market plays a key role for explaining adaptations of other states to European standards, it does not explain why external international institutions adapt to European objectives. However, market power has another impact, as it oftentimes determines whether a state is part of the smallest possible coalition to make cooperation effective (k-group). Accordingly, market power defines how important a state is for cooperation projects like international financial stability or the protection of the ozone layer. In this sense, cooperation is oftentimes more dependent on compliance of great powers compared to less powerful states, giving great powers more leeway to shape international rules (Krasner 1991). Due to its exclusive competences over single market policies and concurrent competences within domains connected to the single market, the EU has regulatory authority over many important private market actors whose behavior is pivotal for the provision of collective goods at the international level. Examples of such regulatory targets are European banks and insurance companies in the case of international financial stability, European car and production industries in the case of global climate protection or European fisheries in the case of global fish stock protection. It follows that the EU is able to undermine global cooperation projects if it defines single market policies or policies connected to the single market inconsistent with the rules and obligations of an international institution. The effect of such a created regulatory conflict could be the adaptation of the external institution towards European preferences.

EU regulations within context: a mechanism of externalization

International regulation today is characterized by a high degree of institutional fragmentation (Biermann *et al.* 2009). For instance, the issue of global finance is not regulated by an integrated organization but by several institutions including, the International Monetary Fund, the World

Bank, the Basel Committee on Banking Supervision and the International Accounting Standards Board. These institutions partially overlap in their membership and regulatory mandate, so that institutions do not regulate as separate entities anymore but influence each other within a broader institutional context (Alter and Meunier 2009; Gehring and Oberthür 2009; Orsini *et al.* 2013; Pratt 2018). This institutional context is frequently conceptualized as a regime complex, defined as an "array of partially overlapping and non-hierarchical institutions governing a particular issue-area" (Raustiala and Victor 2004: 279).

Regime complex literature typically "treats the co-existence of multiple governance actors with overlapping mandates as a pathology […] that threatens governance effectiveness through redundancy, inconsistency and conflict" (Abbott *et al.* 2015: 7). Conflict describes a situation in which „the overall policy objectives as well as the obligations emanating from overlapping […] agreements fail to complement and enhance each other – or worse, when they are mutually exclusive" (Rosendal 2001: 97). Although regime complex research predominantly analyzes conflicts among intergovernmental institutions, it does not exclude national rules as important elements (Raustiala and Victor 2004: 279). Thus, besides horizontal interactions among international institutions, vertical interactions may take place between international and national authority (Zürn *et al.* 2018: 3).

The EU must be conceived as a regulatory state since its member states pooled far reaching regulatory sovereignty and the European institutions such as the Commission and the ECJ possess extensive regulatory competencies (Genschel and Jachtenfuchs 2018: 180). As a regulatory state, the EU may create a regulatory conflict with an international institution by its internal policies. Thus, rule based conflict may occur due to regulations adopted via the ordinary legislative procedure involving the Commission, Council, Parliament and the Court of Justice (ECJ). Alternatively, it occurs because an empowered agent like the Commission or ECJ takes a binding regulatory decision.

Furthermore, the EU may either unintentionally or intentionally create a conflict. The EU may accidentally create a conflict if it seeks to address a new societal problem that requires regulation (Koremenos *et al.* 2001). It may then define conflicting regulations, although it does not desire to intervene into the authority of an international institution. The EU may also intendedly create rule conflict. An intended conflict emerges if the EU seeks to challenge the objectives and obligations of an international institution and, therefore, formulates rival rules and standards (Morse and Keohane 2014; Schneider and Urpelainen 2013). In this regard, it is argued that supranational organs like the Commission have strong incentives to export internal policies (Gehring *et al.* 2017: 730).

Creating a regulatory conflict, the EU can externalize its internal policies to international institutions in which it is not a member. Based on the work of Damro (2012, 2015), I define externalization as an overlapping institution's adaptation to European internal policies and regulatory measures. This definition is similar to the concept of policy export defined as "the EU's capacity to actively or passively project its own policy paradigms or norms beyond its borders" (Müller *et al.* 2014: 1106). Hence, by using its market power (either intentionally or unintentionally), the EU is able to influence decision-making in external international institutions beyond its own formal regulatory sphere (Birchfield 2015).

The causal mechanism between the cause (a regulatory conflict created by the EU) and the outcome (adaptation by an international institution) is conceptualized in three intermediate steps. First, conflicting rules or regulatory decisions by the EU change the behavior of European regulatory targets. While these private market actors had to comply with those rules and obligations of the external institution before, conflicting regulations defined by the EU bring them into a bad position as they cannot comply with both sets of regulations at the same time. Using its coercive means, the EU is able to enforce its policies towards European targets, causing them to suspend external obligations. Regulatory targets might even have an intrinsic motivation to follow European rules and to suspend externally defined regulations as it makes

them better off. Second, the change of behavior of market actors triggered by conflicting European regulations is at odds with the objectives of the external institution, thus weakening the latter's effectiveness (Gehring and Oberthür 2009: 142). As important targets suspend compliance, the external institution faces problems to achieve its regulatory goal. This leads to a reaction of the external institution, as a third step, and coerced internalization of European objectives. The external institution realizes that the regulatory conflict changed the institution's environment in a way that it undermines its role as a regulator, and that it must adapt to enable targets to comply with both overlapping obligations at the same time. The outcome is institutional adaptation, as the external institution realigns its policies towards European internal decision-making.

Table 1: The causal mechanism of externalization (inspired by Beach and Pedersen 2013)

Cause	**Causal Mechanism**			**Outcome**
EU creates regulatory conflict →	European targets adapt to EU rules →	Change of behavior weakens effectiveness of external institution →	External institution internalizes EU objectives →	External institutional adaptation
	<u>Observable implications</u> - targets state they cannot comply with both sets of regulations at the same time -targets state they do not have to implement external standards due to European rules	<u>Observable implications</u> - external institution considers targets' behavior as problematic - attempts to enforce compliance by European targets	<u>Observable implications</u> -external institution realizes it cannot enforce its obligations to European targets -external institution perceives adaptation as an opportunity to sustain its role as standard-setter	

The mechanism includes an important scope condition that must be existent to be triggered. A necessary condition is that the EU exhibits sufficient structural power in the overlapping area. This is given under two conditions. First, the EU must have sufficient

hierarchical authority to be able to influence European market actors towards complying with European rules, while simultaneously suspending external rules. If market actors have no incentives to react to conflicting standards by the EU, the mechanism is not triggered. Second, the performance of the external institution must sufficiently depend on compliance by European market actors. If the external institution is able to achieve its goal without compliance by them, the EU is not able to coerce the external institution towards adaptations.

I use theory-testing process-tracing to explore the potential of the proposed mechanism (Beach and Pedersen 2013). In this regard, I select two typical cases where both the cause and outcome are present as well as the scope conditions that allow the mechanism to operate (Beach and Pedersen 2013: 150): the EU's externalization of data protection to the Internet Corporation for Assigned Names and Numbers (ICANN) and the externalization of European fundamental rights to the UN Security Council. However, both cases variate to that effect that regulatory conflict was caused by European legislation in the first case and by a decision of the ECJ in the second case, thus demonstrating that the mechanism may operate in different circumstances if the typical conditions are existent.

ICANN and the adaptation to European data protection regulations

The case of ICANN's adaptation to European data protection regulations shows how a regulatory conflict created by the EU leads to external institutional change. With the internet becoming increasingly important for the global economy, the regulation of the domain name system (DNS) became functionally important for the impact of international intellectual property rules. While ICANN established policies to protect trademarks in the DNS, regulatory conflict emerged when the EU adopted its General Data Protection Regulation (GDPR) in 2016. To protect the personal data of European domain name holders, the GDPR required market actors to stop providing personal information of European domain name holders to a public

data base and thus, indirectly, to stop complying with ICANN's policies. With important European market actors suspending compliance with ICANN' requirements out of fear for financial penalties, ICANN adapted its policies towards dissolving inconsistencies with the European GDPR to preserve its role as a global regulator.

ICANN and the protection of trademarks

Intellectual property rights play an important role in the globalized political economy (Helfer 2009; Muzaka 2010). Trademarks that "grant[s] exclusive rights to names, signs and other identifiers in commerce" (WIPO 2013: 12) became a controversial issue for the global economy with the rise of the internet.

Trademark questions were raised regarding the regulation of the DNS that includes IP-addresses and names of websites like www.adidas.com. The DNS, as a global database, maps domain names to the respective numerical identifier (IP-address), thus enabling the transmission of information across computer networks without internet users being required to remember complicated IP-addresses. To be functional, however, each IP-address and domain name has to be unique (Goldsmith and Wu 2006: 168), which requires the regulation of the allocation of domain names. In this respect, the DNS was characterized by trademark conflicts over individual domains and trademark infringements including cybersquatting and typosquatting. While cybersquatting means that a domain name of someone else is registered to sell it to the trademark owner, typosquatting describes the securing of almost-identical domains to a trademark name to exploit typos and misspellings (Bradshaw and DeNardis 2018: 337).

The negative side effects of conflicts and infringements was a main reason for the US government to support the creation of a new private organization based on a multi-stakeholder design, ICANN, and to delegate the task of establishing policies that would settle disputes

between domain name and trademark holders (Kleinwächter 2000: 558). ICANN did not replace registries that administer individual top-level domain names or registrars that sell domain names to registrants, but in fact exerts hierarchical authority over them (Mueller 2010: 230).

One important objective of ICANN was to extend the impact of intellectual property rules to the DNS, giving trademark holders the same rights they possess in the physical world (Mueller 2002: 231). This would include rules for the allocation of domain names that allow the protection of trademarks as well as rules that facilitate the identification of trademark infringements.

Accordingly, ICANN created the *Uniform Domain Dispute Resolution Policy* that became effective in 1999 and illustrated "an international dispute resolution procedure that enables trademark holders to challenge the registrant of an Internet domain name, bring the name to binding arbitration and, if the challenge is successful, gain control of the name" (Mueller 2001: 152). The policy specifies when disputes between domain name and trademark holders will be initiated and under which circumstances domain names must be transferred.[1] For this purpose, ICANN accredited several dispute-resolution service providers that must follow ICANN's rules on dispute settlement.[2] Although the policy established by ICANN does not give trademark holders a preemptive right (before allocation) over specific domain names, it gives trademark holders the ex-post right to usurp a domain name if the claim is based on proper arguments.

While the *Uniform Domain Dispute Resolution Policy* builds the legal basis for the protection of trademarks, there were also concerns about the implementation of intellectual property rights. Thus, WIPO stated within a report in 1999 that

[1] ICANN, *Uniform Domain Name Dispute Resolution Policy*, Para 4, available at: https://www.icann.org/resources/pages/policy-2012-02-25-en.
[2] See „Rules for Uniform Domain Name Dispute Resolution Policy (the „Rules") for more information about the procedure.

> "We consider that it is essential for the legitimate protection and enforcement of intellectual property rights, as well as for many other public policies recognized in the law, that contact details be collected. Without accurate and reliable contact details, the task of assigning responsibility for activities on the Internet is vastly complicated" (WIPO 1999: Para. 64).

Furthermore, the report stated that

> "the majority of commentators considered that the public availability of contact details of domain name holders was a key to the enforcement of intellectual property rights and strongly opposed any restrictions on the availability of data concerning those contact details" (WIPO 1999: Para. 75).

According to WIPO recommendations, ICANN established policies to strengthen the enforcement of intellectual property rights in the DNS and to simplify the identification of domain name holders and the detection of trademark infringements. Central for the identification of trademark infringements is the WHOIS system, an identity disclosure database that publicly provides personal information about domain name owners (Bradshaw and DeNardis 2019: 4). ICANN committed to "implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information" (Affirmation of Commitments 2009: Para. 9). Therefore, ICANN required contracted registrars (those actors that sell domains) to supply information about domain name holders to the WHOIS system, including the name, postal and e-mail address, voice telephone number and fax number of the domain name holder (ICANN 2013: Para. 3:3). Thus, WHOIS, as a public database, implemented intellectual property interests to detect the identities behind registered domain names that contained their trademarks and to enforce intellectual property rights.

The EU's push for data protection: regulatory conflict leads to externalization

In 2016, the European Union (EU) unintentionally created a regulatory conflict by adopting the General Data Protection Regulation (GDPR). The GDPR's objective is to protect the "fundamental rights and freedoms of natural persons and in particular their right to the

protection of personal data" (EU 2016: Para. 1:1). In this context, the EU defined specific rights for individuals and the protection of their personal data, thus imposing "a new set of rules and obligations on organizations that collect personal data of EU residents" (Bradshaw and DeNardis 2019: 8). In article 5, defining "principles relating to processing of personal data", the GDPR bases the collection of personal data on six important principles, whereby the *purpose limitation* and *data minimization* principles are of central importance for the WHOIS system. While the *purpose limitation* principle says that personal data shall be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes", the *data minimization* principle says that "personal data shall be adequate, relevant, and limited to what is necessary in relation to the purpose for which they are processed" (EU 2016: Art. 5).

Concerning ICANN, the GDPR's push for personal privacy protection required to restrict access to the WHOIS system and created regulatory conflict with ICANN, since the functionality of the domain name system does not require the public availability of personal contact information. The WHOIS system administered by ICANN was based on the principle of transparency instead of anonymity by making personal information about domain name holders public, including the name, phone number, email address, postal address, fax number and voice telephone number (Bradshaw and DeNardis 2019: 4). The WHOIS system, therefore, followed intellectual property objectives, as it illustrated an effective instrument for trademark holders (Mueller 2002: 235). While putting great emphasize on the protection of trademark holders' interests, it also created negative secondary effects for privacy and data protection since sensitive and publicly accessible information exposed individual persons to spam and harassment (Bradshaw and DeNardis 2019: 6).

The EU's GDPR brought individual registrars and registries under contract with ICANN in a bad position as both ICANN's and the EU's policies could not be implemented at the same time. While ICANN required them to comply with its policies and to provide transparent

information about registrants to the WHOIS system, the EU's GDPR threatened registrars and registries with severe financial penalties when doing so. Thus, registration authorities that do not comply or might fail to comply with EU law "would be liable for GDPR penalties of up to €20 million or 4 percent of their annual turnover" (Vaughan-Nichols 2018).

As a reaction to the conflict, registration authorities were forced to select among the mutually exclusive policies. To prevent financial punishment by the EU, important individual registrars like GoDaddy subsequently changed their behavior and started to mask personal contact information and throttle access to its WHOIS service. Another registry, CoCCA, removed all personal information from the WHOIS system and started charging trademark holders for information (McCarthy 2018). This put a lot of functional pressure on ICANN since the change of behavior of important registration authorities towards non-compliance threatened the operability and efficiency of ICANN. ICANN first required individual registries to comply with its policies and to return to providing the personal information of registrants to the WHOIS system. Yet, registries like the Dutch FRL Registry B.V. sought to persuade ICANN to refrain from consequences since implementing the Registry Agreement with ICANN would automatically result in breaking EU law.[3]

ICANN stated that the conflict could ultimately undermine its ability to enforce its contracts with registration authorities and that the suspension of compliance by some targets could lead to the fragmentation of the WHOIS system (ICANN Board 2018: 3). Finally, ICANN's Board decided to adapt its regulations towards coordination with the European GDPR to resolve the regulatory conflict.

> "Absent these modifications, ICANN, Registry Operators, and Registrars would not be able to comply with both the law and ICANN agreements when the GDPR goes into effect on 25 May 2018. This would result in the inability of ICANN to enforce its contracts. This would also result in each Registry Operator and Registrar making their own determination regarding what gTLD [generic top-level domain] Registration Data

[3] ICANN, *Data Protection/Privacy-Correspondence: Letter from Jetse Sprey to Göran Marby regarding Gemeente Amsterdam FRL Registry B.V.*, available at: https://www.icann.org/en/system/files/correspondence/sprey-to-Marby-9oct17-en.pdf.

> should be collected, transferred and published, leading to a fragmentation of the globally distributed WHOIS system. Fragmentation of the WHOIS system would jeopardize the availability of Registration Data, which is essential to ensuring the security and stability of the Internet, including to mitigate attacks that threaten the stable and secure operation of the Internet" (ICANN Board 2018: 1).

In May 2018, ICANN internalized European data protection objectives by adopting the *Temporary Specification for gTLD Registration Data.* While the specification on one side keeps requiring the collection of domain name holders' data, it restricts this data to a layered/tiered access. WHOIS queries will then not provide personal data of the registrants anymore but only information to identify the sponsoring registrar. Yet, it gives third parties with legitimate interests the opportunity to access data by contacting the registrar (ICANN Board 2018: 1). Furthermore, the specification gives registries and registrars greater flexibility to prevent thwarting EU regulations (ICANN Board 2018: 1). Since this ad-hoc specification by the ICANN Board expired in March 2019, there was need for a long-term solution. Therefore, the Generic Names Supporting Organization (GNSO), responsible for generic top-level domains within the DNS, adopted long-term policy changes against the parochial intellectual property and towards privacy interests (Mueller 2019). These changes, inter alia, comprised the redaction of personal contact information from the WHOIS system including the name, organization, street, city, postal code, phone and email address of the domain name holder (ICANN GNSO 2019: 13–14), thus reforming the WHOIS system according to the provisions of the GDPR.

Summarizing, the regulatory conflict created by the EU led to adaptations of ICANN to European data protection regulations. Important European market actors, registries and registrars, suspended compliance with ICANN's policies because they feared financial penalties, thus undermining the effectiveness of ICANN. Recognizing that it was not able to enforce its policies towards registries and registrars, ICANN adapted its policies towards European data protection regulations to sustain its role as a global regulator.

The UN Security Council and the adaptation to European fundamental rights: the Kadi case

The case of the UN Security Council's adaptation to European fundamental rights illustrates that European institutions with far-reaching authority and autonomy, primarily the European Commission and European Court of Justice (ECJ), can establish regulatory conflict with an external institution even against the will of European member states and that this causes external institutional change. As part of its strategy to combat terrorism, the UN Security Council created a listing procedure in which the financial assets of individuals and entities connected to Al-Qaida must be frozen by the member states. Regulatory conflict emerged when the ECJ decided in the well-known Kadi Case that the UN Security Council's listing rules violated European fundamental rights of due process and annulled European regulations that implemented UN listings decisions. With European private banks being forced to release financial assets of listed persons and entities, the Security Council feared that its multilateral sanction regime could be undermined. Consequently, it adapted its listing procedures towards including fundamental due-process standards.

The UN sanctions regime and the Kadi complaint before the European General Court

The UN Security Council has different non-military instruments at hand to provide international peace and security such as trade and arms embargos. For some time, it increasingly used so-called smart sanctions that do not target entire states, but individuals and entities associated with threats to international peace and security. As part of its individual sanction regimes, the Security Council regularly establishes sanctions committees to reduce its workload which are composed of the same member states. In this regard, the Security Council created the Al-Qaeda sanctions committee responsible for implementing the UN resolution 1267 that called for financial asset freezes of individuals connected to the terrorist group. The main objective of the committee is to manage the sanctions list, including defining procedural rules that govern the

process of listing individuals and entities connected to Al-Qaeda as well as taking the listing decisions according to these rules (Gehring and Dörfler 2013). All in all, the committee listed about 100 individuals and entities that were supposed to have ties to Al-Qaeda (Harsch and Maksimov 2019: 1098).

In 2002, the EU adopted regulation No. 881/2002 to implement the UN sanctions list in order to freeze financial assets in the EU of listed persons and entities. In this context, the EU regulation included the freezing of funds and other assets of a Saudi Business man, Yassin Abdullah Kadi, who had substantial financial assets in the EU (Búrca 2010: 17) and who was listed by the UN upon request by the US in October 2001. When European banks froze the financial assets, Yassin Abdullah Kadi took legal actions against it and filed a suit in the European General Court (EGC)[4], making it the first regional court to review UN resolutions. Seeking to annul the European implementing regulations, Kadi accused the EU that they violated his "fundamental rights, including the right to be heard, the right to judicial review, and the respect for property" (Harsch and Maksimov 2019: 1098). The EGC decided against Kadi, arguing that the EU has no jurisdiction to review legally higher UN resolutions that are binding for all member states. However, Kadi appealed the judgement to the European Court of Justice.

The ECJ decision: regulatory conflict leads to institutional adaptations within the UNSC

The European Court of Justice followed the assessment of ECJ Advocate General Miguel Maduro who argued that the European regulation implementing the UN sanctions list is not compatible with European fundamental rights of due process, thus overturning the decision of the EGC in 2008. The ECJ's decision made clear that all European regulations must respect

[4] Formerly the Court of First Instance.

fundamental rights, thus annulling sanctions against Kadi as they restricted the right to be heard, the right to an effective legal remedy, and the right to property.[5]

The decision of the ECJ to annul the European regulations that implemented the Al-Qaida sanction measures led to a direct regulatory conflict between the fundamental rights of the EU and the UN Security Council's listing procedures and its goal to combat terrorism (Búrca 2010: 11). In other words, the ECJ decided that EU member states must not implement UN Security Council's listings decisions as long as the listing procedures do not comply with European fundamental rights. Therefore, by creating conflict, the ECJ forbade European banks to maintain freezing assets as it did not recognize the legality of the UN's listing procedures.

The established regulatory conflict by the ECJ put a lot of pressure on the UN Security Council (Heupel 2009: 314), as it led to a change of behavior of important European market actors. The court decision to annul implementing regulations by the EU meant that financial asset freezes by European banks lost its (European) legal foundations. Thus, the decision forced European banks to release financial assets of Yassin Abdullah Kadi, otherwise they ran the risk of being sued. With European banks releasing financial assets, the whole sanctions regime of the UN Security Council was at risk (Morse and Keohane 2014: 396), since determined asset freezes were not implemented in one of the most important markets of the global economy. Hence, the US which had the strongest influence in the process of listings and de-listings (Bírca 2010: 5) feared that the divergence in legal standards would undermine the effectiveness of the multilateral sanctions regime (Wikileaks 2009).

Undermining the effectiveness of the Al-Qaida sanctions regime, the UN Security Council adapted its listing procedures towards including fundamental rights called out by the ECJ (Bot 2013; Búrca 2016: 325). In this context, the Security Council made two central institutional changes that established an independent review mechanism within the listing

[5] Case C–402/05 P and C–415/05, P. Kadi and Al Barakaat International Foundation v. Council and Commission[2008] ECR I–6351.

procedure: the creation of the office of an ombudsperson and the reversing of the burden of proof (Gehring and Dörfler 2013: 579).

The creation of the office of the ombudsperson within the listings procedure strengthened the review mechanism. The ombudsperson acted as a neutral and independent actor within the listing process with the main task to review delisting requests submitted directly by listed individuals and entities seeking to be removed. Thus, the ombudsperson collects information from all relevant actors and reports to the sanctions committee which decides on de-listings according to the report (UNSC resolution S/RES/1904 (2009)). The ombudsperson only formulates recommendations while the formal decisions are taken by the UNSC member states. However, it has tremendous agenda-setting power that impedes to overrule delisting recommendations. States that seek to overrule neutral and independent delisting recommendations by the ombudsperson require consensus of the other committee members, which is only likely if they can substantiate their claims with evidence (Gehring and Dörfler 2013: 580–81).

Summarizing, the established conflict by the ECJ caused adaptations of the UN Security council to European fundamental rights. Forcing European banks to release financial assets of listed individuals and entities, the effectiveness of the UN sanctions regime was strongly influenced, causing reaction within the external institution. Recognizing that the internal policies of the EU could undermine the entire sanctions regime, the UN Security Council adapted its listing procedure towards including a strong review mechanism.

Conclusion

The EU's internal decision-making sometimes has external effects. As a consequence, the EU may externalize its internal policies by intentionally or unintentionally creating a regulatory conflict with overlapping international institutions. Possessing regulatory authority over one of

the most important markets of the global economy, the effectiveness of international regulatory institutions frequently depends on European compliance. Thus, if European rules and obligations change the behavior of important European market actors towards suspending the rules and obligations of the international institution, the latter's effectiveness is undermined. In order to preserve its role as a regulator, the external institution then has incentives to internalize European objectives and to adapt towards European internal policies.

Tracing the process for two typical cases where both the cause and outcome are present as well as the scope conditions that allow the mechanism to operate provided evidence for the existence of the proposed causal mechanism of externalization. In the domain name system case, the EU was able to externalize its data protection rules to ICANN by influencing important market actors. When registries and registrars suspended compliance with ICANN by no longer providing personal information of domain name holders to a public data base, ICANN feared the negative consequences of conflict. To preserve the operability of the domain name system and its role as a global regulator, it adapted to European internal policies. In the Kadi case, the European Court of Justice created a regulatory conflict that led the UN Security Council to adapt its listing procedures towards including fundamental due-process standards. The decision of the ECJ that UN listing rules are incompatible with European fundamental rights had negative consequences for the effectiveness of the UN sanctions regime as it meant that European banks had to release formerly frozen assets and funds of listed persons and entities. In order to preserve the sanctions regime, the UN Security Council had to internalize European fundamental rights. Thus, as the EU had regulatory authority over important European market actors in both cases, it was able to carve out authority from institutions in which it does not participate in decision-making.

The findings of this article have important implications for three debates in IR literature. First, it adds to the EU actorness debate by confirming that the EU must not be a formal member to be taken seriously by international institutions. The EU is an important actor in a lot of policy

areas and might shape global regulations because it possesses regulatory authority over the single market. Second, the article adds to the broader great power politics literature by proposing an innovative causal mechanism of how market powers can force third parties to adapt to their objectives and policies. While this mechanism is especially interesting for the EU, that is not a formal member in most international institutions, the mechanism also implies that great powers could intentionally create a regulatory conflict with an international institution if they cannot enforce institutional changes within the institution. In this respect, the causal mechanism is not only applicable to the EU but also to other important market powers including the US and maybe China. Third, the findings also have important implications for the regime complex literature. While the regime complex literature predominantly focuses on interactions among international institutions, the cases demonstrate that national rules and obligations, especially of great powers, may as well shape dynamics of regime complexes to a great deal.

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