

**Private Governance and E-commerce:  
Triangular Diplomacy and Contested Authority  
in the United States and European Union**

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## Introduction

We live in a sovereignty@bay world (Kobrin 2001). Today, policymakers and companies are increasingly faced with how to address the advance of new technologies -- digitalization, and satellite technologies -- that transcend national boundaries. Instead of focusing on home vs. host country border relations, or “behind-the-border issues”, the new technologies raise the challenge of addressing “no border issues.” Markets are migrating to cyberspace where there is a lack of territorial jurisdiction. Networks are replacing hierarchies. And most importantly, it is argued, the control of these markets rests increasingly with companies. This situation creates a growing policy space for private governance and private authority in global economic relations (Cerny 1993, Porter 1993; Underhill 1997, Kobrin 2001).

Private authority, of course, is not new. Susan Strange was among the first to emphasize the role of firms in setting agendas and bargaining among themselves and with governments to develop regulatory frameworks (1988, 1996). In 1999, Cutler, Haufler, and Porter published *Private Authority in International Affairs*, which highlighted the importance of private actors in governing key policy areas through the creation of mechanisms such as self-regulation<sup>1</sup> and private law (Cutler et al. 1999). Indeed, Cutler et al. became one of the seminal works on the private governance of firms in the international relations (IR) and international political economy (IPE) literature

Since Cutler et al., a number of studies have explored private authority. While Higgott et al. (2000) argued that the coexistence of public/private actors signifies ‘a new way of sustaining capitalist accumulation in an era of global structural change’, Kahler and Lake (2002) emphasized the continuing dominant role of the state in public-private arrangements. Meanwhile, Hall and Biersteker expanded the private authority concepts to other non-governmental actors (2002). To be sure, these IR/IPE contributions are important. At the same time, however, the literature does not yet provide a robust conceptual framework with which to understand private authority. While scholars have identified rationales for why firms promote private governance, compiled reasons for why governments might grant private authority, and, identified conditions under which one might find private authority, there is no overarching framework for how these actors interact with one another. The tendency among scholars has been to address governments and firms as fairly static, homogeneous groups. Accordingly, private authority, viewed from the firm, is presumed to come about when there is a high degree of compliance and acceptance among firms (Cutler et al. 1999). Private authority, viewed from the government, is granted when governments find it in their interest to do so. Yet, one can find many instances of private authority in international affairs where firms differed over how to regulate activities and where governments promoted private authority for very different reasons. Private authority, therefore, is not something that occurs due to a static set of given circumstances. Private authority, like other forms of international cooperation, involves politics -- bargaining, compromise, and contestation.

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<sup>1</sup> Self-regulation can be defined in many ways. For purposes of this article, self-regulation is defined as the voluntary rules in which the scope, provisions, monitoring, and enforcement remain the prerogative of participating companies (Sheridan 2001, 20).

The purpose of this article is to explore ways in which scholars might better understand the contested nature of private authority. The article applies John Stopford and Susan Strange's notion of "triangular diplomacy" (1991) to conceptualize the state-state, firm-firm, and state-firm relationships inherent in global private authority. In doing so, it recognizes the contributions of the EU private governance literature that acknowledges divergent forms of public-private linkages across governments and at various levels of governance. From this perspective, private global authority is not made without reference to the regional, national, and subnational public-private arrangements that underlie it.

Using an institutionalist approach, I contend that the contested nature of private authority is a product of competing institutional arrangements of which there are two types. The first are the informal institutions – the culture and historic type of business-government relations – including private governance -- found within a country. The second are the formal institutions – the legal rules and government-created or -recognized institutions that provide upfront legal sanctions or back-up mechanisms allowing for public authority to step in should the private mechanisms fail. The manner in which public and private actors address these different institutions through political means -- bargaining, sidepayments, etc. -- will ultimately influence whether or not private governance is successful.

This conceptual framework and institutionalist lens are applied to a case study of the American and European Union public and private actors behind the Global Business Dialogue on e-commerce (GBDe). The GBDe is a group of leading US, European, and Asian firms in e-commerce, including – at various times -- AOL Time Warner, Disney, Hewlett Packard, DaimlerChrysler, Vivendi Universal, Telefonica, Fujitsu and Toshiba (Cowles 2001b). These companies seek to develop private rules and principles that might govern e-commerce on a global basis in policy areas such as taxation and cybersecurity. The article focuses more specifically on the so-called "consumer confidence" policy area that includes privacy policy, alternative dispute resolution (ADR), and trustmarks.<sup>2</sup>

The article begins by discussing the development and expansion of private governance theory and its broader conceptual framework. The second part of the article highlights the promotion of private authority in global e-commerce activities, and the creation of the Global Business Dialogue on e-commerce. The third section examines the GBDe's policies in the three key areas of consumer confidence: privacy policy, alternative dispute resolution, and trustmarks. The final section of the article reviews the case study in light of triangular diplomacy and contested authority, and discusses how our theoretical approaches to private governance and global governance in general need to be expanded to recognize the role of private actors in this sovereignty@bay world.

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<sup>2</sup> The American and European firms are the recognized leaders of the GBDe. The focus of this article is therefore on these companies. Pending future funding, I also intend to examine how private governance is promoted in a number of Asian countries in e-commerce.

## Private governance: theory and contestation

When examining global public policy, we often ask ourselves “Who are the rule-makers?” Of course, the answer is usually governments and politicians. Yet, as Susan Strange has pointed out, “politics is larger than what politicians do, and that power can be exercised – as is every day being exercised – by non-state authorities as well as governments” (Strange 1996).

Cutler, Haufler, and Porter (1991) were among the first international relations scholars to highlight the role of firms in creating international rules and policy frameworks. They pointed out that interfirm cooperative arrangements and self-regulation have taken many forms over the centuries, from informal industry norms and practices, to production alliances, to cartels, to private regimes. Cutler et al. pointed out several reasons why firms seek to develop these inter-firm arrangements. The first is an economic rationale. Firms in general seek to avoid regulation and prefer self-regulation to government regulation. The second is a political rationale following the “shadow of hierarchy” argument. Firms recognize that if they don’t act to self-regulate, governments will. Third, there are technological reasons when markets move beyond state or supranational institutions. In the area of information and communications technology markets, for example, the actual scope of the market no longer corresponds with the structural scope of national or supranational institutions (Cerny 1995.) Quite simply, there is a “lack” of territorial jurisdiction over the market.

Cutler, Haufler, and Porter argued that firms are able to act as private authorities when three conditions are met: 1) their rules are viewed as legitimate; 2) when there is a high degree of compliance among the firms, and 3) when they are empowered explicitly or implicitly by governments. This third point, the implicit or explicit empowerment of private authority, is arguably the most important. In later writings, Haufler expanded on this point by identifying various reasons why governments grant this authority. First, governments may grant private authority for budgetary reasons when they find it may be easier to turn governance issues over to firms to address. Second, governments may find they have a lack of capabilities in view of complex technological developments. When state authorities do not understand the complexity of new technologies, for example, or how these technologies may impact policy, they may encourage the firms responsible for such technology to assume a clear governance role. Third, governments may grant private authority because they have experienced difficulty in negotiating international state-to-state agreements in the same policy area. Fourth, governments may grant authority to private actors simply through their own neglect of governance in a particular policy area (Haufler summarized in Higgott et al. 2000)

Haufler provided a fifth reason as to why governments may promote private governance – namely, that the government may be ideologically committed to self-regulation by firms. As I will discuss shortly, however, this characterization might be more of an Anglo-Saxon bias towards a particular type of private governance as opposed to a disposition toward private governance itself.

What one finds, therefore, in the international relations literature on private governance is a thoughtful overview of the motivations behind and conditions for private governance. Figure 1 provides a conceptualization of this literature.

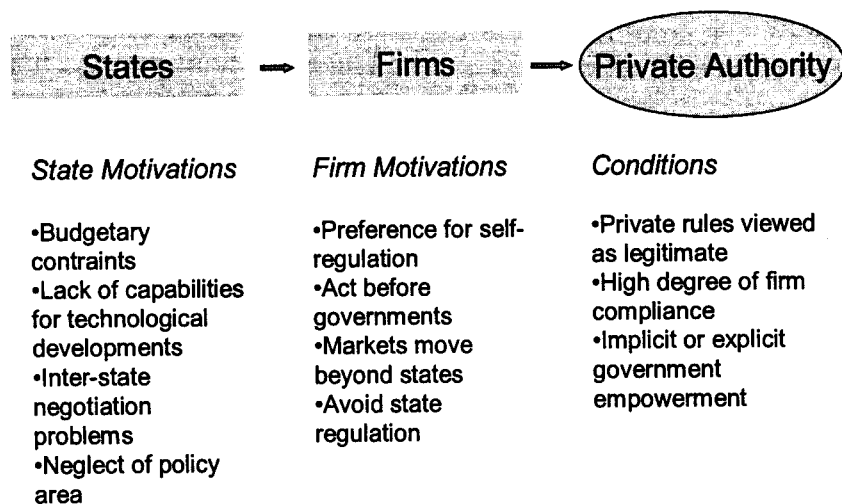


FIGURE 1: Motivations and Conditions for Private Governance

While this conceptual framework is helpful in identifying motivations and conditions of public and private actors, it suggests a rather static notion of private governance. Accordingly, states and firms are homogenous actors that interact in a non-conflictual linear manner to create private governance on the global stage. Yet, empirical studies of private authority suggest a much more dynamic process at play.

### The EU Governance Literature

A separate set of literature of governance that emphasizes the role of private actors, including firms, has emerged in European Union studies in recent years. As discussed below, in many respects the EU scholarship provides a greater context for understanding private governance by emphasizing multi-level governance, comparative public-private relations, and contestation.

The EU scholars can be divided into two main groups. The first group is the broadly writ “governance school” (Jachtenfuchs 2001) that has applied comparative politics and public policy literature to European Union policymaking (c.f. Börzel 1998, Héri-tier 1999, Jordan and Schubert 1992, Kooiman 1993, Kohler-Koch 1996, Kohler-Koch and Eising 1999). The shift from the traditional American-led international relations literature to explain EU policymaking is driven, in part, by the EU’s scholars’ conceptualization of the EU as a “polity” as opposed to an “intergovernmental organization” per se. Traditional IR integration theories such as realism – including liberal intergovernmentalism, its modern day variant (c.f. Moravcsik 1993) – and neofunctionalism thus fail to adequately capture the dynamics of EU policymaking. Moreover, these two schools take an either/or approach to EU policymaking (Ronit 2001). Either the EU is driven by the omni-present force of nation-states (liberal

intergovernmentalism) or the EU is driven by supranational factors (neofunctionalism). Yet many scholars today tend to view the EU as a multilevel governance system in which governance is accomplished at different levels of authority (national and supranational), and by different types of actors (public and private) (Marks, Scharpf, Schmitter, and Streeck, 1996). Indeed, the inability of traditional international relations theory to capture the emerging public/private partnerships in EU policymaking is also behind this development.

The EU governance school has clearly enriched the literature on the European Union and on governance in general. The introduction of policy networks and regimes has allowed for a more robust understanding of EU policymaking. Still, the EU governance school has arguably set up a false dichotomy between comparative politics/public policy governance literature and the international relations global governance literature (Cowles 2003). Policy networks and regimes, after all, are not limited to Brussels alone. The result is that the two sets of literature – IR/IPE and EU governance – tend to focus on similar developments while using different terminology.<sup>3</sup>

Despite these criticisms, the EU governance school emphasizes what is not always recognized by IR governance scholars – namely, that “global governance should not be regarded as an isolated process cut off from regional and domestic processes” (Ronit 2001: 560). Indeed, governance at the global level is often patterned after governance at the regional, national, or even subnational level.<sup>4</sup>

The second group of EU scholars might be termed the “EU private authority school” (Knill 2001; Knill and Lehmkuhl 2002; Ronit 2001; Ronit and Schneider 1999; Héritier 2002). While on one hand a subset of the EU governance school, the EU private authority scholars easily embrace both the IR and comparative politics/public policy literature. Of course, implicit in this approach is the recognition that private authority exists at various levels of governance. Put another way, these scholars believe that “it is essential to link theories developed to understand the global level of regulation with theories of national self-regulation to present a more coherent perspective of private authority” (Ronit 2001: 564).

In doing so, these EU scholars present three important contributions to the literature on private authority. The first is a deeper historical and comparative perspective of private authority. To understand this contribution, one needs to first reexamine the IR/IPE literature. Not surprisingly, many IR and IPE scholars have focused their global governance studies on more recent developments in information technologies (Spar 1999, Salter 1999, Kobrin 2001), global finance industries (Haufler 1993, Sinclair 1999) and intellectual property rights (Sell 1995). American and British firms have largely dominated this effort to promote private authority. Even the historical studies in the IR/IPE literature have tended to focus on particular time periods, notably the Pax Britannica or Pax Americana (Porter 1999). The unintended result is an Anglo-Saxon bias to the studies in which self-regulation takes on particular forms and highlights a distinctive type of business-government relationship. The argument, therefore, that

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<sup>3</sup> I thank Christoph Knill for pointing this out to me in an earlier publication (Cowles 2003).

<sup>4</sup> Of course, the contrary can also be found where globalization and Europeanization can erode national patterns of regulation (perhaps including self-regulation) (Coleman and Underhill 1998; Cowles, Caporaso, and Risse 2002).

certain governments may be more predisposed to self-regulation (Haufler 2000) must be guarded at best, particularly when a broader comparative approach is taken.

EU private authority scholars, on the other hand, begin their understanding of regional or global private authority at the level of the state – and indeed, at the level of a variety of states -- where self-regulation is understood in terms of the regulatory culture and political institutions that shape it (Ronit 2001: 564-565). Particular attention is paid in Western Europe to the role of business associations in carrying out self-regulatory functions. In Germany, for example, the neocorporate German state grants “public” status to German business and labor associations to carry out specific public functions (Offe 1981, Mayntz 1992). The idea of *private interest government* was introduced in a major study by Streeck and Schmitter (1985) of European business associations in the 1980s. Like IR private authority approaches today, the private interest government study found that the extent to which the business associations were successful depended on implicit or explicit granting of government authority to these private actors. At the same time, Streeck and Schmitter found that this success often correlated to the maturity of business associations and to the length of cooperation between them and the state (Ronit 2001: 566). Thus, EU private authority scholars recognize that groups of firms or associations have carried out private authority for many decades. Equally important is their recognition – arguably missing in the Anglo-Saxon studies -- that private authority appears in many different forms across countries in the EU.

The emphatic linkage between public and private actors is the EU scholars’ second major contribution. Again, one turns first to the IR/PE literature to appreciate this contribution. To be certain, IR scholars do not ignore state-firm interactions and do recognize that the two different types of actors can influence each other’s activities. The emphasis in IR/IPE theory, however, tends to focus on the complementarity yet separateness of public and private governance (c.f. Cutler et al. 335-336). More recently, this emphasis has turned into a debate over whether or not private authority “implies a decline in state capacity” (Kahler and Lake 2002: 15).

Indeed, IR scholars are careful to highlight the separateness of public and private actors.<sup>5</sup> Cutler et al. argue that some scholars find it difficult to conceptualize private authority precisely due to this separation of public and private entities. The first difficulty arises when addressing coercive action because private authority is an “international authority operating in the absence of a government capable of identifying, articulating, and enforcing rules of conduct” (368). The second arises because private authority does not derive its legitimacy from republican and democratic institutions and practices that foster such legitimacy in states (369). Cutler et al. suggest alternative theoretical or conceptual approaches for transcending these difficulties in the global private authority literature.

For EU scholars, however, the emphasis is not on separateness. State-firm interaction is not a debate, but a given. One might argue that this is because the “state” has historically played a more important role in market activities in Europe. That argument alone, however, would be misleading. As Ronit and Schneider note, private governance and self-regulation arrangements “are rarely completely self-contained, but are embedded in a larger public institutional infrastructure” (260). This embeddedness,

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<sup>5</sup> Again, the focus on Anglo-Saxon firms that historically are more distant from the state may help explain this emphasis on separateness.

for example, provides the “coercion” that Cutler et al. suggest is missing in global private authority. Oftentimes, private authority operates “in the shadow of the state” (Scharpf 1997). Private authority can operate as long as there is a high degree of compliance among the private actors. However, states remain in the background to reassert public authority should the private authority compliance falter or disappear. A similar argument is made in terms of private governance and legitimacy. According to Wolf (2001), the public-private relationship is integral. Private actors and private authority are deemed legitimate precisely because of the state. Since private actors must be empowered either explicitly or implicitly by governments and international organizations with the right to make decisions for others, there is indeed a certain degree of democratic legitimacy conveyed on firms. In short, firms are always operating in the “shadow of the state” and know that their authority, formal entitlement, and credibility may be lost if they take actions that are considered illegitimate and therefore, undemocratic.<sup>6</sup>

State-firm interaction is also critical, according to EU scholars, because “global governance needs assistance from national or regional actors in the translation of global norms and rules” (Ronit and Schneider 1999: 246). While private firms and other non-governmental actors may play an important role in norm creation at the global level (Haufler 1999), these norms must be translated and implemented at the national or even subnational levels. Thus, the regulatory style and political institutions of nation-states will greatly influence the ultimate translation of these norms. This is true, Ronit and Schneider suggest, even in the most powerful private forms of authority. For example, to minimize or preclude state intervention, the International Chamber of Commerce seeks to provide its own monitoring to ensure compliance as well as the legitimacy of its self-regulatory measures. Oftentimes, however, national and regional business groups must be called upon to facilitate this monitoring. How these groups determine the implementation of and compliance with self-regulatory arrangements will depend, in part, on the national or regional regulatory settings in which they operate (Ronit and Schneider 1999). For global norms to be properly carried out, they must be translated – sometimes on a state-by-state basis – so as to be deemed credible at the national level.

The public-private, state-firm interactions are apparent in the EU scholarship precisely because the focus is on multi-levels of governance. Private authority in international affairs is only possible in the context of the national arenas of governance as well. This multi-level approach to governance also allows one to bring in another important dimension to private governance – politics in the form of contestation and cooperation.

Indeed, the third important contribution of EU scholars to our understanding of private governance is their recognition of contestation and cooperation. By linking global governance with other levels of governance, the EU literature acknowledges inherent conflicts between different types of public-private relationships at the national level. Different public-private arrangements have different means to carry out coercion should private governance fail, or different democratic values associated with determining the legitimacy of private governance. These same public-private relationships will influence the manner in which global norms are ultimately translated and implemented. These public-private relationships also determine, as I argue below,

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<sup>6</sup> Interestingly, Ronit and Schneider argue that private governance is most difficult in developing countries which lack the public institutional capacity to provide this coercion and this legitimacy.



the private norm generation process itself. In short, private authority is very much a contested concept.

By incorporating the contributions of the EU literature, a different form of private governance can be conceptualized. See figure 2 below. Borrowing from Stopford and Strange's triangular diplomacy model, private governance becomes a series of negotiations among public and private actors.<sup>7</sup> Firms negotiate with other firms to advance and develop self-regulatory schemes. States negotiate with other states as to whether or not to grant firms such authority. Influencing both sets of negotiations are the national patterns of private authority found in state-firm arrangements. The outcome is the state-firm negotiations that result in private authority. This is not a static outcome, but a dynamic one in that firms carry out private authority in the shadow of the state. The state remains present to step in, if necessary, should private authority fail or if private authority is no longer deemed legitimate.

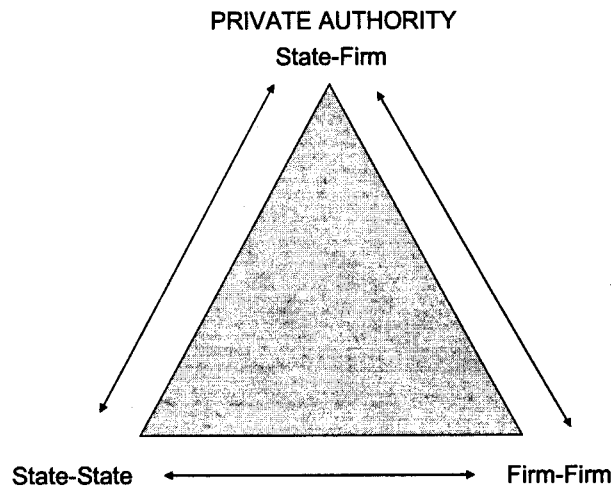


FIGURE 2: The Triangular Diplomacy of Private Authority

### Contested Authority

As suggested above, the contested nature of private authority is an important but underdeveloped element. As noted in Figure 1, the IR/IPE literature tends to emphasize homogeneous actors, motivations, and conditions that enable private authority to emerge. The Triangular Diplomacy conceptualization of private authority offered above provides a more dynamic explanation for private authority. Viewed as a series of negotiations

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<sup>7</sup> The Stopford/Strange triangular diplomacy model has been applied in other ways in the literature. See, for example, Lawton (1997).

among public and private actors, one recognizes the “contested authority” inherent in the process.

But what are the roots of contestation? I maintain that an institutionalist approach provides a means to better understand this contested authority. Building on the EU private governance literature, one finds two types of institutions that structure private authority. The first are the informal institutions – the regulatory culture and historic type of business-government relations – that one finds in a state or supranational entity. This is clear in Europe, for example, where the United Kingdom, Germany, and France, for example, have different types of business government relationships – notably pluralistic, corporatist, and statist (Schmidt 1996). At the same time, different types of business-government relations have emerged in the European Union. This has led, at times, to considerable conflict not only in negotiating regulatory regimes at the European level, but in producing pressures on business-government relations at the domestic level (Cowles 1996, Cowles 2001a, Schmidt 2002). Of course, one finds another type of business-government relationship in the United States, for example, that differs considerably from that of the French (Vogel 1978). The fact that self-regulation is carried out in different ways in these countries based in part on these informal state-firm arrangements points to inherent conflicting approaches to self-regulation when private authority is promoted at the global level.

The second type of institution are the formal institutions – the legal rules as well as government bodies that stipulate upfront public sanctions or back-up legal mechanisms to provide the punishment or coercive measures should private authority fail (c.f. Newman and Bach 2002). As discussed below, the “shadow of the state” in American self-regulatory policy in many instances is the Federal Trade Commission (FTC). When firms do not abide by self-regulation, they may be taken before the FTC under unfair trade practices for legal sanctions. In the European Union, however, there is no EU-level equivalent of the FTC. Thus, the EU’s “shadow of the state” is found upfront in the legislation that authorizes, in effect “grants”, private authority in the first place. It is not surprising, therefore, that there are oftentimes disagreements among governments and firms when determining what role the states should play in sanctioning global private authority.

An institutionalist approach, therefore, sheds light on the inherent conflict in private authority in negotiating among states and firms with differing informal and formal institutions. Ronit and Schneider suggest that regulatory culture and political will influence the translation of private authority norms at the national and subnational level. I would argue, however, that these same formal and informal institutions will also shape the construction of these norms at the global level in the first place. Firms and states must negotiate not only the nature of the norms, but how they will be carried out, and the role that the state will play implicitly or explicitly in its public capacity. And because firms and states oftentimes approach the bargaining table with different informal and formal institutions, the negotiation of private authority is oftentimes contentious.

Of course, institutional approaches can shed light on conflict and on why change does not take place. These approaches, however, are not as helpful in explaining why things happen – or why private authority occurs at the global level in the first place given

these institutional obstacles.<sup>8</sup> Importantly, the motivations and conditions for private governance identified by IR/IPE scholars (see Figure 1) also do not explain why and how these institutional impediments can be overcome. What the private governance literature also needs to address is the role of key actors -- firms and states -- to mediate these differences and/or create new types of agreed upon formal and informal institutions.

EU private governance scholars like Knill (2001), for example, has suggested that business organizations in the field of information and communication policy in the European Union have reorganized themselves to become "interface actors".<sup>9</sup> They are restructuring their organizations and undertaking roles to mediate and accommodate diverse positions of industry players across sectors as well as across levels of governance. Of course, one could argue that business groups might also reposition themselves to mediate among governments not only across various levels of governance, but also across governments at the global level. As discussed in the case study below, American firms and European firms undertook considerable discussion to bridge differences in regulatory cultures between the European Commission and US government regarding how one might go about private governance.

The creation or modification of formal and informal institutions might also allow for private governance to take place. As noted in the case of the GBDe below, major problems emerged in the promotion of self-governance through on-line alternative dispute resolution mechanisms and trustmarks because the private, formal institutions that exist in the United States to facilitate this -- for example, the Better Business Bureau-online (BBB-online) -- were not known in many EU countries and simply did not exist at the EU-level. As a means to overcome this obstacle, several American companies took the initiative to work with two EU industry organizations, Eurochambres and Fedma, to develop an EU form of BBB-online. More recently, the US Department of Commerce provided a monetary grant to BBB-online to assist in the development of a private European ADR system. Thus, the creation of private institutions within a country or region may be facilitated by countries outside the region.<sup>10</sup>

Of course, governments themselves may decide to create formal institutions to facilitate self-regulation. As noted in the GBDe case study below, the European Commission has discussing the possible creation of a body similar to the US Federal Trade Commission at the EU level.

Recognizing the institutional impediments as well as ways in which firms and governments seek to mediate these differences sheds light on contention and cooperation in global governance and private authority. I now turn to the case study to explore an empirical example of triangular diplomacy and contentious authority in global private governance of e-commerce.

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<sup>8</sup> Ronit and Schneider, for example, identify conditions under which private governance may be most successful (2001). Following Mancur Olson's work, they find that the ability of firms to produce public goods is more likely to emerge and be sustained when the number of firms is limited. However, while a smaller number of firms may also be helpful in addressing institutional obstacles, the numbers themselves do not explain success.

<sup>9</sup> For a history on how firms have reorganized themselves over time in the European Union, see Cowles 1994 and 1997.

<sup>10</sup> The creation of informal institutions by outside firms and governments may be particularly important in developing countries where the financial means to create such institutions is lacking.

## Private governance and e-commerce: the origins of the GBDe<sup>11</sup>

The question of how to govern e-commerce burst onto the world scene in 1997. That year, the United States, the European Union, and Japan all issued important policy papers that dealt in varying degrees with the promotion and governance of the internet and e-commerce.<sup>12</sup> From the very beginning, the e-commerce governance debate highlighted the divergent views of the Americans and Europeans over the matter of private governance by e-commerce firms.

In April, the European Commission issued “A European Initiative in Electronic Commerce” (European Commission 1997).<sup>13</sup> The Commission set for itself the ambitious goal of implementing an appropriate regulatory framework built on existing Single Market legislation by the year 2000. The Commission spelled out four principles to guide this electronic framework: 1) No regulation for regulation’s sake; 2) Any regulation must be based on all Single Market freedoms; 3) Any regulation must take account of business reality; and 4) Any regulation must meet general interest objectives effectively and efficiently (such as privacy or consumer protection).

The following month, the White House issued its own document, “Framework for Global Electronic Commerce” (White House 1997). The document was unofficially known as the “Magaziner Paper” after Ira Magaziner, the president’s White House point-person on e-commerce who spearheaded the initiative. The overarching principle of the U.S. document was that “the private sector should lead.”

Private sector leadership accounts for the explosive growth of the Internet today, and the success of electronic commerce will depend on continued private sector leadership. Accordingly, the Administration also will encourage the creation of private fora to take the lead in areas requiring self-regulation such as privacy, content ratings, and consumer protection and in areas such as standards development, commercial code, and fostering interoperability (White House 1997).

While a European Commission official estimated that the U.S. and EU papers overlapped by roughly 80 percent (Vittet-Philippe 1997), U.S. officials saw distinct differences between the documents of the transatlantic partners. While both documents promoted a minimalist regulatory approach, the Clinton Administration’s “internet guru” Elliot Maxwell found the European approach ready to embrace regulatory action, if necessary, “at every step of the business activity....” (Maxwell 1998, 112).

Attempts at governmental global policy coordination were in a nascent stage. By 1998, the first major e-commerce conference had taken place in the Organization for Economic Cooperation and Development (OECD) in Ottawa, Canada, and the World

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<sup>11</sup> This section is largely drawn from Cowles (2002).

<sup>12</sup> The Japanese document was a draft policy paper issued by the Ministry of International Trade and Industry, “Towards the Age of the Digital Economy—For Rapid Growth in the Japanese Economy in the Twenty-First Century.” For an excellent overview of the U.S., EU, and Japanese documents from an American perspective, see Maxwell (1998).

<sup>13</sup> Unfortunately, the EU archives no longer carry the original website: [www.ispo.cec.be/Ecommerce](http://www.ispo.cec.be/Ecommerce).

Trade Organization (WTO) agreed to a one-year moratorium on internet tariffs (Vesely 1998). The U.S. government, led by Magaziner, was also engaged in a number of bilateral policy dialogues on e-commerce with countries around the world to encourage a hands-off government approach to e-commerce. The American e-commerce diplomacy was not lost on the Europeans. As one Commission official noted, "We saw Magaziner going around signing these bilateral statements, including one with the EU. [It was] the U.S. love affair with self-regulation.... The problem with the American approach was that it was too dogmatic."<sup>14</sup> The Commission, in fact, believed that many countries around the world—especially the developing countries—were more comfortable with the Commission's proposed regulatory framework on e-commerce.

The year 1997 also marked the year when U.S. and EU industry sat down to discuss e-commerce issues in the Transatlantic Business Dialogue (TABD), a business-to-business forum created in 1995-96 to address non-tariff as well as "beyond-the-border" barriers to trade (Cowles 2001a). In 1997, the TABD included a special issue group on e-commerce led by the Les Alberthal, the CEO of EDS and Thomas Middelhoff, the Chairman and CEO of Bertelsmann, representing the U.S. and EU respectively. The TABD e-commerce group focused on five key issues: 1) personal data and privacy; 2) digital signatures; 3) encryption; 4) tax, tariff and customs; and 5) intellectual property protection (TABD 1997). The TABD's mantra—from both the U.S. and EU industry perspective—was that any e-commerce initiative should be "industry-led, market-driven."

#### The Bangemann Charter

The launch of the e-commerce global governance debate in 1997 began with a speech by EU Commissioner Martin Bangemann on September 8<sup>th</sup> at the Telecom Inter@ctive '97 conference in Geneva.<sup>15</sup> Bangemann called upon "governments, regulators, and industry to work together to establish a new global framework for communications for the next millennium" (as quoted in Hayward 1997). The Commissioner argued

We need to simplify the current [international regulatory] framework and perhaps bring together legislation on the provision of infrastructure, services, content, and access to content via television, computer, or telephone networks.... It will not be possible to achieve a satisfactory international framework only on the basis of strengthened industrial cooperation and existing international organizations... The current situation may lead to the adoption of isolated global rules with different countries signing up for different rules agreed under the auspices of different international organizations (as quoted in Hayward 1997, 1-2).

Bangemann's answer was to create some sort of international charter. According to Bangemann, industry should take the lead in drawing up a charter that would be based primarily on self-regulation and mutual recognition of national licenses (Reuter

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<sup>14</sup> Interview with EU Commission official, May 10, 2001.

<sup>15</sup> Unfortunately, the speech is no longer posted at [www.ispo.cec.be/infosoc/promo/speech/geneva.html](http://www.ispo.cec.be/infosoc/promo/speech/geneva.html).

Information Service 1997). Later, at a news conference, Bangemann noted that “some kind of body, perhaps a loose one, would be needed in the long term to help implement the agreed principles, and resolve disputes, such as in the area of telecommunications licenses and frequencies (Reuters 1997).

The “Bangemann charter” received considerable attention in government and industry circles, in newspapers and high technology sources, as well as on computer chat lines around the world.<sup>16</sup> The notion that greater international cooperation might be necessary to create global principles was attractive. However, U.S. government and industry were at best suspicious of, and at worst utterly against, the idea of the charter (c.f. Vesely 1998). Bangemann’s call, after all, “was not for a global dialogue but for a global charter. A charter says what you can do and cannot do.”<sup>17</sup> U.S. Secretary of Commerce William Daley opposed the charter noting that it introduced “top-down mandates for more government solutions—rather than letting industry and the market lead” (quoted in Simon 2000, 335). U.S. business representatives also were not convinced that Bangemann’s ideas were truly reflective of EU industry concerns. From the American point of view, EU industry did not have “the same ability to access, discuss and contribute to legislation” as American companies did in the United States. There was also the American view that Bangemann had simply been “grandstanding” or “grabbing for the global ring” in the new e-commerce debate.<sup>18</sup> Bangemann proposed the charter because “he wanted to set the rules.”<sup>19</sup>

Across the ocean, the European Commission was baffled and frustrated by the American reaction. Bangemann, after all, was the Industry Commissioner, one of the more liberal members of the Commission. At the time of the charter idea, for example, he was overseeing the deregulation of the telecommunications industry in Europe. It was “not in his philosophy” to focus on government regulation.<sup>20</sup> Moreover, the Europeans believed that the charter addressed principles supported by the Americans, but with a global approach. From the EU point of view, there was “a lot of intentional misinformation” on the part of the Americans—because the charter idea could have come from the Americans, but didn’t. In the words of a Commission official, “At the end of the day we had this impression that it was this ‘not invented here’ syndrome.”<sup>21</sup>

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<sup>16</sup> Interestingly, one can still find countless on-line group discussions that occurred in 1997 concerning the Bangemann charter. These discussions reflect the strong “hands-off” “anti-regulation” approach of the group members. As one of the tamer commentators from the World Wide Web consortium stated, “I’m not sure why we need //any// regulations dealing with technical standards and encryption. Bureaucrats can’t write protocols; engineers can and do. And encryption is like any other free speech matter: government can govern best by governing least.” See [www.fitug.de/debate/9709/msg00010.html](http://www.fitug.de/debate/9709/msg00010.html).

<sup>17</sup> Interview with former U.S. government official, May 21, 2001.

<sup>18</sup> Interview with GBDe Americas region (AM) representative, April 10, 2001. Another industry concern—though not widely expressed in the interviews conducted, was that US industry was not convinced that the Commission was capable of speaking on behalf of the European Union. As one business leader noted, “we did not want to see our government in a bilateral discussion when there would have been a 1-to-15 ratio. Member states maintain their autonomy. I wasn’t convinced that some common Community law would emerge. I thought there were too many differences among the member states.” Ibid.

<sup>19</sup> Interview with former U.S. government official, May 21, 2001.

<sup>20</sup> Interview with EU Commission official, May 10, 2001.

<sup>21</sup> Interview with EU Commission official, May 10, 2001.

Many EU industry leaders shared similar reactions, believing that the Americans simply did not like the European Union taking the initiative in e-commerce issues.<sup>22</sup> From their viewpoint, Americans did not understand the role of the Commission and the Single Market process in Europe. Faced with fifteen competing regulatory systems at the national level, EU industry often welcomed a single regulatory framework at the European level. In order to deregulate and challenge member state laws, the Commission had to reregulate at the European level. As one European industry official explained, “The Commission made policy to liberalize, to breakdown national frontiers, not the other way around.”<sup>23</sup> The charter, with its emphasis on industry-led development, was a means to promote liberalization further. In short, whereas American industry viewed Bangemann as the “great regulator,” the Europeans saw him as the “great liberalizer.”<sup>24</sup>

Whatever the U.S. government’s unofficial view of the charter was, Ira Magaziner gave a conciliatory response to the Bangemann proposal a month later. He cautiously supported the global charter idea as long as it did not entail the creation of a formal regulatory body.

Back in Brussels, Bangemann met with Thomas Middelhoff, CEO of Bertelsmann, whose company was very active in the TABD e-commerce issue group. Middelhoff, in turn, raised the issue in discussions with his American counterparts in the TABD, including Steve Case of AOL and Jerry Levin of Time Warner, both of whom had developed personal friendships with the German CEO.<sup>25</sup> Bangemann, with the assistance of Bertelsmann, began to make overtures to the Japanese, who expressed a willingness to sign up to the charter idea.

Bangemann and Middelhoff also championed the business-led charter idea in a meeting with Commerce Secretary Daley in Washington, D.C., on June 22, 1998. A week later, on June 29, 1998, the European Commissioner hosted a “global business roundtable” in Brussels. Over 100 industry officials attended, including approximately ten CEO-level officials from the EU, U.S., and Japan.<sup>26</sup> While the roundtable was underway, a private meeting with leading representatives from EDS, AOL, Bertelsmann, and the Commission hammered out a two-page document announcing that industry had taken the initiative to create a Global Business Dialogue to be formally launched in the first half of 1999.<sup>27</sup> In a sense, what would become the Global Business Dialogue on e-

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<sup>22</sup> Interview with GBDe Europe-Africa region (EA) official, May 24, 2001.

<sup>23</sup> Interview with GBDe EA official, May 24, 2001.

<sup>24</sup> At least one GBDe member from outside Europe and the U.S. noted his government and industry did not share the same qualms as the Americans did regarding the Bangemann charter. “We had a sense that the Europeans were right, that there was a need to look at these issues globally. The fact that the European Commission was promoting it didn’t bother us. We’re more comfortable dealing with government than the Americans are.” Interview with GBDe AM official, May 16, 2001.

<sup>25</sup> In 1994, Middelhoff bought a 5 percent interest in America Online and became a 50-50 joint venture partner in AOL Europe. Ironically, AOL later severed its links to Bertelsmann to address European competition policy concerns when the American firm merged with Time Warner.

<sup>26</sup> Business Round Table on Global Communications, Brussels, 29 June 1998, List of attendees. The CEOs and Board Members from large companies included Bertelsmann, Brokat, Ericsson, Eutelsat, MCI, NEC, Nokia, Société Générale de Belgique, and Toshiba.

<sup>27</sup> The statement is found at [www.gbde.org/ie/archive/origins.html](http://www.gbde.org/ie/archive/origins.html). An earlier version of this GBDe page included a Japanese statement on “The Need for Strengthened International Coordination” and a broader industry statement on “Globalisation and the Information Society.” The Japanese paper noted the “respect”

commerce (GBDe) was born, with Bangemann formally passing the initiative to business at the Brussels roundtable.

Upon returning from Brussels, the American sherpas – the CEOs’ key representatives -- faced a daunting task.<sup>28</sup> In the Brussels document, they had committed themselves to a major CEO-led conference within the first six months of 1999. The first reaction of US industry was “This is never going to happen.”<sup>29</sup> There was no structure to this proposed dialogue, no focus. Over the summer months, it was agreed that the GBDe would build on the structure set out by the Transatlantic Business Dialogue (TABD) by identifying regions and developing issue groups. Like the TABD, the GBDe was to be firms-only,<sup>30</sup> with no business associations in the group. Moreover, the GBDe’s agenda would be driven, in part, by a yearly conference in which the CEOs or Board members would meet and present their positions to government officials. Unlike the TABD, however, the GBDe organizers did not want any government participation in various meetings throughout the year. The GBDe was to be industry-led in that firms, not governments, would be developing their own governance rules. Moreover, the GBDe organizers determined that the GBDe would represent all types of industry (i.e. telecommunication service providers, equipment manufacturers, media/content producers, and high-end services) as well as geography. Three regional groups were created: the Americas, Europe/Africa, and Asia/Oceania.

As the outline of the GBDe took shape, the core U.S. group involved in the early discussions began to host a series of meetings in Washington, D.C., to inform others in the e-commerce industry of the GBDe’s development. The U.S. team drew from the TABD e-commerce distribution list, and later held meetings at the National Association of Manufacturers (NAM) and at the U.S. Chamber of Commerce. Organizers saw this effort as a means to share and debate ideas on the GBDe with the rest of the e-commerce industry so there would be a mandate for the GBDe’s positions.

Still, a month before the first CEO meeting, there was still considerable concern among some companies as to whether the GBDe would get off the ground. It also was not clear whether or not the U.S. government was supportive of the idea. Indeed, the U.S. government was “extremely suspicious” of the GBDe, wondering if the European Commission was “using the private sector as a front for its own agenda... as a puppet for the European Commission.”<sup>31</sup>

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for “the efforts of the European Commission, especially the personal contribution of Commissioner Bangemann ... to have introduced the idea of the International Charter.” Accessed 9/08/2000.

<sup>28</sup> The term “sherpas” refers to the Tibetan people who carry the heavy packs and assist mountain climbers in scaling the Himalayas. The phrase is quite common in business and government circles. It is often noted, for example, that European Trade Commission Pascal Lamy and USTR Bob Zoellick developed their friendship in their earlier careers as sherpas for their respective presidents at G-7 meetings.

<sup>29</sup> Interview with U.S. business representative, May 23, 2001.

<sup>30</sup> The CEO-only distinction is in practice somewhat blurred due to corporate cultural differences. CEOs are to American companies what Chairmen of the Board are to many European firms.

<sup>31</sup> Interview with former U.S. government official, May 24, 2001.



## Launching the GBDe

The GBDe was formally launched on January 14, 1999, with a CEO meeting at the Bertelsmann headquarters in New York City (see figure 3 below). The decision to inaugurate the GBDe in New York was a strategic one—the Europeans wanted to assure the Americans that they were not going to run the show, and that Brussels Eurocrats would not intervene in the process.<sup>32</sup> Whatever disagreements emerged during the meeting, the CEOs put on a united front to the outside world. They issued a statement noting that “Governments around the world should recognize the dangers that regulation of the Internet would pose to their economies and societies” (GBDe 1999). As then-Time Warner CEO Gerald Levin stated in a press session following the meeting, “We have a role to play in the shaping of public policy, and we are truly capable of rising above ... narrow geographic issues” (Authers 1999).<sup>33</sup>

AMERICAS	EUROPE/AFRICA	ASIA/OCEANIA
Spokesperson: Gerald M. Levin, Time Warner (USA)	Overall Chair: Thomas Middelhoff, Bertelsmann (Germany)	Spokesperson: Michio Naruto, Fujitsu (Japan)
Steve Case, AOL (USA)	Rijkman W. J. Groenink, ABN AMRO Bank (Netherlands)	Tadashi Kurachi, Bank of Tokyo/Mitsubishi (Japan)
Jean Monty, BCE Inc. (Canada)	Gérard Moine, France Telecom (France)	Lee Yong-Kyung, Korea Telecom (Korea)
Gustavo Cisneros, Cisneros Group (Venezuela)	John Sacher, Marks & Spencer (United Kingdom)	[To be named], Malaysia Telecom (Malaysia)
Lewis E. Platt, Hewlett Packard (USA)	Cobus Stofberg, MIH (South Africa)	Seiichi Shimada, Mitsui & Co. (Japan)
Louis V. Gerstner, IBM (USA)	Jorma Ollila, Nokia (Finland)	Eiichi Yoshikawa, NEC (Japan)
Bert Roberts, MCI Worldcom (USA)	Francisco Pinto Balsemao, SIC (Portugal)	Shigehiko Suzuki, NTT (Japan)
James Barksdale, Netscape (USA)	Jean-Marie Messier, Vivendi (France)	Tadashi Okamura, Toshiba (Japan)

FIGURE 3: GBDe attendees at New York Bertelsmann launch, January 14, 1999

<sup>32</sup> Interview with GBDe EA representatives, May 9, 2001; May 24, 2001. One EA representative suggested there were three factors that finally brought the Americans on board: 1) Because the Japanese had signed on to the dialogue, the American firms saw that the GBDe was going to go ahead with or without the U.S.; 2) the personal relationship between Middelhoff, Steve Case, and Jerry Levin; and 3) the fact that Commerce Secretary Daley and others had given the green light. Interview with GBDe EA representative, May 24, 2001.

<sup>33</sup> Interestingly, the initial GBDe BSC meeting also launched serious discussions among CEOs for strictly business reasons. A number of people point out, for example, that the AOL-Time Warner merger can be traced directly back to the GBDe. Another key merger was between Vivendi and Seagrams. More recently, Hewlett Packard and Accenture have teamed up to focus on Business-to-Business (B2B) work—in direct competition with another GBDe player, IBM.

Outside the business community, not everyone was pleased with the GBDe's launch. James Love, director of the Consumer Project on Technology, had a different view of the CEOs' meeting. According to Love,

One of the great crises in our move toward electronic commerce is the parallel movement toward governance without government. Because as awkward and imperfect as governments are, there's still this idea that they're responsible to the people in a way that companies are not (Authers 1999).

With the process launched, the GBDe day-to-day work began with the sherpas. The aim was to examine key issues facing e-commerce and to develop agreed-upon global business principles. These would form the basis for a policy framework based on market-driven policies. In time, the companies focused on nine key areas (see Figure 4).

<i>Issue</i>	<i>Company-in-charge</i>
Consumer Confidence	DaimlerChrysler
Content/Commercial Communication	Walt Disney
Liability	Telefónica
Authentication and Security	NEC
Jurisdiction	EDS
Tax and Tariffs	Deutsche Bank
Information Infrastructure	Nortel Networks
Protection of Personal Data	Toshiba
Intellectual Property Rights	Fujitsu

FIGURE 4: 1999 Issue Groups

The sherpas worked together regionally as well as in global meetings. The global sherpas' group slowly came together, with meetings held in the three regions throughout the year. There were several factors that rendered the process more difficult. First, the issues themselves were incredibly challenging as company public affairs officials, lawyers, and technical advisors sought to work through taxation, liability, and jurisdiction issues. One had to have an open mind to think through these issues and to see them from various geographical and industry perspectives. Second, these same companies were competing "very harshly" with one another in the marketplace—yet were expected to cooperate in the GBDe setting. While seeking to develop self-regulatory mechanisms in privacy policy, for example, they were also competing for market share in third generation wireless technology. Third, the global nature of the discussions themselves was daunting as sherpas needed to come to appreciate various negotiating cultures of GBDe members. Indeed, a couple of sherpas stepped down or were pushed out due to

their inability to work with the others.<sup>34</sup> One experience that facilitated the GBDe process for several firms was their previous participation in the TABD e-commerce working group. As one Americas sherpa noted,

The leaders had learned the simple art of negotiation and diplomacy with different people, different countries, different legal systems, and different cultures. They had learned the mechanisms of what worked—for example, focusing on what we could agree on, not on what we couldn't agree on.<sup>35</sup>

AOL, Bertelsmann, DaimlerChrysler, EDS, Siemens, and Telefónica had all been involved in the TABD. These were the companies “who know how to work these global processes.”<sup>36</sup> The American and European sherpas had experience working together in the TABD and were comfortable with each others' styles.<sup>37</sup>

Interestingly, at the end of the day, regional differences proved not to be the key source of friction within the GBDe. True, there were significant disagreements over the American and European views on self-regulation -- a point discussed below. However, the real problems rose due to the different kinds of e-commerce industry represented in the GBDe (see figure 5 below). In the liability issue group, for example, strong differences existed between Internet service providers (ISPs) and content companies. If an ISP transmitted a product from a content company (for example, a film or music) that somehow proved injurious or illegal, who was liable? With ISPs, media/content producers, equipment manufacturers, high-end service providers, and others all approaching the issues from different vantage points, developing agreed-upon global principles proved daunting. In the end, the consensus—which is the coordination principle by which GBDe operates—was “driven hard by the content companies in Europe and the U.S. and by Fujitsu in Japan” (Riley 1999).

The sherpa group's work culminated on September 13, 1999, with the first GBDe conference featuring the CEOs and board members. From the sherpas' perspective, it was somewhat of a miracle that they had sorted through and developed policy papers on all nine issues over the previous eight months.<sup>38</sup> A motivating factor was the fear that governments would become more involved in regulating the industry, and thus hold back the development of global Internet-based e-commerce. According to one observer, “That fear was the true catalyst for the GBDe and why it achieved consensus so quickly” (Riley).

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<sup>34</sup> Interview with GBDe EA representative, May 9, 2001.

<sup>35</sup> Interview with GBDe AM representative, April 10, 2001.

<sup>36</sup> Interview with GBDe EA representative, September 18, 2000.

<sup>37</sup> The same was not true for the Japanese who were confronted with very different styles of negotiation in the GBDe. The American style of throwing ideas out on the table for discussion, for example, did not necessarily work as well with Japanese participants whose cultural tradition often involved working behind-the-scenes for consensus opinions and who, therefore, appeared rather passive in meetings. Interview with GBDe EA representative, September 18, 2000.

Unfortunately, despite considerable effort, no interviews could be arranged with any of the Asian participants for this paper. The larger research project will undoubtedly benefit from such interviews in the future. For a good secondary source discussion of developments in Japan in the high-tech sector, see Cohen (1998).

<sup>38</sup> Interviews with GBDe EA representatives, April 12, 2001, and May 2, 2001.

# GBDe Membership

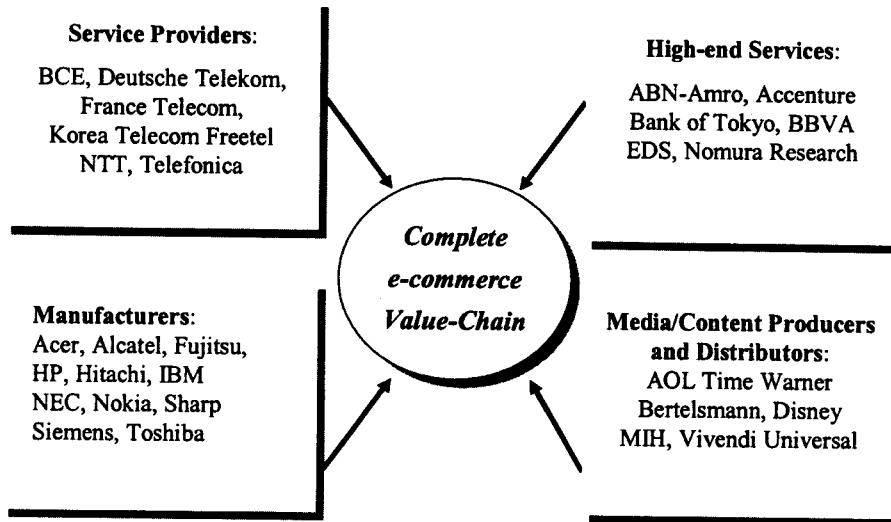


FIGURE 5: Membership Type within the GBDe  
Source: Europe/Africa GBDe representative

## The Paris Meeting: The Beginning of Legitimacy

Invitations for the Paris conference, held at the Louvre Carrroussel, were extended to key government and industry players. U.S. government officials included Commerce Secretary William Daley and David Beier, point-person on e-commerce from the Office of Vice President Al Gore, as well as numerous officials from the Department of Commerce, the State Department, and the Federal Trade Commission. On the European side, the Commission was represented at the Directorates General level and below as the Commission itself had recently resigned en masse during the leadership crisis of the Jacques Santer presidency. Numerous European member state officials were also in attendance. The Japanese government also brought a high-level delegation to the meeting. Finally, in addition to the companies represented in the BSC, industry from around the world participated in the meeting—from Argentina, Australia, Brazil, Egypt, Estonia, Indonesia, Israel, New Zealand, and Thailand. All told, the Paris GBDe meeting brought together more than 470 business and government representatives.

The turnout itself gave the GBDe “a lot of legitimacy” in the eyes of some government officials.<sup>39</sup> The fact that global industry leaders were able to develop positions in the nine different issue areas was significant to many. The GBDe agreements “surprised sceptical governments which did not believe the IT communications and media industry could get its act together and agree [on] a workable

<sup>39</sup> Interview with former U.S. government official, May 24, 2001.

self-regulated environment for e-commerce” (Riley). As one U.S. government official noted, “It was the first time that industry was taking a position on a global basis. It was the whole soup-to-nuts approach to e-commerce.... Getting people on the same page and making recommendations.... That was ground-breaking and should not be lost.”<sup>40</sup> That is not to say that governments agreed with every position of industry. Clear areas of difficulty were evident over data protection policy, export controls, and jurisdiction (Riley 1999).

Paris made perhaps the biggest impression on the GBDe companies themselves. Many sherpas were surprised at their companies’ willingness to come together to speak out on a global e-commerce framework. If firms had been unsure of their role in the GBDe in earlier months, there was a “suspension of disbelief” after the Paris conference. There was a realization that “If not us, who; if not now, when.”<sup>41</sup> The GBDe companies had a global role to fulfill. But, as one delegate to the Paris conference noted, “the time for general principles is over. It is now time for the boring, difficult sweat, getting down to the detail of adaptation and self-regulation” (Riley 1999).

“What came out of Paris,” according to one sherpa, “was a lot of recognition that the internet was global, that industry must sit at the table, and that governments need to take industry involvement seriously.”<sup>42</sup> The GBDe undertook a number of initiatives to raise its profile and enhance its legitimacy. For example, the GBDe expanded its membership to 60 companies and sought to recruit more small and medium-sized firms. The GBDe also determined that it would seek to cooperate with other international organizations that were grappling with some of the same issues, rather than attempt to “reinvent the wheel” (GBDe 2000). Members of the GBDe met with representatives of the International Chamber of Commerce (ICC) to ensure that there would be some form of alignment on key policy issues. Moreover, the GBDe went on record saying that it would reach out to consumer groups and other advocates to inform them of the GBDe’s policy approaches.

### Consumer Confidence

The GBDe began to turn its attention to implementing the self-regulatory mechanisms discussed in Paris (GBDe 2000). Most of the issue group recommendations, however, were not ready for this stage. This was clearly the case with the Consumer Confidence group where the proposed industry self-regulation did not go far enough in addressing worrisome consumer trends. For example, by 2000, American industry received the first inkling that consumers were increasingly wary of buying goods and services “on-line.” Research surveys—some funded by industry itself—showed that many customers did not have confidence in web-site companies and had growing fears that ranged from submitting credit card numbers over the web to questionable return-of-merchandise

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<sup>40</sup> Interview with former U.S. government official, May 24, 2001. Yet it was also ironic how the business leaders had succeeded in putting on a very governmental-style meeting in Paris. As another government official noted, “The Paris meeting was as scripted as any intergovernmental meeting that you could attend.”

Interview with former U.S. government official, May 21, 2001.

<sup>41</sup> Interview with GBDe AM representative, May 22, 2001.

<sup>42</sup> Interview with GBDe AM representative, April 23, 2001.

policies.<sup>43</sup> One study estimated that over 12 million people had stopped shopping online due to privacy concerns. Another estimated that this lack of confidence in e-commerce cost industry over \$12.4 billion in sales (Despeignes 2001). Of course, more than any government regulator, the lack of consumer confidence in e-commerce could significantly hinder the growth of the industry. Linked to these concerns, consumers also questioned how complaints would be handled in the borderless realm of the Internet. If redress to the courts was necessary, where would the consumer turn—to the courts of one's own country, to the courts of the firm's country? What if one could not determine the geographical location of the firm?

In 1999, the GBDe addressed these issues under the single rubric of Consumer Confidence. Over the next few years, this group was broken down into three subcategories: privacy, alternative dispute resolution, and ADR. The most contentious issue proved to be that of privacy and more specifically, data protection—the rules governing the collection and handling of personal data. In Europe privacy is considered a fundamental human right that must be protected. Most member states had their own approaches to information privacy and each country had created its own data protection agency (c.f. Bennet 1998; Bessette and Haufler 2001; GILC 1998; and Mayer-Schonberger 1998). The European Commission had already legislated a privacy protection directive in 1995. The directive, which went into effect on October 24, 1998, has far-reaching implications on global e-commerce. Article 25 of the directive allows member states to “prohibit all data transfers to a third country if the Commission finds that the country does not ensure ‘an adequate level of ‘protection’ of data privacy rights (Shaffer 1998: 422). American companies who do not provide this level of protection can be fined and prevented from transferring data – including to their U.S. affiliates. Thus the EU directive places pressure on American firms to improve their self-regulatory data protection schemes. It also prompted the US Department of Commerce to sign a “Safe Harbor Agreement” with the EU that would shelter American firms who meet the European requirements. Initially, the US government proposed that this be done through self-regulatory mechanisms – a process the EU rejected. The extra-jurisdictional impact of the EU data protection policy, as Greg Shaffer has argued, means that the practices of US government and industry officials are now “conducted in the shadow of foreign regulations – the European Commission and the Member States authorities” (Shaffer 1998: 429). Or, as a GBDe sherpa noted, “The Europeans make a law and force the rest of the world to comply. That’s the power of the internet.”<sup>44</sup>

In contrast, the United States has what many observers have called a “patchwork” or “hodgepodge” of privacy rules. The Privacy Act of 1974 that provides protection on informational privacy applies only to data processed by the federal U.S. government, not private companies. It is not surprising, therefore, that the White House argued in the 1997 Framework paper that privacy issues related to the Internet should not be subject to legislation, but to industry legislation.

It also was not surprising that negotiations over self-regulatory privacy principles in the GBDe proceeded slowly as companies clashed not only between industry sectors but between regional interests as well. Some companies with commercial interests in web

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<sup>43</sup> Surveys included those by the Pew Internet and American Life Project and Forrester Research. See Despeignes, 2001.

<sup>44</sup> Interview with GBDe AM representative, April 23, 2001.

information recoiled from any constraints. Americans and Europeans disagreed over the desirability of any privacy policy as well as over “self-regulatory approaches” versus “co-regulatory policies”—an issue discussed below. At the same time, the GBDe did not undertake any meaningful consultation with other stakeholders in the privacy debate. Thus, in the early months of the GBDe, privacy became an issue where there was a “void,” in the words of one sherpa. “We [had] not been able to crack the issue.”<sup>45</sup>

The privacy issue came to a head at the Miami conference in September 2000, featuring 72 companies as well as leading government figures from around the world. While the GBDe presentations on ADR and trustmarks were well received by the government officials, the privacy debate was not.<sup>46</sup> Unlike other issues, the privacy statement became a “lowest common denominator” document. As one GBDe member noted, “No one liked it. The Europeans disdained it.” Indeed, at a key Miami luncheon, U.S. Commerce Secretary Norm Mineta gave industry a lecture on the shortcomings of the privacy paper. “We [industry] felt there was egg on our face.”<sup>47</sup>

### The Self-Regulation Debate

In many respects, the failed Miami privacy document could be attributed to industry’s preoccupation with commercial interests as well as industry’s shortsightedness in not including other stakeholders in the discussion of privacy and data protection. Yet it is also the result of the underlying debate between “self-regulation”, as promoted by the Americans, and “co-regulation” advocated by many Europeans. In effect, the two sides were talking about the same issue. The problem, however, was in each side’s perception of the implicit role of government in self-regulation. Here, culture, history and institutions all shaped this debate.

For most American firms in the GBDe’s initial years, there was no backing down from the idea that government should not be involved implicitly or explicitly in regulating the industry. After all, self-regulation “American-style” was the cornerstone of the 1997 White House paper on e-commerce to promote growth in the industry. Self-regulation was also part of U.S. industry’s posturing for future domestic e-commerce debates; American firms needed to stake out a strong stance to preserve as much self-regulation as possible in the face of growing calls for U.S. government involvement.<sup>48</sup>

Moreover, there were cultural (informal institutional) and formal institutional factors underlying the U.S. industry position. To begin, self-regulation is part of the “underlying ethos that all American companies bring to the table—not just in e-commerce.”<sup>49</sup>

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<sup>45</sup> Interview with GBDe AM representative, April 12, 2001.

<sup>46</sup> The detailed policy papers are available on-line at [www.gbde.org/ie/2000/trustmark.html](http://www.gbde.org/ie/2000/trustmark.html), [www.gbde.org/ie/2000/adr.html](http://www.gbde.org/ie/2000/adr.html), and [www.gbde.org/ie/2000/privacy.html](http://www.gbde.org/ie/2000/privacy.html).

<sup>47</sup> Interview with GBDe AM representative, May 22, 2001. The view is one generally shared within the GBDe. As another sherpa noted, “We got slammed for it [i.e. not delivering a strong policy statement on privacy].” Interview with GBDe EA representative, June 6, 2001.

<sup>48</sup> Interview with GBDe AM representative, April 10, 2001.

<sup>49</sup> Interview with GBDe AM representative, April 12, 2001. Interestingly, with or without a formal advocacy process, GBDe representatives tend to speak to GBDe issues in a similar manner during the interviews. Put another way, whether from Europe or the U.S., the GBDe members tend to “speak with one voice” when discussing core GBDe principles.

Historically, the American business-government relationship has been at “arms-length,” with business holding a general mistrust of the state (Vogel 1978). Thus, codes of conduct and self-regulatory mechanisms have been part and parcel of the public policy toolbox in the United States. Industry should be able to act separately from the government. This was particularly true in the American e-commerce community which developed its own strain of this American ethos. Although the creation of the internet goes back to a U.S. Department of Defense project, many of the internet companies—the “start-ups” and “dot.coms”—were formed by entrepreneurs who saw no need for government intervention. These were often the “pure internet players,” the “pure libertarians from the West Coast.”<sup>50</sup>

Self-regulation in the United States was also facilitated by the fact that private groups existed to monitor and sanction violators of self-regulation. The existence of the BBB-online, for example, has allowed consumers to obtain redress from this private entity and not the government per se.

Of course, what American firms did not acknowledge was that there were institutional factors that facilitated the U.S. emphasis on self-regulation. The Federal Trade Commission, an independent regulatory agency, was empowered to take action under Section 5 of the Federal Trade Commission Act against those companies who conducted unfair trade practices, including the violation of self-regulatory policies. Under this American system of self-regulation, the sanctioning of these firms occurs “after the fact” – after a violation had occurred. As discussed below, the ex poste sanctions in the American system were disconcerting to many European governments and firms who believed that sanctions need to be spelled out upfront in legislation to be credible.

In contrast to the Americans, several European firms promoted the concept of “co-regulation” in the GBDe. The term itself carries different meanings in the various member states of the EU. In general, however, co-regulation indicates there is a role for government to set the parameters of self-regulation, and/or to serve as an “honest broker” among the stakeholders in the policy debate. For a number of European firms, “co-regulation” tends to resonate more broadly for cultural, historical, and institutional reasons. Culturally, some EU industry representatives, notably the French, prefer the term to self-regulation, which is construed as too Anglo-Saxon in orientation. From a French perspective, self-regulation places too little emphasis on the role of the sovereign state in international affairs. Co-regulation also has its historical significance as a form of “negotiated governance” in the member states (c.f. Kooiman 1993). Historically, for example, many consumer protection measures in countries like France and the United Kingdom were negotiated agreements between stakeholders with or without the formal legislative sanction of the state (Trumbull 2000).

The focus on co-regulation also has an important institutional basis for EU industry for two reasons. First, EU industry operates in a multi-level system of governance where any number of players influence the policymaking process at the European, national, and subnational level (Marks, Hooghe, and Blank 1996). One EU participant explained his support of co-regulation by noting that EU industry was “still hesitant that [the

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<sup>50</sup> Interview with former U.S. government official, May 21, 2001. Often, it wasn't until these companies needed electronic contracts and digital signatures that they realized that government might need to be a player.



American] self-regulatory approach could work in Europe.” This was not due to any industry misgivings about self-regulation per se. Rather, the companies were concerned about the reaction from the member states.<sup>51</sup> While the Commission (and more specifically, the Information Society Directorate-General) could propose a single regulatory framework for e-commerce, the member states would ultimately be voting on the initiative. Thus, EU industry representatives needed to be attuned to member states’ views on acceptable language in the proposed EU directive—as well as be attuned to the domestic debates and proposed national legislation on similar issues.

A second reason why institutions matter in the self-regulation vs. co-regulation debate is precisely because there is not a tradition of the BBB at the EU level, nor is there the equivalent of the FTC in the European Commission. The EU does not have the traditional back-up enforcement systems attached to self-regulation in the United States. Therefore, the Commission has sought to back up voluntary codes and self-regulation measures with legislation in the e-commerce directive. Many members of the European Parliament prefer this legislative action because it gives them a role in the regulatory process which otherwise would not exist under self-regulation. Indeed, a special business-Parliament working group (including many GBDe members) was set up to explore the impact of self-regulation, co-regulation, and soft-law on EU policymaking in the e-commerce sector (European Internet Forum 2001).

Given these different cultural, historical, and institutional factors, it is not surprising that the Americans and Europeans disagreed over the term self-regulation. To many in European industry, the American obsession with their form of self-regulation was just that, an obsession. Yet, to many in American industry, European ideas of co-regulation raised immediate concerns over a Commission pre-disposed to regulation and industry actors unwilling to intercede in the process.<sup>52</sup> Interestingly, U.S. companies were also more wary of emphasis on legislation given the litigious nature of American society.<sup>53</sup>

By 2001, American and European companies agreed to a truce in the self-regulation vs. co-regulation debate. When neither the Americans nor the Europeans could accept the other’s terms, it was decided to use a different expression, “policy coordination.” Jean-Marie Messier, CEO of Vivendi, formally introduced the norm of “policy coordination” to the Miami conference participations in September 2000. According to Messier, policy coordination is the effort “to increase the contacts between the public and private sectors, to forge a converging vision of the future, to coordinate legislation, international treaties and codes of conduct and to ensure global consistency.”<sup>54</sup>

In a sense, the definition of policy coordination is loose enough to please everyone. American firms can argue that they are, in any case, in regular contact with the U.S. administration over e-commerce issues and self-regulation. The Europeans, on the other

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<sup>51</sup> Interview with GBDe EA representative, May 9, 2001.

<sup>52</sup> This idea was repeated in countless interviews with American industry and government officials. American sherpas also tended to view the non-combative relationship between industry and the Commission as a further sign of this complicity. Yet, part of this relationship might be explained by the non-aggressive style indicative of EU policymaking. Indeed, “aggressive American-style lobbying” is often frowned upon in Brussels (c.f. Cowles 1996).

<sup>53</sup> European companies, for example, do not face the same prospect of class action lawsuits filed against them (c.f. Shaffer 2000).

<sup>54</sup> See “Draft for Jean Messier’s Speech at the Annual GBDe Miami Conference, Miami, September 26, 2000.

hand, can point to the fact that they are responding more formally to the concerns of member states. “Policy coordination” also links well with the definition of co-regulation articulated by Erkki Liikanen, the Commissioner responsible for the Enterprise and the Information Society DGs. Defining co-regulation as the “co-operative approach to governance”, Liikanen identifies a number of criteria associated with the term:

- The adoption of a legal framework for self-regulation (for example, compliance by a company with a co-regulatory instrument may result in a presumption that it is acting legally);
- Sanctions for non-compliance;
- Stakeholder or administration participation in designing, auditing, monitoring, and enforcing instruments (Sheridan 2001, 5).

While there is no clear definition of co-regulation in the Commission, the term is bandied about extensively in the on-going discussion of alternative regulatory mechanisms (ARMs) in the European Commission. It is noteworthy that the Data Protection Directive and the draft Electronic Commerce Directive have been singled out for creating “a bridge between ‘pure’ voluntary mechanism and ‘pure’ Community legislation” (EU Committee, n.d.). In other words, the Commission sees this type of “enforced self-regulation” or, possibly, “co-regulation” as an appropriate alternative regulatory model to be considered.

In the end, the lessons of Miami, the results of consumer surveys, the changes in domestic debates, the continuing extra-jurisdictional impact of the EU’s 1995 Data Privacy Directive<sup>55</sup>, as well as policy learning within the GBDe itself, have prompted the GBDe to further refine its Consumer Confidence efforts. Hewlett Packard and other companies have begun to hold discussions with Consumers International, as well as a number of American, European, and Japanese consumer and privacy advocacy groups to see if a viable policy might be outlined that will meet key concerns of industry, as well as those of other stakeholders. The fact that some global firms, notably DaimlerChrysler, are now contemplating adoption of a single corporate privacy policy that would be operational anywhere in the world is also driving this process. The GBDe’s goal is to define industry-led data privacy protection that is “practicable” and “that works in the real world.”<sup>56</sup>

Despite the efforts, GBDe officials are not too hopeful about the privacy initiative. The reason, however, has nothing to do with the firms’ efforts, but with that of the governments. The GBDe cannot have a voice until the U.S. government itself develops public policy in the area, and not just a patchwork of legislation. As one key player noted, “Unless the US government develops a coherent position [on privacy policy], the European Data Privacy Directive wins out. It’s the template that people use because it’s the only template around. We’re losing the intellectual debate [on self-regulation] to the Europeans.”<sup>57</sup> Because the US government does not have a more coherent overall policy, it has no bargaining power on the self-regulation debate in privacy matters. As a consequence, the GBDe firms have no bargaining power either. Thus, only when the US

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<sup>55</sup> See Shaffer 1998, Swire and Litan 1998.

<sup>56</sup> Interview with GBDe AM representative, May 22, 2001.

<sup>57</sup> Interview with GBDe AM representative, March 25, 2003.

does adopt more comprehensive privacy legislation will “the GBDe can emerge as an important voice in promoting one jurisdictional policy over another, possibly removing some of the territorial jurisdiction of the EU.”<sup>58</sup>

### ADR and Trustmarks

ADR and trustmarks, though two separate concepts, are closely interlinked. A trustmark is a label or seal that indicates that the e-commerce merchant is committed to complying with agreed-upon best business practices, codes of conduct, etc., in addressing privacy issues. Trustmarks often found on US companies’ websites include BBB-online, Verisign, and the like. The trustmark will usually include a “redress mechanism” that allows for the consumer to remedy an unsatisfactory situation. In the case of the BBB trustmark, for example, it is the BBB that also provides the ADR mechanism.

Many e-commerce firms have argued that the promotion of on-line ADR and trustmarks are critical to the future of e-commerce.<sup>59</sup> If a consumer has a complaint about a good or service purchased on-line, she can go to a court to take action against the company. (Companies have argued that such court cases should be in the court of the merchant, but governments have sided with consumer groups in stating that such redress must be in the court of the consumer.) Companies argue that there must be a means for the consumer to seek redress first “on-line” and then, if the situation is not satisfactorily resolved, in the national courts. Otherwise, it is argued, the promotion of global e-commerce will be stifled as companies could not afford to appear in courts throughout the world every time a consumer has a complaint. The purpose is not to prevent consumers from seeking legal recourse, but to consider alternative forms of on-line dispute resolution as a first step. In effect, the trustmarks and ADR mechanisms are designed to address jurisdictional problems associated with the internet.

Unlike the GBDe privacy debate, the discussion among firms was less contentious in part because it was fairly new for the European and Asian participants. In effect, considerable policy learning took place as American firms educated their global counterparts on the role of the Better Business Bureau and other trustmark/ADR systems in the United States. By the Miami 2000 conference, the GBDe firms had come to agreement on the general principles that would underlie on-line ADR and trustmarks. Indeed, the main debate that took place within the GBDe concerned the type of trustmark companies should use. Americans were familiar with the American trustmarks. But would European or Japanese consumers, for that matter, “trust” such icons on company websites. For a while, Japanese companies argued that the GBDe should create its own trustmark. American companies, however, preferred to use the existing trustmark

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<sup>58</sup> Interview with GBDe AM official, March 25, 2003. American government and industry officials, as well as other stakeholders, are in the process of re-evaluating self-regulation in the U.S. privacy debate. In May 2000, the Federal Trade Commission issued a report suggesting that industry self-regulation was not adequate, and that legislative action was necessary. Countless states began proposing their own data privacy legislation around the country. In 2001 alone, the U.S. Congress introduced over 100 bills dealing with data privacy/consumer confidence issues. In the view of some government officials, future Congressional action is necessary to provide “privacy with teeth”—that is, legislative action to back up industry codes of conduct. Interview with former U.S. government official, May 24, 2001.

<sup>59</sup> On the growing role of ADR in e-commerce, see Katsch and Rifkin (2002).

companies, many of which received funding from the US GBDe companies themselves, or to create new privately-run trustmark companies in Europe, Asian, and other parts of the world. The companies have also discussed setting up a type of “mutual recognition” system for trustmarks as long as those trustmark companies adhered to the guiding principles devised by the GBDe. The idea, for example, would be to allow a Japanese consumer to click on a trustmark on an American firm’s website and see another Asian trustmark that she recognizes and trusts, and to which she can go if she seeks redress from the American company.

In general, the American and European governments applauded the GBDe’s work in this ADR/trustmark arena. Problems arose in 1999, however, when a “competence battle” emerged within the European Commission between the Directorate-General (DG) Information Society and the DG Health and Consumer Protection (SANCO) over ADR and trustmarks.<sup>60</sup> By the summer, DG SANCO had emerged as the lead DG on the issues – a development that did not please EU industry which found the DG unresponsive to industry concerns and inward-looking as opposed to global-thinking in its policy development.

That same year, Commissioner David Byrne, the commissioner responsible for DG SANCO, created a core group of consumer groups, industry representatives, and members of his serves to develop a coordinated approach to trustmarks. The Commissioner’s idea was to create a government-legislated trustmark system, as opposed to the private sector self-regulation model carried out in the United States. While the GBDe was not invited to Byrne’s core group, several GBDe EU companies participated in the weekly meetings. The problem from EU industry’s point of view, was that DG SANCO had little intention of listening to industry while articulating its own position. The end result was the EU industry representatives, frustrated with the process, simply stopped talking with DG SANCO officials. To avoid seeing his group disintegrate, Byrne turned to UNICE – the umbrella organization for EU industry associations. UNICE, however, then turned to a GBDe representative to be the EU industry voice on the matter. In the end, the GBDe company’s position was firm: GBDe member from around the world could not support the Commission’s government-legislated proposal on trustmarks. With the weight of the GBDe against the proposal, “Byrne realized that he could not afford to have this battlefield.”<sup>61</sup> Moreover, once the Commission backed down from its position on trustmarks, so did BEUC, the European consumer umbrella group, which expressed an interest in meeting with the GBDe. As a consequence, several EU GBDe members and BEUC officials began their own dialogue on trustmarks.

DG SANCO’s stance on the trustmark and ADR issue can be traced to a number of factors. First, the European Commission itself had little experience working with trustmarks and was having its own problems figuring out which DG had “competence” over this particular issue. After winning the “competence” debate, DG SANCO was not interested in turning over its new-found authority to private industry on the matter. Second, of course, DG SANCO also questioned the legitimacy of a private self-regulatory system given that its core constituency was the consumer. Third, DG SANCO was pre-disposed to “legislating” trustmark and ADR guidelines precisely because the EU itself did not have any “institutional back-up” in the form of the FTC to take actions

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<sup>60</sup> The DGs are akin to government departments and agencies in the US.

<sup>61</sup> Interview with GBDe EA representative, June 6, 2001.

against the firms. Yet, unlike the privacy legislation, ADR and trustmarks clearly operate in the shadow of the state. After all, if consumers do not find satisfactory redress of their issues under the privately-run mechanisms, they can always resort to the national courts. Again, however, even this option was not interesting to DG SANCO because it would be the national courts – and not DG SANCO – that would ultimately serve as “the state” in these matters. Perhaps for this reason, DG SANCO began to explore the possibility of developing its own FTC-like capabilities and functions at the European level.

In the meantime, Hewlett Packard (HP) and other GBDe members, with the support of DG Information Society and the Department of Commerce, began exploring the idea of developing a BBB-on-line in Europe. In 2001, a Memorandum of Agreement was signed between BBB-online, FEDMA (the EU-level direct marketing association), and Eurochambres (the EU group representing the Chambers of Commerce across Europe), to work together to create an ADR system and to disseminate information on the project throughout Europe. This has resulted in the development of the Global Trustmark Alliance (GTA), an emerging umbrella group for ADR programs in the EU and in parts of Asia. In 2002, the US Department of Commerce awarded a major grant to BBB on-line to support this effort to develop a European/international mutual recognition system of trustmarks.

Concurrent with the trustmark initiative, HP and several other GBDe companies embarked on their own campaign to actively solicit ideas and support from policymakers, consumer groups, and privacy advocates to create a broader agreement on ADR guidelines.<sup>62</sup> The action has not been without criticism. When a European GBDe representative suggested that discussions be undertaken with consumer organizations, several American companies voiced their concerns warning that if the discussions did not go well, the consumer groups could turn against the companies.<sup>63</sup> By contrast, this was less a concern for EU, Canadian, and Japanese companies, who had closer links to and/or negotiations with consumer groups on privacy issues at the national level. Indeed, the three Commission directorates concerned with e-commerce – DG SANCO, DG Internal Market, and DG Information Society – all suggested that an agreement between business and consumers was necessary for ADR to be accepted in Europe.

Thus, on April 9, 2001, industry representatives from the three GBDe regions met with Consumers International (CI) – a global umbrella organization for national consumer groups – at the Hewlett Packard London office to discuss ADR guidelines. The process of coordination between CI and the GBDe was not easy. There remained a considerable lack of trust as well as a vocal group of naysayers in each camp that did not support the talks. The business and consumer representatives brainstormed and reviewed the GBDe draft guidelines on ADR on a point-by-point basis. Two weeks later at a Madrid sherpa meeting, CI was invited to give a presentation to the sherpas. By March 2003, GBDe-CI had developed a near-final draft of ADR guidelines in an HP-sponsored meeting in Washington, DC. Attending the meeting were FTC and Department of Commerce officials, US consumer groups, as well as Canadian business and government

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<sup>62</sup> Hewlett Packard is generally considered a maverick among American firms on privacy and ADR issues. It is interesting to see how the GBDe itself has specific “policy entrepreneurs” who push the group into certain directions. Part of this is a function of the type of firm involved (see Figure 4 above). For example, Disney is the recognized policy entrepreneur in intellectual property issues.

<sup>63</sup> Interview with GBDe EA representative, June 6, 2001.

officials. Indeed, these government and NGO members, along with the European Commission officials, have been present for much of the ADR guideline negotiations and have provided support and input throughout the process. While these same government officials could have negotiated ADR guidelines, it is clear to companies why they agreed to delegate such authority to the GBDe and, in turn, the CI. As one company official in the negotiations noted, turning the ADR guidelines over to the companies “takes a big issue off the table for governments, one they clearly have a hard time dealing with.”<sup>64</sup> On the one hand, turning ADR over to private authorities allows the governments to avoid the jurisdictional conflicts inherent in state-led negotiations. At the same time, by encouraging transnationally- or globally-organized groups to negotiate the details on a global basis, governments can avoid the inherent domestic conflicts among interest groups in government-led negotiations.

Importantly, when the GBDe/CI guidelines are finalized in the next few months, they will represent the first time that business and consumers have sat down to hammer out global self-regulation guidelines in this e-commerce policy area.<sup>65</sup> The guidelines will likely serve as a template for other ADR guidelines around the world.

### Bringing Firms, States, and Contention Back In

The case story of the GBDe and its efforts to promote private authority in Consumer Confidence matters provides insight into the dynamic nature of private authority. It also challenges us to reconsider our thinking on the IR/IPE literature on private authority. This literature has tended to identify motives and conditions for private authority that emphasize homogeneous private actors who come together to develop norms and who, once granted authority, act “beyond the state”. The GBDe story, however, suggests that a more dynamic model needs to be conceptualized.

As I argued early on in this paper, one way in which to conceptualize private authority is to revisit Stopford and Strange’s triangular diplomacy model in which one finds on-going negotiations taking place among firms and states to develop private authority. Private authority does not mean operating without the state, as some IR/IPE scholars have suggested. Rather it signals novel global interactions among firms and states that allow for a different type of public/private governance to emerge. I have also suggested that by identifying the formal and informal institutions in this process, one can not only recognize the “contested nature” of private authority, but also the various means by which firms and states can mediate or overcome these institutional obstacles. The GBDe is illustrative of this process.

As the GBDe case suggests, the existence of homogeneous private actors is not a precondition for private governance. Nor is it necessarily a reality. Indeed, private governance involves negotiations among firms with different regulatory cultures and business-government relationships. It can also involve negotiations among firms who represent different segments (and therefore, different interests) of an industry. The results can be quite contentious, as suggested by the “self-regulation vs. co-regulation” debate in GBDe privacy policy. At the same time, firms can work to overcome these differences

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<sup>64</sup> Interview with GBDe AM member, March 25, 2003.

<sup>65</sup> Interview with GBDe AM member, March 25, 2003.

and to even invent new terms that might be mutually acceptable (though not universally admired) to discuss self-regulation on the global level.

Private governance also involves negotiations among governments over whether or not to grant authority to firms to carry out their self-regulatory policies on the global level. Sometimes, as in the case of privacy policy, this authority is not forthcoming not because firms' authority is not considered legitimate, but because one of the governments does not have policy with which it can bargain against the other side. Other times, as in the ADR/trustmark debates, private firms and governments can promote (and even fund) new types of private and/or public institutions to build support for self-regulation at the global level.

Finally, private governance involves ongoing interactions between firms and states over the issue of private governance. As suggested by the ADR case, states can influence the nature of self-regulation by emphasizing the conditions of legitimacy. Indeed, by encouraging globally-organized firms to negotiate with similarly organized consumer organizations to develop self-regulatory ADR guidelines, states are able to shape the parameters of self-regulation.

The ADR case also points to reasons other than those typically identified in the private governance literature regarding state motivation and support for private governance (see Figure 1). One can argue, for example, that reasons why states delegate authority to supranational institutions are similar to why they might delegate to private firms (Cowles 2003). For example, drawing on the EU literature on principle-agent theory (Pollack 1997), states delegate authority to firms: (1) to monitor firm compliance, (2) to solve problems of 'incomplete contracting', (3) to serve as an independent regulator, and (4) to initiative policy proposals and set the agenda for the principals.

Contrary to the assumptions in IR/IPE, private governance does not occur without the state, but rather, as the EU literature suggests, operates within the shadow of the state. This is the case even in the United States where the state does not impose its shadow upfront in authorizing legislation (as in the case of the EU), but in the ex-ante powers of the Federal Trade Commission. Indeed, as Ronit and Schneider (2001) argue, the implementation of the norms of private authority are often translated, indeed, mediated by the state.

For "statist" IR scholars, this reconceptualization of the role of state-firm relations in private authority would appear to confirm what they have suspected all along – namely, that globalization does not signal a "hollowing out of the state". Kahler and Lake, for example, argue that 'private governance does not stand independent of public governance' (Kahler and Lake 2002). Despite the claims of a "sovereignty@bay" world, the state remains the sovereign, the sole authority, in global governance. Such an argument, however, is misleading for just as one can argue that private governance does not stand independent of public governance, one can also argue the converse -- that public governance increasingly does not stand independent of private governance (Cowles 2003). In reality, one increasingly finds a synergistic relationship between public and private actors in this triangular diplomacy -- the existence of public *and* private management of international markets, and development of public *and* private mechanisms to coordinate the global political economy. Thus, it is not a reassertion of public authority, but a qualitatively different kind of governance that is emerging.

## REFERENCES

- Authers, John (1999), "Media and telcoms chiefs aim for self-regulation of internet: governments 'should leave policing of industry', says group," *Financial Times*, January 14, p. 18.
- Bennett, Colin (1998). *Regulating Privacy: Data Protection and Public Policy in Europe and the United States*. Ithaca, NY: Cornell University Press.
- Bessette, Randi and Haufler, Virginia (2001), "Against All Odds: Why There is No International Information Regime," *International Studies Perspectives* 2, 69-92.
- Boddewyn, J. J. (1992) *Global Perspectives on Advertising Self-regulation: Principles and Practices in Thirty-eight Countries*, Westport, CT: Quorum.
- Börzel, Tanja A. (1998) 'Organizing Babylon. On the Different Conceptions of Policy Networks', *Public Administration*, 76: 253-73.
- \_\_\_\_\_ (2002) 'Non-State Actors and the Provision of Common Goods. Compliance with International Institutions', in Adrienne Héritier (ed.) *Common Goods: Reinventing European and International Governance*, Lanham, MD: Rowman and Littlefield: 155-78.
- Cerny, P.G. (1993) *Finance and World Politics: Markets, Regimes and States in the Post-Hegemonic Era*, Cheltenham, UK: Elgar.
- Coleman, W.D. and Underhill, G.R.D. (1998), 'Globalization, regionalism and the regulation of securities markets' in W.D. Coleman and G.R.D. Underhill (Eds.), *Regionalism and Global Economic Integration: Europe, Asia and the Americas*, London: Routledge, pp. 225-226. (check page numbers)
- Cowles, Maria Green (1994) *The Politics of Big Business in the European Community*, Ph.D. dissertation, American University.
- \_\_\_\_\_ (1996) 'German Big Business: Learning to Play the European Game', *German Politics and Society*, Vol. 14, No. 3, Fall: 73-107.
- \_\_\_\_\_ (1997) 'The Changing Architecture of Big Business,' in Justin Greenwood and Mark Aspinwall, eds., *Collective Action in the European Union: Interests and the New Politics of Associability*, Routledge, pp. 108-125.
- \_\_\_\_\_ (2001a) 'The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue', in Mark Pollack and Gregory Schaffer, eds, *Transatlantic Governance in a Global Economy*, Lanham, MD: Rowman and Littlefield, pp.
- \_\_\_\_\_ (2001b) 'Who Writes the Rules of E-Commerce? A Case Study of the Global Business Dialogue on e-commerce (GBDe)', Policy Paper #14, American Institute for Contemporary German Studies, Washington, DC, 2001. Downloadable from <http://www.aicgs.org/publications/pubonline.shtml#policypapers>.
- \_\_\_\_\_ (2003) 'Non-state Actors and False Dichotomies: Reviewing IR/IPE Approaches to European Integration', *Journal of European Public Policy* 10:1; 103-121.



- Cowles, Maria Green, Caporaso, James, and Risse, Thomas (Eds.) (2002), *Transforming Europe: Europeanization and Domestic Change*, Ithaca, NY: Cornell University Press.
- Cutler, A. Claire, Haufler, Virginia and Porter, Tony (1999) *Private Authority and International Affairs*, Albany, NY: Suny University Press.
- Despeignes, Peronet (2001), "Inside Track: Exorcising the ghost in the internet machine," *Financial Times* (London), February 29, p. 14.
- Farazmond, A. (1999) 'Globalization and Public Administration' *Public Administration Review*, 59: 509-523.
- GBDe (1999), "Unprecedented global Business Dialogue launched to establish framework for e-commerce," Press Release, January 14.
- Haufler, Virginia (2000) 'Private Sector International Regimes: An Assessment,' in Higgott, Richard A., Underhill, Geoffrey R.D. and Bieler, Andreas, *Non-State Actors and Authority in the Global System*, London, New York: Routledge, pp..
- \_\_\_\_\_ (2001) *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy*, Washington, DC: Carnegie Endowment for International Peace Press.
- Hayward, Douglas (1997), "European Communications Chief Calls for Internet Charter," *TechWeb*, 9/8/97, [www.techweb.com](http://www.techweb.com), accessed 5/25/2001.
- \_\_\_\_\_ (2001) 'New modes of multiarena governance in Europe Policy-making without legislation', Paper presented at the conference 'Linking Law and Politics', 1-2 February, Bonn.
- \_\_\_\_\_ (ed.) (2002) *Common Goods: Reinventing European and International Governance*, Lanham, MD: Rowman and Littlefield.
- Higgott, Richard A., Underhill, Geoffrey R.D. and Bieler, Andreas (2000) *Non-State Actors and Authority in the Global System*, London / New York: Routledge.
- Jachtenfuchs, Markus (2001), 'The Governance Approach to European Integration', *Journal of Common Market Studies*, 39(2), June, [pp. ...].
- Jordan, Grant and Schubert, Klaus, eds (1992) *European Journal of Political Research* 21, special issue: *Policy Networks*.
- Kahler, Miles and Lake, David A. (eds) (2002) *Globalizing Authority: Economic Integration and Governance*. Unpublished manuscript.
- Katsh, Ethan and Rifkin, Janet (2002). *On-line Dispute Resolution: Resolving Conflicts in Cyberspace*.
- Knill, Christoph (2001) 'Private Governance across Multiple Arenas: European Interest Associations as Interface Actors', *Journal of European Public Policy* 8(2): 227-46.
- \_\_\_\_\_ and Lehmkuhl, Dirk (2002) 'Private Actors and the State: Internationalization and Changing Patterns of Governance', *Governance* 15 (1) (January): 41-63.

- Kobrin, Stephen (2001) 'Sovereignty@Bay: Globalization, Multinational Enterprise and the International Political System', in *The Oxford Handbook of International Business*, A. Rugman and T. Brewer (eds.), Oxford University Press.
- Kohler-Koch, Beate (1996) 'Catching up with change: the transformation of governance in the European Union', *Journal of European Public Policy* 3 (3) September: 359-80.
- Kohler-Koch, Beate and Eising, Reiner, eds (1999) *The Transformation of Governance in the European Union*, London: Routledge.
- Kooiman, Jan (1993) 'Social-political governance: introduction', in Jan Kooiman (eds) *Modern Governance. New Government-Society Interactions*, London: Sage, pp. 1-9.
- Lawton, Thomas C. (1997). *Technology and the New Diplomacy: The Creation and Control of EC Industrial Policy for Semiconductors*, Aldershot, Hants, UK: Ashgate.
- Lehmkuhl, Dirk (2000) 'Commercial Arbitration – A Case of Private Transnational Self-Governance?' Working Paper, Max-Planck Group on 'Common Goods: Law, Politics and Economics', Bonn.
- Litan, Robert E. (2001). Think Again: The Internet Economy," *Foreign Policy*, March/April.
- Marks, G., Scharpf, F.W., Schmitter, P.C. and Streeck, W. (Eds.) (1996) *Governance in the European Union*, London: Sage.
- Mattli, Walter (2002) 'Globalization and the Changing World of Transnational Standards Governance', in Miles Kahler and David A. Lake, (eds) *Globalizing Authority: Economic Integration and Governance*. Unpublished manuscript.
- Maxwell, Elliot (1988). "The Internet and Electronic Commerce: A Tale of Three Cities," in *The Emerging Internet* (Washington, DC: The Aspen Institute, Institute for Information Studies.)
- Mayntz, R. (Eds. (1992) *Verbände zwischen Mitgliederinteressen und Gemeinwohl (Private and public functions of associations)*, Gütersloh, Germany: Verlag Bertelsmann Stiftung.
- \_\_\_\_\_ (1993) 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach', *Journal of Common Market Studies* 31 (4): 473-524.
- Newman, Abe and Bach, David (2002) 'Self-Regulatory Trajectories in the Shadow of the State: Resolving Digital Dilemmas in Europe and the United States', unpublished manuscript.
- Offe, C. (1981) 'The attribution of public status to interest groups', in S.D. Berger (Eds), *Organizing Interests in Western Europe: Pluralism, Corporatism, and the Transformation of Politics* (pp. 123-138), Cambridge, UK: Cambridge University Press.
- O'Harrow, Robert Jr. (1999), "Companies Resist U.S. Proposals on Privacy," March 16, *Washington Post*, p. E01.
- Pollack, Mark (1997) 'Delegation, Agency and Agenda Setting in the European Community', *International Organization* 51 (1): 99-135.

- \_\_\_\_\_ (2001) 'International Relations Theory and European Integration', *Journal of Common Market Studies* 39 (2) (June): 221-44.
- Porter, Tony (1993) *States, Markets and Regimes in Global Finance*, New York: St. Martin's.
- Prakash, Aseem (2000) *The Greening of the Firm*, Cambridge: Cambridge University Press.
- Princen, T. and Finger, M. (Eds.) (1994) *Environmental NGOs in World Politics: Linking the Local to the Global*, London: Routledge.
- Reinicke, Wolfgang (1998) *Global Public Policy: Governing Without Government?* Washington, DC: Brookings Institution Press.
- Reuters (1997), "Magaziner backs world net charter," October 2. Found at [www.gtld-mou.org/gtld-discuss/mail-archive/05490.html](http://www.gtld-mou.org/gtld-discuss/mail-archive/05490.html), accessed May 25, 2001.
- Rhodes, R.A.W. (1996) 'The New Governance: Governing without Government', *Political Studies*, XLIV: 652-67.
- Riley, John (1999). "We can look after ourselves," *Computer Weekly*, September 30, 1999.
- Ronit, Karsten (2001) 'Institutions of Private Authority in global governance: Linking Territorial Forms of Self-Regulation' *Administration & society*, 33 (5): 555-578.
- Ronit, Karsten and Schneider, Volker (1999) 'Global Governance through Private Organisations', *Governance* 12 (3): 243-66.
- Sally, Razeen (1995) *States and Firms: Multinational Enterprises in Institutional Competition*, London / New York: Routledge.
- Scharpf, Fritz (1997) *Games Real Actors Play*, Boulder: Westview Press.
- Schmidt, Vivien (1996) *From State to Market*, Cambridge, UK: Cambridge University Press.
- \_\_\_\_\_ (2002) *The Futures of European Capitalism*, Oxford: Oxford University Press.
- Sell, Susan (1995) 'Intellectual Property and Antitrust in the Developing World: Crisis, Coercion, and Choice', *International Organization* 49 (2) (Spring): 315-49.
- Shaffer, Gregory (1999). "The Power of EU Collective Action: The Impact of EU Data Privacy Regulation on US Business Practice," *European Law Journal*, 5,4 December: 419-437 .
- Simon, Leslie David (2000) *Netpolicy.com*, Washington, DC: Johns Hopkins University Press.
- Spar, Debora L. (1999) 'Lost in (Cyber)space', in A. Claire Cutler, Virginia Haufler and Tony Porter (eds), *Private Authority and International Affairs*, Albany, NY: Suny University Press.
- Steinmo, Sven, Thelen, Kathleen and Longstreth, Frank eds (1992) *Structuring Politics: Historical Institutionalism in Comparative Analysis*, Cambridge: Cambridge University Press.

- Stopford, John and Strange, Susan (1991), *Rival States, Rival Firms: Competition for World Market Shares*, Cambridge University Press.
- Strange, Susan (1988) *States and Markets*, New York: Blackwell.
- \_\_\_\_\_ (1996) *The Retreat of the State: The Diffusion of Power in the World Economy*, New York: Cambridge University Press.
- Streeck, Wolfgang and Schmitter, Philippe C. (1985) *Private Interest Government: Beyond Market and State*, Sage Series in Neo-Corporatism, London: Sage.
- Underhill, G.R.D. (Ed.) (1997) *The New World Order in International Finance*, London: Macmillan.
- Vesely, Rebecca (1988), "The Big Bangemann Theory: Problems faced by an ecommerce charter show how tough it is to regulate the Internet, in *Business 2.0*, [www.business2.com/ebusiness/1998/08/19172.htm](http://www.business2.com/ebusiness/1998/08/19172.htm), accessed 5/25/2001.
- Vittet-Philippe, Patrick, "A note for the File, U.S. Policies in Electronic Commerce: A Comparative Analysis of the 'Magaziner Paper,' 3 July 1997, as cited in Elliot Maxwell (1998) *The Emerging Internet* (Washington, DC: The Aspen Institute, Institute for Information Studies.)
- Vogel, David (1978) 'Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives' *British Journal of Political Science*: 45-78.
- Wolf, Klaus Dieter (2001) 'Private Actors and the Legitimacy of Governance Beyond the State,' Paper presented at the Workshop 'Governance and Democratic Legitimacy', ECPR Joint Sessions of Workshops, Grenoble, Switzerland, 6-11 April 2001.