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THE ARCHITECTURE OF TRANSNATIONAL PRIVATE  
REGULATION

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## **Abstract**

Conflicting interests among private actors constitute an important factor to explain why and how transnational private regulation has grown and the proliferation of standards and standard setting organizations that has followed. This essay provides a map of transnational regulatory space suggesting that the different levels are related to various governance responses to conflicts within the private sphere and between private and public actors. Three levels of the global regulatory space are considered: (1) the single global regulatory body, where interests are integrated into one organization, (2) the regime, in which multiple organizations operate, regulating within the same policy field, (3) multiple regimes often associated with different, often conflicting, policies that interplay cooperatively or competitively. In the last instance the conflict of interests translates into a conflict of norms. Unlike in the traditional multilevel governance literature, where 'levels' are primarily defined on the basis of a territorial metric, here the notion of regulatory space is functional and independent from the administrative boundaries of nation states. For the three levels, the choice of the key governance features are driven by the different forms of the relationship between regulators, regulatees and beneficiaries and how their conflicting interests are balanced at the organizational and/or regime level. Depending on how the interests of regulatees and beneficiaries are combined, different governance options will emerge: creating single or multiple regulators, defining the architecture of the whole regime, in particular the alternative between monopoly and plurality of private regulators, or creating independent regimes, each one representing the interests of a constituency with potentially policies' interdependencies. The selection of the legal instruments, in particular the choice between contract and organization to coordinate conflicting interests is correlated to the level: organization law is more important in the first level while contract law becomes increasingly important moving up to the regime or inter-regime level. Two forms of governance are distinguished: micro-governance, operating primarily through organizations where judicial intervention by domestic courts is very limited; macro-governance, using transactional rather than organizational tools, deploying coordination mechanisms between organizations or regimes representing different interests (trade and environment, e-commerce and data protection, labour and consumer). In the latter case the role of domestic Courts increases to regulate conflicts and allocate ex post the regulatory space.

The paper concludes arguing that the future of TPR and its effectiveness will depend on the choice among these different levels which will be partly driven by endogenous factors, and partly by exogenous legal and non legal factors, among which competition law is likely to play an important role.

## **Keywords**

Private regulation, governance, contract, transnational private regimes, conflicts of norms.





## Introduction\*

For many, 'private regulation' remains an oxymoron. In conventional analysis where markets and states are juxtaposed, regulation sits in the domain of the latter, and it is almost by definition public. The private sphere has often been associated with de-regulation, operating in markets, regulated primarily by competition law. This view is flawed and reflects a balance between markets and states, i.e. private and public, which does not hold anymore, if it ever even existed. The regulatory space has dramatically changed, both at the domestic and international level, with transfers from public to private and from national to transnational. These shifts have occurred with different degrees depending on the field<sup>1</sup>. In certain areas, the 'privatization' of regulation has coincided with a much higher concentration of regulatory power in the hands of private actors; in other areas a powerful, competitive process among private regulators has developed with the proliferation of private standards and their fragmentation. Within this framework private meta-regulators have emerged in order to provide common, primarily procedural, rules to foster mutual recognition of private standards or legal integration by way of harmonization.

The financial crisis of 2007/8 has redefined the balance between public and private, eroding but certainly not eliminating the role of private regulation<sup>2</sup>. The flow of regulatory power moves from private to public and from public to private according to sectors unlike at the domestic level where more uniform trends across fields can be detected.

Transnational regulation is characterized by the growing number of regimes, each one focusing either on a single policy or on a set of integrated policies. In the field of public international law, this proliferation has caused normative fragmentation and triggered different types of solutions depending on the regulatory instrument and its legal status<sup>3</sup>. The use of soft law has grown triggering the use of different techniques of coordination between hard and soft law instruments. In the private field, the growth is more recent but it is generating strong competition and fragmentation rather than harmonization, at least in certain fields like food safety, environmental protection and corporate social responsibility (CSR). Proliferation increases uncertainty without necessarily fostering regulatory innovation. Institutional responses have been called for in order to govern the process of multiplication. The focus, in relation to the private sphere, is on a particular dimension of normative

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\* This essay has been written in the framework of the SSPA (Scuola Superiore della Pubblica Amministrazione) project on "Governance by contract in transnational regulation". Footnotes are very limited and refer primarily to primary sources. It is part of a broader project which investigates the impact of transnational private regulation on the regulatory state. It was presented at the Florence conference on Transnational business regulation (May 2011) and at the LSA annual meeting in San Francisco (June 2011). Thanks to Stepan Wood, Jonathan Zeitlin and other participants to both workshops for useful critical comments. I am also grateful to David Levi-Faur, Dennis Patterson, Tony Prosser and Colin Scott for comments on previous drafts. Thanks finally to Federica Casarosa and Rebecca Schmidt for useful research and editorial assistance. The usual disclaimer applies. Responsibility is mine.

<sup>1</sup> JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); Colin Scott, *Analysis of Regulatory Space: Fragmented Resources and Institutional Design*, Public Law, Summer, 2001, at 283-305; JACINT JORDANA, J. & DAVID LEVI-FAUR, *THE POLITICS OF REGULATION* (2004); JOHN BRAITHWAITE, *REGULATORY CAPITALISM* (2008); Kenneth W. Abbott & Duncan Snidal, *THE GOVERNANCE TRIANGLE, REGULATORY STANDARDS INSTITUTIONS AND THE SHADOW OF THE STATE*, in *THE POLITICS OF GLOBAL REGULATION*, 44 (Walter Mattli & Ngaire Woods, eds., 2009); Julia Black, *Legitimacy and the Competition for Regulatory Share*, LSE W.P. 2009/14, [www.lse.ac.uk](http://www.lse.ac.uk); Tim Buthe, *Private Regulation in the Global Economy a (P)review*, 12:3 *BUS. & POL.* (2010).

<sup>2</sup> A good illustration of the rebalancing between public and private is the changing but still rather relevant role of ISDA in the regulation of CDS and over the counter transactions. The regulatory responses were first given by International Swaps and Derivatives Association, *MASTER AGREEMENT* (2008, 2009) and then by the Financial stability Board, *COMPENDIUM OF STANDARDS* (2010), and by domestic legislation in the US and Europe. Similar patterns in relation to Credit Rating Agencies.

<sup>3</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, 58th Session, U.N. Doc. A/CN.4/L.682 (April 13, 2006) (*finalized by Martti Koskenniemi*).

fragmentation: governance responses to conflicts within organizations, between organizations within a regime, and among regimes.

TPR differs from traditional private rule making, particularly *lex mercatoria*, because of (1) its stronger regulatory emphasis, (2) the identity of participants in the regulatory process - particularly the role of NGOs - and (3) the effects on third parties<sup>4</sup>.

In TPRs, the regulator is a private entity which may or may not coincide with regulated entities. A radical change is represented by the increasing number of private regulatory regimes where there is no coincidence between regulator and regulatees as it was generally the case in conventional self-regulation. The regulatory process is in place to protect various interests, concerning regulated entities, and third parties (beneficiaries). The beneficiaries are those who are likely to benefit from compliance by the regulated entities, and likely to be harmed by infringements of the private regulatory regimes<sup>5</sup>. Thus, a private regulator can set rules affecting regulated entities for the benefit of third parties, (e.g. NGOs, consumers or other enterprises, e.g. competitors). It can also monitor, directly or indirectly, compliance and enforce violations to ensure that interests are adequately protected.

The private regulatory sphere is not homogeneous. It consists of a wide variety of private actors, representing numerous (often conflicting) interests<sup>6</sup>. Industries and NGOs often develop competitive regulatory regimes which, sometimes, subsequently merge into a multi-stakeholder organization, such as in the Forest Stewardship Council (FSC). Empirical evidence shows that there is a general trend towards the creation of multi-stakeholder organizations and regimes<sup>7</sup>. This trend varies depending on the maturity of the regime showing an evolutionary pattern: younger legal regimes are generally more fragmented, older tend to consolidate and at times merge.

Private actors are often occupying different positions in the global regulatory space. NGOs are both promoting their own regulatory regimes, especially in certification, and participating in multi-stakeholder regimes with firms and/or independent experts in standard setting. Even within the same group or constituency, conflicting interests emerge. In the business domain, often the interests of multinational corporations (MNC) conflict with small and medium enterprises (SMEs) in relation to the distribution of regulatory costs and the benefits from compliance with CSR, environmental or safety regulation. In the domain of NGOs, consumer interests may conflict with labour, which at the same time may conflict with environmental protection interests. Examples range from conflicts between fundamental rights and consumer protection, environmental and consumer protection, and labour and consumer. Stricter process standards increasing environmental protection may translate into stricter product standards raising the costs of final products passed on consumers. The distributional effects of different regulatory regimes may thus translate into conflicts.

TPR includes forms of (1) voluntary, (2) promoted and (3) mandatory regulation. In the first case, membership of the organization or agreement is voluntary; in the second scenario, access to the regime is linked with tax or other types of benefits for the regulatees, sometimes partly transferred to the beneficiaries; in the third instance, the regulated entity may be bound to comply with private regulation, even against their will, by legislation or administrative regulation. The focus here is on private voluntary regimes, but the approach can be expanded to the other forms of private regulation.

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<sup>4</sup> David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261-282 (2008); F. Cafaggi, *New Foundations of Transnational Private Regulation*, EUI/RSCAS W.P. (2010).

<sup>5</sup> Beneficiaries often take the form of NGOs but may also be competitors or firms along the supply chain. Fabrizio Cafaggi, *Rethinking Self-Regulation in European Private Law*, in REFRAMING SELF-REGULATION IN EUROPEAN PRIVATE LAW, 3 (Fabrizio Cafaggi ed., 2006).

<sup>6</sup> BRAITHWAITE & DRAHOS, *supra* note 1; Vogel, *supra* note 4; MARK A. POLLACK & GREGORY C. SHAFFER, *WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS* (2009); David Levi-Faur, *Regulation and Regulatory Governance* (unpublished paper, 2009); Abbott & Snidal, *supra* note 1; Jonathan Zeitlin, *Pragmatic Transnationalism: Governance Across Borders in the Global Economy, Presidential Address*, 9 SOCIO-ECONOMIC REV. 187-206 (2010), Buthe, *supra* note 1; Cafaggi, *supra* note 4.

<sup>7</sup> Abbott & Snidal, *supra* note 1, at 53 ff.

The voluntary nature of TPR has important governance implications that partly explain the differences with global public regulation. Private standards are voluntary, but, once adopted, their compliance is legally binding and legal and non legal sanctions are imposed on those who breach the rules. Since membership is voluntary, incentives to become a member are of great importance.

Differences emerge between public and private organizations and regimes in addressing conflicts. The design and criteria to draw legal boundaries of the different spheres affect policies' interdependences. The toolbox to correlate interdependences and regimes' independence are different in the public and private spheres.

In the public landscape, international organizations (IO) are created as autonomous and independent bodies, which often try to govern themselves as 'independent legal orders'. However, they do not act in a normative vacuum, but inside a legal framework defined by *jus cogens*, customary international law and the general principles of international law. Their addressees used to be States, increasingly including non members as well as members. In their standard setting activities progressively I.O. have addressed directly private actors, primarily enterprises, instead of member States. Examples of codes of conduct or best recommended practices addressed to multinational corporations have been enacted by OECD, ILO, FAO, WHO, to name a few.

In the private domain, private regimes can have contractual or organizational forms or be the result of a combination of the two<sup>8</sup>. Regulatory contracts arise when firms agree on rules concerning their conducts and commit to comply with reciprocal undertakings. Contractual models can take the form of bilateral connected contracts, as it is the case of regulation along supply chain where clauses concerning safety, environmental sustainability, or compliance with ISO standards are homogeneously reproduced. Alternatively they can take the form of multiparty contracts, for example network contracts. This is often the case in financial markets where master agreement (for example ISDA) or rulebooks (Euro payment system SEPA) are deployed.

Organizational forms deploy generally associational (FSC, ISO, MSC) or foundational models (GRI, IASB). Sometimes the for-profit model is also deployed when the regulatory activity generates profits for the regulators.

Often the two instruments are combined and organizational models, including associations or foundations composed of multiple stakeholders, use master agreements or codes of conduct to regulate the activities of the members and their relationships with third parties.

Private actors regulate markets and social conduct both at the domestic and international level, addressing also market and governmental failures which take specific features at the transnational level. If considered in isolation from the public spheres they constitute private orderings based on freedom of contract and freedom of association. Private autonomy defines the boundaries of action and effects. They operate as independent private orderings but, unlike the international organizations, without a common transnational frame of private rules. National private law systems fill in any gaps that are left by transnational private regulation but do not provide a common core of rules valid across boundaries. Current research is trying to identify these common principles by engaging in comparative analysis of private regimes<sup>9</sup>.

In this essay, I analyze the governance designs in TPR through the lenses of the regulatory relationship between regulators, regulatees and beneficiaries to show that the regulatory space reflects the different modes of addressing conflicts among these categories<sup>10</sup>.

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<sup>8</sup> *Id.* and Cafaggi, *supra* note 4.

<sup>9</sup> See the HUIL project on transnational private regulation at [www.privateregulation.eu](http://www.privateregulation.eu).

<sup>10</sup> Cafaggi, *supra* note 4.

Three levels of the global regulatory space are considered: (1) the single regulatory body, (2) the regime, in which multiple organizations operate regulating within the same policy field, (3) multiple regimes associated with different, often conflicting, policies interplay cooperatively or competitively. Unlike in the traditional multilevel governance literature, where 'levels' are defined on the basis of a territorial metric, here the notion of regulatory space is functional and independent from the administrative boundaries of nation states. For the three levels, the choice of the key governance features are driven by the different forms of the relationship between regulatees and beneficiaries and how their conflicting interests are balanced at the organizational and/or regime level. Depending on how the interests of regulatees and beneficiaries are combined, different governance options will emerge: creating single or multiple regulators, defining the architecture of the whole regime, in particular the alternative between monopoly and plurality of private regulators, and the selection of the legal instrument between contract and organization to coordinate conflicting constituencies.

Two forms of governance are distinguished: micro-governance, operating through organizations; and macro-governance, using transactional rather than organizational tools, deploying coordination mechanisms between organizations or regimes.

### **The Regulatory Relationship in TPR**

Unlike conventional forms of self-regulation, primarily promoted and governed by industry, where there is a formal coincidence between regulators and the regulated, TPR concerns regulatory relationships among regulators, regulated entities, beneficiaries and also third parties which can be negatively affected by private regulation<sup>11</sup>. Regulatory beneficiaries are those whose interests are legally or socially protected, i.e. those whose welfare will be enhanced by the implementation of private regulation or conversely harmed by the violation of private regulation. The concept of regulatory relationship, including both regulated entities and beneficiaries, broadens the reach of regulatory responsiveness. The inclusion of beneficiaries in the regulatory space changes the relationship between legitimacy and effectiveness of the regulatory process since it forces to consider the effects produced by compliance or infringements of private rules on third parties who are not members of the regulatory body.

One can further distinguish between intentional and incidental beneficiaries. The former are those who are expressly targeted by the regulatory regime, while the latter are those who may incidentally be benefited by compliance with the rules or harmed by their violations. In financial market transnational private regulation, investors and depositors can be considered intentional beneficiaries, taxpayers may be incidental beneficiaries or, as was the case in the financial crisis, those negatively affected by the drawbacks of the previous regulatory regimes. As the regulatory responses show, often there have been regulatory and distributional conflicts among these categories both within the public and the private domain. Similar conflicts arise in the context of agriculture between environmental protection and food policies with food producers being forced to endorse sustainable environmental standards. A third example is the conflict between e-commerce and data protection where e-trade-restrictive provisions may be enacted to ensure that personal data circulate only upon consent of the interested parties.

The protection of the beneficiaries can occur (1) within one organization, (2) within a single regime by creating alternative regulatory bodies, proposing competing or complementary rules, or (3) by generating a new regulatory regime altogether. The choices are often driven by strategic considerations of the different players and their bargaining power. In some circumstances new regimes have been promoted by NGOs, in other circumstances by firms who could benefit from stricter environmental standards, as in the case of green economy. Often these different levels are connected. One NGO representing environmental or consumer interests may try to gain a voice in a standard-

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<sup>11</sup>

*Id.*, *New Foundations of Transnational Private Regulation*, 38 J.L. & Soc'y 20 ff. (2011).

setting organization characterized by a dominance of firms; but at the same time, or later, once sufficient reputation has been created, it can generate a new regulatory body or even contribute to the creation of a new regulatory regime by imposing stricter standards in order to compete with the firm-led regulatory regime.

Self-regulation has been often accused of protecting only regulatees' interests. In TPR, this is not necessarily the case. The role of the beneficiaries is relevant to ensure legitimacy of the regulatory process and private regulators have increasingly conferred procedural rights to non members. Given the voluntary nature of TPR, the regulatees will subscribe to a specific regulatory regime, only if the beneficiaries recognize and appreciate that regime. In the case of consumers, this recognition will influence transactional choices, i.e. the selection of the enterprises from which products or services are bought. Certification is perhaps the best illustration of the beneficiaries' strategic role (consumers) in defining the incentives for the creation of a private regime, often overlooked in regulatory discourse describing the transnational regulatory space.

In this context, the reach of responsibility is extremely important for the definition of the identity of the beneficiaries. Responsibility regimes, including legal liability, define the effects of a regulatory regime regardless of whether the beneficiaries are 'formal' members of the regulatory body. Civil liability before domestic courts represents an additional tool to empower beneficiaries. For example, according to the UN Global Compact in the field of CSR, the definition of spheres of influences designs the boundaries of responsibility, thereby identifying the final beneficiaries of the regime<sup>12</sup>.

The relationship between regulators, regulatees and beneficiaries contributes to defining the organizational boundaries and how conflicts are addressed within and between organizations. For this reason it should be at the strategic juncture of the governance debate in transnational regulation. Governance responses may affect the boundaries of the organization, in addition to the separation of functions within the organization and reallocate the power among the different actors within the regulatory relationship.

### **Micro- and Macro-Governance**

The toolbox of private regulatory law is remarkably different from that of public international law<sup>13</sup>. General rules are still lacking and transnational private regulators do not act on the basis of common core principles. Contractual and organizational instruments regulate private organizations primarily by reference to domestic models of private law, subject to various processes of hybridization with public law. Contractual instruments, ranging from framework and master agreements to codes of conduct and guidelines, are used not only to set standards but also to define compliance targets and monitor their achievement<sup>14</sup>. The widespread use of bargaining, sometimes translating into formal contracting (settlements), also characterizes enforcement, where remedies are often negotiated between regulators and regulatees and, seldom, even with beneficiaries. This essay follows the organizational approach, distinguishing between intra- and inter-organizational levels, and applies it to the governance of TPRs. Two mechanisms are deployed to govern TPR depending on the structure of the regulatory relationship and the level of the regulatory space: micro-governance, focusing mainly on

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<sup>12</sup> Human Rights Council, *Clarifying the Concepts of "Spheres of Influence" and "Complicity"*, U.N. Doc. A/HRC/8/16 (May 15, 2008) (prepared by John Ruggie); Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (21 Mar., 2011) (prepared by John Ruggie) [hereinafter, Human Rights Council, *Guiding Principles*]; Stepan Wood, *Four Varieties of Social Responsibility: Making Sense of the 'Sphere of Influence' and 'Leverage' Debate Via the Case of ISO 26000*, OSGOODE CLPE RESEARCH PAPER NO. 14/2011.

<sup>13</sup> The public/private distinction concerning regulation presents different features at the transnational level from the domestic landscape. The distinction between public international law and transnational private instruments concerns both instruments and the effects of regulatory regimes.

<sup>14</sup> See for example in the field of advertising EASA Best Practice Recommendations. In the field of CSR, international framework agreements often define objectives and targets to be met by multinational corporations.

**organizational devices**, and (2) macro-governance deploying primarily **transactional mechanisms** including both ex ante contractual and ex post judicial intervention.

**Micro-governance** concerns single organizations and responds to conflicts among constituencies related to the same organization, even outside its formal legal boundary: a classic illustration is the conflict between industry and NGOs representing human rights, consumers or environmental concerns, when NGOs are not ‘members’ of the regulatory body, but their interests are affected by the regulatory activity. They influence organizational governance primarily by scrutinizing the regulatory output (codes of conduct, master agreements, international framework agreements etc) and underline their (negative) effects on third parties via consultation or litigation. The increasing role of consumer and environmental organizations has affected fields traditionally characterized by self-regulation where regulators and regulatees coincided and private regulation consisted in a club good.

In the sector of advertising, for example, consumer organizations have used the private dispute resolution systems set up by national SROs to bring claims against misleading advertising but also to address violations of fundamental rights. The growing importance of consumer claims has changed the scope and goals of advertising private regulation moving from unfair competition to consumer and fundamental rights protection. As a result more recently some of the SROs have included consumer organizations in their governance structure and in the composition of the enforcement body<sup>15</sup>. Often these efforts are ‘indirectly supported’ by public institutions at national and transnational level by conferring regulatory legitimacy in exchange of wider participation. In other words they are aimed at rebalancing input and output legitimacy of private regulation.

**Macro-governance** concerns conflicts among different transnational regimes: private, public or hybrids. Conflicts arise both within and among regimes and in absence of a clear hierarchy of legal sources need governance responses. Conflicts within single regimes are illustrated by the area of food safety where competing standards have arisen both at regional and global level<sup>16</sup>. Similarly competition has arisen in the field of forestry where the creation of Forest Stewardship Council (FSC, an NGO-led organization which has become multi-stakeholder), has been followed by that of Sustainable forestry initiative (SFI) an industry-led private organization. In this case, the regulatory relationship between regulatees and beneficiaries does not operate within a single organization but among organizations. On the one hand (groups of) regulatees create their own organizations and design a regime. On the other hand the beneficiaries (consumer or environmental organizations) respond by creating new regulatory bodies, often competing with those of the regulatees (i.e. industry-based). But as we shall see competition can even arise within industry or NGOs.

Regimes are generally focused on a single policy (trade, environment, consumer safety etc.) and when policy goals diverge they conflict. They are legally independent, aiming at constituting separate ‘legal orders’, but functionally interdependent. Coordination and conflict resolution is thence needed to govern their interdependence<sup>17</sup>. If coordination is lacking, there is some evidence of a serious risk that each regime will try externalizing costs onto others, thereby producing inefficiencies, under or

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<sup>15</sup> See for example the reform of ARPP in France in 2008. On these developments see Paul Verbruggen, Report on Advertising, HIIL Project (on file with the author).

<sup>16</sup> Joint FAO/WHO Standards Programme, Codex Alimentarius Commission, *Consideration of the Impact of Private Standards*, CX/CAC/10/33/13 (July 5-9, 2010); Sally Washington & Lahsan Ababouch, *Private Standards and Certification in Fisheries and Aquaculture Current Practice and Emerging Issues*, FAO FISHERIES AND AQUACULTURE TECHNICAL PAPER NO. 553 (2011); FAO/WHO Food Standards Programme, Codex Alimentarius Commission, *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*, ALINORM 09/32/9D-Part II (May 2009) (prepared by Spencer Henson & John Humphrey); OECD, Working Party on Agricultural Policies and Markets, *Final Report on Private Standards and the Shaping of the Agro-Food System*, AGR/CA/APM(2006)9/FINAL (July 31, 2006) (prepared by Linda Fulponi with assistance of Adeline Battisti-Borot).

<sup>17</sup> In this context, conflict resolution is a much broader concept than dispute settlements. The focus is on the former. For a more specific analysis of dispute settlements and enforcement in TPR, see FABRIZIO CAFAGGI (ed.) *THE ENFORCEMENT OF TRANSNATIONAL PRIVATE REGULATION* (Edward Elgar, forthcoming 2011).

overproduction of standards and undesirable distributional effects. Macro-governance responses should address these dimensions.

### **Micro-Governance**

Micro-governance depends (1) on power allocation between the regulatees, among them and the beneficiaries, and (2) on interest alignment and/or conflicts of interest. Governance responses may include contracts and/or organizations. Often they operate jointly. Contracts are primarily used to setting standards; organizations are deployed to monitor compliance and to enforce rules. The use of contracts as regulatory devices to set standards is coherent with a rich menu of regulatory strategies, as it may be compatible with different degrees of hierarchy between regulators and regulatees: standard contracts can be used in command and control private regulation, while relational contracts are more frequent in responsive regulation and spot contracts in market based regulation<sup>18</sup>. In addition, organizational tools, associated with the adopted legal form, can be used to ensure that members (regulatees) comply with the rules to which they have subscribed. For example, there are the sanctions concerning membership such as licensing the activity (related to entry to the regulatory regime), warning, suspension, and expulsion of the non-compliant regulatees (related to exit from the regulatory regime) which complement contractual sanctions in case of breach<sup>19</sup>.

### ***Conflicts and Micro-Governance***

TPR is based on private law models, primarily organizations and contracts and the different regulatory regimes choose a combination of the two depending primarily on how the private sphere in the specific sector is composed. In fact the private sphere within TPR is quite diverse and presents various features. Private actors include MNCs, industry and trade associations, NGOs, law firms, expert groups and different types of epistemic communities<sup>20</sup>. Often their preferences and incentives amongst regulatory outputs vary and can conflict. Variations may depend on the market structure within which they operate and on the level of trade integration of the regulated firms but also on strategic considerations to enhance their bargaining power. When, for example, markets are highly concentrated the incentives of incumbent market players are generally aligned and conflicts might arise with trade associations or NGOs. For instance often global enterprises call for uniform regimes, while national trade associations privilege local regulation in order to preserve the strength of national champions and their own local regulatory power. When market concentration is lower, conflicts occur among regulated entities, which often make alliances with beneficiaries (NGOs) against other regulated entities. A typical illustration is the conflict between MNC and SMEs as to the goals and costs of private regulation and who should bear the latter along the supply chain. In trade and food safety, NGOs and SMEs are frequently allied 'against' MNCs to increase the fairness of trade and to redistribute costs of private regimes<sup>21</sup>.

The regulatory relationship allows us also to describe the different interests of private parties and how the governance of private organizations changes when (1) regulators and the regulated coincide, or (2) when regulators and beneficiaries coincide, while regulators and the regulated differ.

The first three models set out below represent different architectures depending upon how interests among the regulated and between the regulated and beneficiaries are aligned. The fourth model, conventionally justified on the basis of expertise, is used when delegation by private regulators to technical bodies provides a more effective solution for solving conflicts among stakeholders.

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<sup>18</sup> See on the relationship between regulatory strategies and contractual forms F. Cafaggi, *Transnational Governance by Contract. Private Regulation and Contractual Networks in Food Safety*, available on SSRN.

<sup>19</sup> *Id.*

<sup>20</sup> Vogel, *supra* note 4; Levi-Faur, *supra* note 5; Abbot & Snidal, *supra* note 1; Buthe, *supra* note 1.

<sup>21</sup> See Gary Gereffi, John Humphrey & Timothy Sturgeon, *The Governance of Global Value Chains*, 12 REV. INT'L POL. ECON. 78 (2005).

- (1) In a first model, the interests of the regulator and those of the regulated are aligned, while the beneficiaries are kept out of the legal boundaries of the organization. Conflicts concern primarily the relationship between regulatees and beneficiaries. The beneficiaries are not members of the regulatory body. They might not have any legal protection or hold a limited set of rights. For example they might be given procedural rights to participate or to access review, either internal or judicial<sup>22</sup>. This is still the model for the International Chamber of Commerce (ICC) one of the eldest contemporary global standard setter. This was also the case in many corporate social responsibility (CSR) instruments where firms or industries drafted codes of conduct in the interests of various, often conflicting stakeholders without their direct involvement<sup>23</sup>. Many of the CSR regimes have now shifted into a multi-stakeholder model. The governance design needs to accommodate accountability requirements to beneficiaries external to the organization but affected by the regulation. Procedural accountability contributes to acquire information about adverse impact of private regulation and to address potential conflicts.
- (2) In a second model, beneficiaries become the regulators: the regulator is a single NGO or a coalition of NGOs, while the regulated are the firms. Here conflicts arise between the regulator and the regulatees since typically their interests are not aligned. This model is often adopted in the area of certification, where the regulator-NGO accredits bodies that certify the conformity of products and/or services with the rules enacted by the regulator.

Unlike the previous model, in this case the relationship between regulators and regulatees is contractual rather than organizational.

Where do beneficiaries acquire authority over regulatees? Firms voluntarily subscribe to these regimes on the basis of market and social pressures and commit to the rules via contract rather than membership. Their interests are aligned through market accountability mechanisms. The beneficiaries may coincide with constituencies represented by the NGOs in the governing board of the regulator or may reflect a broader range of interests than those represented in the governing body. In the latter case there might be some misalignment between the interests of the regulator and the full group of beneficiaries.

Case (1) resembles traditional self-regulation, although the active role of beneficiaries in the process constitutes a significant departure from it. Case (2) refers to an NGO-driven private regulator defining and monitoring the compliance with rules by regulated firms, as in many certification regimes<sup>24</sup>. This is probably the most original form of private regulation compared to traditional self-regulation.

- (3) In a third model, regulatees and beneficiaries merge into a single multi-stakeholder regulator. In order to solve conflicts of interests between regulatees and beneficiaries more inclusive regulatory bodies have been generated. They can take either the form of a multi-stakeholder organization or that of a multiparty agreement. A wide variety of regimes combines the two features, adopting a multi-stakeholder model where members of the regulatory body are both representatives of the regulated, the beneficiaries and of other constituencies affected by the regulatory process.

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<sup>22</sup> Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law*, 68 L. & CONTEMP. PROBS. 63 – 108 (2005); *Id. Instrument Choice*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 147 (Daniel Bodansky, et al, eds., 2007).

<sup>23</sup> See Human Rights Council, *Guiding Principles*, *supra* note 12.

<sup>24</sup> It should be clarified that there are also certification regimes which are business driven when professional bodies certify compliance with private or even public rules. This is the case of credit rating agencies, accounting and professional services.



Merger is not the end of the conflict but it may contribute to its solution. It should be clarified that the origins of the multi-stakeholder model are manifold. In fact the presence of multiple stakeholders can be determined by many concurring factors: the incentives to reduce conflicts and increase cooperation, the necessity to increase legitimacy by representing different interests, and the combination of different cognitive abilities and expertise<sup>25</sup>.

The role of governance in this third model is very delicate since the ways in which the interests of the regulated and the beneficiaries will be balanced depend on formal and informal rules concerning both the organizations and the activity. This is always the case but in the multi-stakeholder model the role of informal rules tend to increase. The inclusion of multiple stakeholders in the governing body reduces conflicts and induces cooperation, albeit increasing transaction costs.

Unlike the case of macro-governance, judicial interventions are rare in micro-governance whereas conflicts are solved by reference to internal dispute resolution mechanisms. Thus, in order to address uncertainty, governance rules concerning the activity rather than the organization might be necessary. Multi-stakeholder organizations transfer the burden of tackling uncertainty onto the procedural side of decision-making. The Forest Stewardship Council (FSC) constitutes a good example. They govern the certification process on the basis of 10 principles but delegate the ‘important’ conflict resolution to accredited bodies which have to certify on the basis of those principles and additional rules. Another example in the financial market is represented by the International Swaps and Derivatives Association (ISDA), where a variety of interest groups is represented with a leading role of financial institutions and law firms.

- (4) An additional, fourth model of transnational private regulators is that led by experts. References are generally made to those organizations producing technical standards: the most common example is that of the International Standard Organization (ISO). Delegation of rule –making to experts may constitute an attempt to neutralize behind science and expertise the conflicts. Expert models however are not insulated from the regulatory relationship. Attempts to involve stakeholders into the standard setting process have been increasingly yet not entirely successful. On the one hand, ISO has progressively incorporated social and environmental concerns in its technical standardization process; on the other hand, it has moved from product to process standards and increasingly into the field of corporate management including CSR, for instance in the case of ISO 26000. This process has been clearly influenced by the increasing role of beneficiaries in the process of technical standardization which used to be (to some extent still is!) primarily driven by the interests of regulatees.

**Comparative Table of Regulatory Models**

	<i>Model 1</i>	<i>Model 2</i>	<i>Model 3</i>	<i>Model 4</i>
<b>Regulator</b>	Single firm or trade association(s)	NGOs	Multi-stakeholder (including firms, NGOs and expert representatives)	Expert body
<b>Regulatees</b>	firms	firms	firms	firms
<b>Beneficiaries</b>	NGOs	NGOs	NGOs	NGOs

In order to simplify the illustration of conflicts and how they are governed, regulatees and beneficiaries have been held constant, while regulators have changed. Clearly in the real world each organization has different classes of regulatees and beneficiaries whose interests may be conflicting, giving rise to more complex models where conflicts within categories add to conflicts between them.

<sup>25</sup>

Abbott & Snidal, *supra* note 1.

The aim of the table is to show how the identity of private regulators changes and which consequences might have over the nature of conflicting interests with the two main categories of regulatees and beneficiaries.

The four models show the necessity to correlate the nature of the conflicting interests with the governance solution. Different conflicts give rise to different models. The governance model depends on the structure of the regulatory relationship between regulators, regulatees and beneficiaries. Clearly the organizational dimension, in particular how the boundaries of the organizations are designed, how membership is defined, which private rights are given to non-members, are all relevant issues. However, the reach of the effects of the regulation and its scope determine the characteristics of the conflict and the character of the governance model.

### **Macro-Governance**

In the macro-governance framework interests are represented by conflicting organizations thereby moving from intra to inter-organizational conflicts. While consumer protection in micro-governance is ensured by litigation in the first model or by participating into a multi-stakeholder organization in the third model, here consumers define their own transnational rules and try to 'induce' firms to comply with them. For example NGOs, instead of seeking representation in business-driven regulatory bodies create their own organizations that, primarily via certification, affect firms' conduct and choices. Often, in response, new business organizations are created to counteract NGO-led organizations and operate in the area of certification. Forestry and fair trade are good illustrations of this pattern.

In macro-governance the relationships between regulatees and beneficiaries but also among various regulatees move from the intra- to inter-organizational dimension. This occurs both at the level of (1) a single regime, where multiple organizations coexist, and (2) that of multiple regimes where different policy goals, promoted by each regime, correspond to a category of regulatees or beneficiaries.

The focus is on two different yet related issues of transnational governance:

- 1) Coordination and competition among private regulators within the same regime: when two or more organizations regulate the behaviour of the same potential pool of regulatees in relation to the same field (CSR, environment, finance, banking, internet, e-commerce);
- 2) Coordination and competition among different regimes including both private and public ones (trade and environment, environment and consumer, consumer and employment e-commerce and data protection, etc.).

### ***Single regimes***

A regime is a regulatory space defined by a policy field and populated by one or multiple regulators<sup>26</sup>. Its boundaries are functionally determined in relation to the policy field and its goals: for example, in an advertising regime the goals are to promote fair and responsible commercial practices to inform consumers. The governance dimension here concerns the relationship among regulators representing different components of the regulatory chain within a single regime, unlike micro-governance where the focus is on the single components of the regulatory relationship. The regulatory chain within a regime is composed by the set of organizations concurring to the definition of rules and more broadly to the regulatory process. Multiple organizations characterize for example the payment system: there is

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The views on what a regime is are numerous and vary across social sciences. References are too voluminous to be summarized here.

a global organization, International payment Framework (IPF); secondly a European organization which is heavily involved in consolidating the Euro payment system SEPA called European Payment Council (EPC) and thirdly national organizations, primarily banking associations, in charge of implementation of standards set by the two supranational organizations. The focus of the regulation is the relationship between banks to ensure interoperability and as a result, the relationship between banks and customers. Often the conflicts emerge in the vertical space between national banking associations and the European or global level, where the big banking conglomerates operate. Conflicting views are related to when and how an integrated payment system should be in place, which category should pay the costs of integration and how the benefits should be allocated<sup>27</sup>. Thence regulatory conflicts concern both the different components of the banking systems, the customers, both firms and consumers, which can be considered regulatees and beneficiaries in the payment system.

More complex patterns of conflicts within regimes exist in the field of food safety where regional retailers' organizations have competed over standard setting. They include retailers based associations BRC (a British-Dutch), IFS (a Franco-German) QFS (an Australian and North American) but also pan-European, later become global, organizations like Global-gap, (former Euro-gap), and Global food safety initiative (GFSI)<sup>28</sup>. Here the conflicts concern retailers, the relationship between retailers and suppliers and that between the participants to the supply chain and the final consumers of foodstuff.

Within regimes the amount of standards may vary depending on the number of standard setters which depends on the power balance among different constituencies. Increasingly after a period of strong and sometimes disruptive competition, we observe the efforts of cooperation among private regulators both in relation to standard setting and monitoring. Regulatory contracts are increasingly adopted between private and public regulators in the area of rule making, monitoring and compliance. These occur between private and public actors, for example between IO and private organizations, or between single states and MNC. Regulatory contracts and MoU can also focus on monitoring compliance, such as those signed by certifiers in accounting, forestry, food safety<sup>29</sup>.

When regimes are composed by many organizations that can cooperate and/or compete, they pose governance questions different from those featuring a leading uncontested institution or an oligopolistic regime. In the monopolist model accountability is primarily ensured through voice and loyalty; in the pluralist model, where exit is available at relatively low costs, competition and market accountability play a more significant role<sup>30</sup>. Often in the latter case different regulators emerge and conflicts of interest move from the organizational to the regime levels. Thence conflicts among regulatees or between them and beneficiaries do not take place within the organization but among organizations.

Public entities both at the global and regional level do have leverage on how conflicts are governed in private regulation even if they do not directly participate into the regime. The governance of the regime is formally private but heavily or at least significantly influenced by public institutions. Often public institutions both at international and domestic levels push to include beneficiaries' interests into the standard setting and enforcement activities threatening public legislation as an alternative to

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<sup>27</sup> See the European Payment Council's (EPC) response to the Proposal for a Regulation of the European Parliament and of the Council Establishing Technical Requirements for Credit Transfers and Direct Debits in Euros and Amending Regulation (EC) No 924/2009 (December 16, 2010), [http://www.europeanpaymentscouncil.eu/news\\_detail.cfm?news\\_id=171](http://www.europeanpaymentscouncil.eu/news_detail.cfm?news_id=171).

<sup>28</sup> See FAO/WHO *Consideration of the Impact of Private Standards*, CX/CAC 10/33/13 (5-9 July, 2010).

<sup>29</sup> See for example the MOU between IASCF and the financial authorities, the MOU between FSC and LEI in the field of forestry certification or that between GlobalGAP (Foodplus) and IAP in food quality and safety certification.

<sup>30</sup> On the role of competition for regulatory shares in transnational governance, see Black, *supra* note 1.

private regulation. The threat almost never consists of a new Treaty. Rather it is regional (European for example) legislation with some likelihood of spreading across states' boundaries.

### **Macro-Governance - Multiple Regimes**

The third dimension of governance analysis concerns the relationship among regimes pursuing different, often conflicting, policy objectives.

A single industrial activity like agriculture or manufacture can be affected by many regulatory regimes from human rights to environmental protection, from product safety to biodiversity, from free trade to consumer protection. The same regulatee, a firm, is therefore simultaneously regulated by multiple private regulatory regimes functionally interdependent, representing different beneficiaries' interests. Functional regimes' interdependence is often associated with the production of the same or overlapping global collective goods via multiple rules or to a reaction to the interconnected risks (i.e. product safety and environmental protection) through multiple concurring regimes. Conflicts arise thence not only *within*, but also *among* regimes. Insufficiently protected interests within one regime sometimes contribute to the creation of new regimes as a reaction, as in the case of the fair trade regime as a response to (supposedly unfair) free trade rules.

Sector specificity, embedded in separate and independent regimes, implies that the same norm can be compliant with one system but can constitute a violation of another<sup>31</sup>. For example, a trade rule may be compliant with WTO rules but being in violation of the UN Global Compact, or an ILO Convention or OECD Guidelines on multinational corporations, representing the interests of beneficiaries. An environmental norm may lower emissions but at the same time violate free trade principles. Environmental private regimes may often include trade-restrictive measures where for example import bans are justified on the basis of protection of endangered species<sup>32</sup> or on compliance with the precautionary principle<sup>33</sup>. An e-commerce rule may favour free trade but violate data protection or privacy rights of the traders.

Regulatory activities within one regime can thence affect (undermine) policies pursued by other regimes. The search for autonomy of legal orders should not neglect regimes' interdependences, especially related to the integration of policies and the possibility that conflicting goals will have to be balanced<sup>34</sup>. Interdependences may not only require coordination but also conflict resolution<sup>35</sup>. In the domain of TPR, formal hierarchy does not exist and regimes themselves have to define solutions to potential collisions. Private organizations or contractual networks cannot unilaterally impose obligations on other networks or on private organizations in order to define which rule prevails in case of conflict. *De jure* they can only consent to obligations, limiting their freedom to enhance the

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<sup>31</sup> Francesco Francioni, *Environment, Human Rights and the Limits of Free Trade*, in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 1 -26 (FRANCESCO FRANCONI, ed., 2001); Joost Pauwelyn, *Fragmentation of International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2006), [http://www.mpepil.com/subscriber\\_article?script=yes&id=/epil/entries/law-9780199231690-e1406&recno=1&searchType=Quick&query=Fragmentation](http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1406&recno=1&searchType=Quick&query=Fragmentation).

<sup>32</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, DS58/AB/R (Oct. 12, 1998).

<sup>33</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

<sup>34</sup> Technically the degree of interdependence depends on the scope of jurisdiction when conflicts have to be solved by judicial intervention. If a Court defines the scope broadly it will see the individual regime in relation to other regimes and or international law; if a Court defines it narrowly it will not engage in a systematic interpretation but for reference to general international law.

<sup>35</sup> Sabino Cassese, *IL DIRITTO GLOBALE. GIUSTIZIA E DEMOCRAZIA OLTRE LO STATO* (2009); Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT'L J. CONST. L. 373 (2008); Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415, 442 (2008).

protection of interests pursued through different regimes. Unlike micro-governance, which primarily uses organizational tools, macro-governance solves conflicts predominantly through regulatory contracts among regimes or via judicial intervention. In micro-governance different constituencies co-exist in the same organization, for example an association, and solve their conflicts by deliberating in the general meeting or the board. In macro-governance the legal independence of regimes reflect the autonomy of the different constituencies. They do not belong to the same organization and have to use contracts or functional equivalents to address and settle conflicts. However as repeatedly said legal independence can not neglect policies interdependences and conflicts.

The regulatory relationship is here broken down into different regimes, rather than into organizations, characterized by interdependence. Different classes of regulatees and beneficiaries create their own regimes i.e. human rights, environmental, labour, consumer protection<sup>36</sup>. But these regimes represent the interests of different categories within the same regulatory relationship. As mentioned earlier the same firm is simultaneously subject to multiple often conflicting regulatory regimes. The creation of new regimes and new fields reflects on the one hand the transformation process of the regulatory relationship while, on the other hand, increases normative fragmentation and conflicts. For instance by moving from the position of beneficiaries to that of regulators via creation of new regimes, NGOs try changing the distribution of rule-making power and the structure of the regulatory relationship. The possibility to change the power balance depends on the recognition or the denial of policy interdependency among different regimes. This is what is at stake when regimes' conflicts arise.

The final part of the essay focuses only on two families of regime-coordination mechanisms that use or affect macro governance: ex ante regulatory coordination, and/or ex post judicial coordination. This distinction highlights two important aspects: regulatory coordination and conflicts among regimes may have different features at the time of standard setting, and at the time of their implementation and enforcement. Modes of implementation, often in the remit of different players from those who have designed the regime, may generate or reduce conflicts that were anticipated at the drafting stage. Spelling out the distinction should not lead to believe that there is no link between contractual and judicial governance. On the contrary the development of transnational devices to solve conflicts increases the role of judicial intervention since often regulatory contracts to coordinate different regimes are incomplete and ex post gap filling turns out to be a hard task.

### **Governance and Ex Ante Regulatory Coordination**

Regimes' cooperation is a very broad field whose boundaries are still uncertain<sup>37</sup>. In this essay the focus is on regulatory cooperation as a response to conflicts which can occur when overlapping scope of different regimes exist. Cooperation may be directed at preventing conflicts by partitioning ex ante the regulatory space or by giving Courts the power to define ex post the boundaries among regimes. Incentives to cooperate may emerge for different reasons and conflict resolution is only one of them.

**Transnational regulatory coordination** deploys transactional instruments like regulatory framework contracts, memoranda of understanding, codes of practice, individual clauses or decentralized market based mechanisms to coordinate and/or solve conflicts among regimes representing divergent interests related to the same economic activity. Private regimes face similar problems to those investigated in the public domain, but the differences with public international law are remarkable in relation to the instruments deployed to solve coordination problems and the scope of the agreements<sup>38</sup>.

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<sup>36</sup> Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The vain search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J.INT'L L. 999 (2004).

<sup>37</sup> See the paragraph on international regulatory competition in OECD draft recommendations on regulatory policy and governance May 25, 2011.

<sup>38</sup> For instance, the application of rules like *lex posterior derogat priori* or *lex specialis derogat generali* to a conflict between two private regimes regulated by contracts might not be appropriate.

In the brief description that follows, two ex ante governance responses are analyzed: (A) coordination and (B) integration. In the case of coordination the regulatory relationship remains broken into different regimes; in integration (like in the case of multi-stakeholder organizations for micro-governance) it moves from multiple to single regimes resulting in a different type of macro-governance.

**(A) Coordination:** Within coordination one should distinguish between (I) centralized responses, where regimes' coordination is operationalized by the regulators, and (II) decentralized responses when coordination is operationalized by the regulatees through choice of applicable rules (private international law or functional equivalents).

**(AI) Centralized mechanisms:** Within these mechanisms we distinguish between procedural and substantive coordination.

(1) **Procedural coordination:** MoUs or regulatory contracts can regulate consultation or governance participation, i.e. the presence of observers in each other's governing bodies, or the creation of common fora. Some regimes require that consultation takes place before a regulatory instrument comes into force; others provide for the right to be heard and to comment.

(2) **Substantive coordination:** Regulatory contracts or MoUs can address conflicts by designing clauses that connect or disconnect regimes, ensuring compatibility<sup>39</sup>. It is important to underline that both connection and disconnection can ensure regimes' coordination. Exiting from an environmental regime to ensure free trade is a way of connecting two conflicting regimes and decide that free trade must have priority. Connecting clauses include different mechanisms from direct incorporation, incorporation by reference, conforming interpretation, opt-in. Disconnecting clauses ensure opt-out which can be partial or total, referring to a specific aspect or a to a general one<sup>40</sup>. These coordination mechanisms may pursue different goals: regulate interdependencies by ensuring consistency, regulating boundaries, establishing conditionality, or solve conflicts by defining hierarchies or bargaining procedures to reach case by case solutions. These include international framework contracts, MoUs, guidelines, unilateral acts and conflict clauses.

**(AII) Decentralized mechanisms:** Two mechanisms illustrate the different operational structure based on the regulatory relationship (1) mutual recognition, governed by agreements among regulators, and (2) choice of law, governed by choices of regulatees or beneficiaries.

(1) **Mutual recognition:** It is well known in the public domain both at the regional and global levels. It can refer to rules and/or to judgments. It consists of principles and rules defining functional regulatory equivalence among multiple regimes. It is growing in the field of certification where private certifiers have created meta-organizations that define the principles of mutual recognition (for example in the case of food safety GFSI).

(2) **Choice of applicable law:** It consists of clauses defining which regime should prevail in the case of conflict. In this instance it would be a not territorially, as is usually the case in conflict of laws, but a functionally defined regime. These rules can give regulatees and or

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<sup>39</sup> See for examples MoU between ISO and ILO, between ISO and OECD, between ISO and UN Global Compact where clauses are introduced subjecting standards setting by ISO to backing by the other organizations and in case of disagreement.

<sup>40</sup> See on disconnecting clauses in the domain of external relations.

beneficiaries the power to opt-in or to opt-out. An example is provided by the recent Online Behavioural Advertising (OBA) regime where data protection and advertising can come into conflict. Codes give the user the power to opt-out the advertising regime in order to protect her privacy<sup>41</sup>.

**(B) Integration:** A more radical response to policy coordination and conflict resolution is to move from multiple regimes to a single multi-policy regime. In a way somewhat similar to the adoption of the multi-stakeholder model in micro-governance, the integration of single regimes into one multi-policy regime is observed, in order to accommodate conflicts or simply to coordinate different and sometimes conflicting goals, associated to different constituencies at the transnational level<sup>42</sup>. Over time some regimes have merged, becoming multi-policy. Integration among regimes can take different forms, ranging from the creation of loose organizations to the conclusion of regulatory contracts (networks and agreements), to federations of different organizations (closed organizations). Examples of international framework agreements are very common in the field of labour standards where international trade unions and MNCs conclude agreements on rights and employment standards that commit the MNC with its own employees and the whole supply chain. Integration does not solve the conflict per se. It moves from inter to intra-organizational level and shifts back from contractual to organizational devices. With integration regimes coordinated via contract are thereafter coordinated by organizations.

In these forms there is clear ex ante knowledge about the need to coordinate different regimes; regimes' representatives negotiate to identify the best mechanisms to achieve coordination while remaining legally fully independent. When information is incomplete or the policy interdependence mainly affects third parties outside of the regimes, coordination may occur through litigation, given the high level of transaction costs. At transnational level, regulation through litigation has been extensively used in some areas like fundamental rights while a more balanced combination between ex ante regulatory cooperation and ex post judicial coordination has taken place in other sectors. Judicial conflicts' resolution is what we turn to now.

### **Regulatory Judicial Governance**

The shift from a hierarchical to a cooperative approach concerning sources of law has produced a change of tools for solving conflicts among regimes<sup>43</sup>. The contractual mechanisms just described provide a rich yet insufficient toolbox for coordination and conflict resolution among different TPR regimes. While the tools concerning conflicts and coordination among public international regimes are today rather sophisticated, less developed are those concerning conflict resolution and coordination among private transnational regimes. Judicial governance complements ex ante conflict resolution with ex post mechanisms. There are different reasons for this. The first and most important is common to all ex ante mechanisms: the inability to foresee all possible reasons for conflicts and the necessity of

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<sup>41</sup> See European Self-Regulation for Online Behavioural Advertising, IAB, April 2011, Principle II "User choice over online behavioural advertising".

Each third party should make available a mechanism for web users to exercise their choice with respect to the collection and use of data for OBA purposes and the transfer of such data to third parties for OBA. Such choice should be available from the notice described in I.A. 1 and via the OBA User Choice Site.

According to the definitions provided by IAB Online behavioral advertising means the collection of data from a particular computer or device regarding web viewing behaviors over time and across multiple web domains not under Common control for the purpose of using such data to predict web user preferences or interests to deliver online advertising to that particular computer or device based on the preferences or interests inferred from such web viewing behaviors.

<sup>42</sup> This is a complementary view to that expressed by Abbott & Snidal, *supra* note 1, who describe the trend towards integration on the basis of bundling competencies. In particular they identify four competencies necessary to effective transnational regulation: independence, representativeness, expertise and operational capacities.

<sup>43</sup> Cassese, *supra* note 35.

operating with incomplete 'regulatory contracts' that can trigger renegotiations among regimes but do not ensure a final positive result e.g. the completion of the regulatory contract by parties' gap filling. Judicial governance provides coordination among conflicting regimes where hierarchy has been replaced by more complex techniques, combining vertical and horizontal coordination among courts<sup>44</sup>. Judicial governance of conflicting regimes operates along two dimensions: (1) horizontal, among states or supranational courts, (2) vertical, between supranational and national courts.

Coordination among regimes has been promoted by judicial gap-filling especially when disputes concern the boundaries of regimes. For example disputes arise on whether rules concerning fundamental rights can apply to food safety or rules concerning environmental protection should apply to free trade. The need for bridging lacunas has increased the regulatory function of judicial governance, in the absence of general principles in the field of transnational private regulation.

Courts, in particular domestic ones, have long been faced with the resolution of conflicts among different legal regimes, both public and private. At times conflict is altogether denied, at other times it has to be solved. Separation among independent jurisdictions defined by their scope may provide a formal boundary, thereby reducing the emergence of conflicts. Hence, one technique to avoid conflicts (at least formally) is to deny interdependence and claim independence and separation among regimes. Accordingly trade rules would have a different scope from human rights or environmental protection and the principle of finality would avoid or minimize collisions between regimes. In public international law this perspective has been rightly criticized<sup>45</sup>. This approach begs the question by hiding policy interdependences: clearly the identification of a conflict depends on the 'recognition' of the interdependence among regimes. Courts have recognized the compatibility between autonomous legal orders and their interdependence through devising coordinating mechanisms that prevent or solve conflicts. Different patterns have been followed: some have been seeking general principles of international law and in particular an international rule of law, others have operated on an ad hoc basis. A similar approach should be taken in relation to TPR by recognizing the link between policy interdependence and conflict.

Among the most important devices deployed by courts are the principles of reciprocity, judicial comity, equivalent protection, margin of appreciation, extraterritoriality and the effects-based approach<sup>46</sup>. Sometimes these mechanisms are defined by international or transnational instruments. More often they are the result of judicial decisions and are exported from one court to another. Only very rarely, as in the case of transnational bankruptcy, does coordination operate through 'court to court agreements'.

The two families of mechanisms, ex ante cooperation and judicial coordination, should be seen as complementary. Court interventions are of utmost importance where lack of coordination generates externalities towards third parties protected by neither regime involved in the cooperative venture, and ex ante information is not accessible at reasonable costs. Court interventions are also relevant when asymmetric powers among regimes are such that compliance with coordination clauses is not ensured by peer monitoring and self-enforcing mechanisms. Yet judicial coordination of private regimes does not only address externalities, asymmetric power and gap-filling functions. It can also provide a link with *jus cogens*, general principles and other regimes that private regulators may not otherwise have

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<sup>44</sup> Yuval Shany, REGULATING JURISDICTIONAL INTERACTIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (2007); Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59(2009); THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY (Tomer Broude & Yuval Shany, eds., 2008); Sabino Cassese, *The Constitutional Function of Supranational Courts: From Global Legal Space to Global Legal Order*, in INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN A CHANGING WORLD, 231, 233 (S. Flogaitis ed., 2009).

<sup>45</sup> International Law Commission, *supra* note 3.

<sup>46</sup> Shany, *supra* note 44; Cassese, *supra* note 35.



incentives to put in place. The integration between the public and private dimension at transnational level operates primarily through judicial coordination rather than regulatory contracts.

The relationship between ex ante regulatory cooperation and ex post judicial coordination is not without problems. Clearly there is an institutional tension between the former, where private regulators define the degree and modes of coordination, and the latter, where, in the context of litigation, courts create obligations concerning loyal cooperation among private regulators. In the private domain, freedom of contract and freedom of association limit judicial intervention by courts and constrain judicial coordination to a larger extent than the public domain, where the institutional balance between ex ante cooperation and ex post judicial coordination differs.

### **On the Link between Micro- and Macro-Governance and its Systemic Implications**

The distinction between organizations and regimes has showed that different yet similar questions arise in relation to conflicts between regulatees and beneficiaries in single organizations, in single regimes within which single or multiple regulators co-exist, and in multiple regimes, characterized by policy conflicts.

All these levels of the transnational regulatory space present conflicts between regulatees and beneficiaries and among different constituencies, firms, consumers, and investors within each group, calling for governance responses in addition to, or as a replacement for, traditional legal tools based on hierarchy or even more innovative normative tools.

In relation to single organizations the different structures of regulatory relationships define conflicts of interests and help classifying different governance responses which were grouped in the four different models above. Micro-governance is mainly related to intra-organizational level and the responses to conflicts are primarily associated with organizational design that grant participatory rights and/or duty to give reasons to stakeholders outside the legal boundary of the organizations. The role of judicial governance is rather limited here.

In relation to single regimes different interests, within the same policy field, may be represented by different organizations. Models include a single monopolist, an oligopoly or multiple organizations competing over regulatees in the interest of different classes of beneficiaries. In this case governance responses focus on instruments to coordinate and to solve conflicts among organizations and on the combination between transactional and social and market accountability mechanisms. Organizational tools like cross participation in boards is not uncommon but does not suffice and it is complemented with agreements and regulatory contracts<sup>47</sup>.

The third dimension is that of multiple regimes where a combination of ex ante cooperation and ex post judicial coordination is deployed.

Different policy goals often reflect different interests within the regulatory relationship. In the more radical case those who are potential beneficiaries of the regulatory process, consumer or environmental organizations, investors or depositors in the financial market, become regulators and set forth a new regime. In the less radical case a group of the regulated entities exit a regime and create a new one, often in competition with the previous.

Conflicts among regimes thus reflect their sector specificity and focus on single policies but might bring about paradoxical results: a firm complying with trade rules may be subject to sanctions under a code of conduct for violations of its CSR principles. If each regime reflects only its own logic and policy goals, the outcome might be internally rational yet systemically problematic. Macro-governance might collide with micro-governance and require coordination mechanisms contributing to

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<sup>47</sup>

ISO is a good illustration.

policy coordination. Regimes often interact and require coordination in order to prevent conflicts or solve them when they arise<sup>48</sup>. Conflicts among regimes require not only rules that avoid conflicts but also governance responses that at the same time can respect autonomy but govern interdependences. Micro- and macro-governance are therefore strategically intertwined and the functional approach, adopted in this essay, suggests that rather than concentrating exclusively upon the legal boundaries of organizations and regimes, which are very important for determining the scope and jurisdictions of regulators, one should also focus on the effects of regimes when considering governance devices to respond to conflicts of interests.

## **Conclusions**

In this essay the regulatory relationship has been selected as the relevant notion to explain governance responses to conflicting interests in transnational regulatory processes. While it is recognized that conflicts of interest among different constituencies involved in the regulatory process do not constitute the only explanatory variable to describe the architecture of TPR, its importance has been neglected. Three functional levels in the transnational regulatory space have been identified: individual organizations, single and multiple regimes, associating the former with micro- and the latter two with macro-governance issues. The thesis is that conflicts of interests may be solved by using micro or macro-governance responses depending on how regulatees and beneficiaries have chosen to locate themselves in the regulatory space. Often they select different strategies and micro and macro governance co-exist.

In micro-governance the conflict between regulatees and beneficiaries gives rise to at least four models with different organizational forms depending on the position of the beneficiaries with respect to the organization and, when they are inside as in the multi-stakeholder model, on their bargaining power in relation to the different classes of regulatees.

In macro-governance concerning a single regime often the regulatory relationship breaks down into multiple organizations, each one representing the interests of (a class of) regulatees and/or beneficiaries. The relationship varies depending on whether competition or cooperation prevails. Unlike the case of micro-governance, here competition may arise among organizations within the same regime. Transactional rather than organizational tools are deployed.

The second dimension within macro-governance is concerned with the interplay among different regimes operating alongside competition and cooperation. In this case the interests, associated with different conflicting policy goals, give rise to regimes (trade versus environment, e-commerce versus data protection, employment versus environment) representing various classes of regulatees and beneficiaries. On this third level, we again find competition and cooperation. In relation to the latter two complementary responses, *ex ante* cooperation and *ex post* judicial coordination have been identified while a growing trend towards regime integration is taking place. The role of judicial coordination increases when moving from micro to macro-governance and it must be combined with transactional instruments devised by the regimes. Governance responses are needed to provide coordination and to solve conflicts among regimes since the traditional legal tools, based on hierarchy, are insufficient. Thus, they do not entirely substitute for hierarchy, but instead complement it. As has become clear in the field of public international law, coordination by way of negotiation is only one possibility but often proves to be very costly and rather ineffective. In this framework, courts, in particular domestic ones, have come to play a very relevant role.

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<sup>48</sup> Macro-governance affects different schemes of coordination/competition among regimes which reflect the internal structure of each of them; while there is clearly a correlation between micro and macro-governance it is beyond the scope of this essay to identify the relevant structural variables of macro-governance based on the differences in micro-governance.

The future of TPR and its effectiveness will depend on the choice and the combinations among these different levels which will partly driven by endogenous factors, i.e. the relationships between MNCs and SMEs in developed and developing countries, and partly driven by exogenous legal and non legal factors, among which competition law is likely to play an important role.





