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NEW FOUNDATIONS OF
TRANSNATIONAL PRIVATE REGULATION

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EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES
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Abstract

Transnational Private Regulation (TPR) constitutes a new body of rules, practices and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard-setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation.

Its recent growth reflects (A) a reallocation of regulatory power from the domestic to the global sphere and (B) a redistribution between public and private regulators. When in place, TPR produces strong distributive effects both among private actors and between them and nation states. It differs both from global public regulation and from conventional forms of private rule-making identifiable with the law merchant. The main differences concern both actors and effects.

TPR is generally voluntary, mirroring domestic private regulation. Parties who wish to join the regulatory bodies participating to the regime are free to do so, however once they are in, they are legally bound and violation of the rules is subject to legal sanctions.* This freedom can be partially limited when the participation in a private regime and compliance with its standards is the condition to access to other regimes which provide market opportunities for the regulated entities. Often, subscription to a regime or compliance with a set of standards condition the access to the market or the ability to compete thereby reducing the freedom to choose. Voluntariness can be undermined by public intervention changing the regime from voluntary to compulsory. Less frequent than those observed at the domestic level are the examples of delegated private regulation to be found at the transnational level, where an explicit act of delegation by an IO or an IGO empowers a private body with regulatory power and makes the regime mandatory for the regulated entities. More diffused are the examples of ex post judicially recognised private regulation, when domestic courts recognise privately produced standards as part of customary public or private (international) law making it binding.

The paper will address the factors driving towards the emergence of new TPR are identified in comparison with, on the one hand, *lex mercatoria* and, on the other hand, international public regimes. The focus will be then on the private sphere, looking at both the different conflicts of interests arising in the regulatory relationships and the need for governance responses; and then institutional complementarity between public and private regimes will be examined. In light of this approach, the claim that differences between public and private at the global level exist is substantiated. The public-private divide is analysed, comparing the domestic and the transnational level. Four different models of interaction are identified: hybridisation, collaborative law-making, coordination and competition.

Keywords

Transnational private regulation, private regimes, Public-private divide, soft law, global governance.

* This definition differs from that of standards adopted in the TBT explain this agreement under Annex 1.

1. Introduction¹

Transnational Private Regulation (TPR) constitutes a new body of rules, practices and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard-setters and epistemic communities, either: exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation.

Its recent growth reflects (A) a reallocation of regulatory power from the domestic to the global sphere and (B) a redistribution between public and private regulators. When in place, TPR produces strong distributive effects both among private actors and between them and nation states. It differs both from global public regulation and from conventional forms of private rule-making identifiable with the law merchant. The main differences concern both actors and effects.

TPR differs from international regulation primarily because rule-making is not based on states' legislation. It is rather centred around private actors, interplaying with international organizations (IO) and intergovernmental organizations (IGO). This is not to say that states do not take part in and are not affected by TPR. TPR emphasises to a greater extent the role of the state as a rule-taker as opposed to a rule maker². It produces direct effects on participants to the regime without the need for states' legislative intermediation. However, it still lacks a comprehensive and integrated set of common principles. The toolbox of regulatory instruments differs significantly from that developed in the domain of public international law. Private regulatory regimes are sector specific, driven by different constituencies often conflicting because they protect divergent interests. Standards are generally stricter than those defined by international public organizations, when they exist. The complementarity between public and private often encompasses multiple standards, where the public provides minimum mandatory common standards and the private voluntary stricter ones.

TPR endorses a broad definition of the private sphere, going beyond industry to include NGO-led regulators and multi-stakeholder organizations. New players have entered the regulatory space: in particular NGOs, who are generally outside the domain of *lex mercatoria* or functionally equivalent forms of private law-making. TPR overcomes the traditional limitations that exist in the relationship between regulators and regulated, thereby departing also from conventional self-regulatory regimes. It can be identified in very different forms, ranging from those fostered by trade associations and market players to those promoted by NGOs and trade unions³. It comprises (a) regulatory frameworks concerning individual enterprises, promoted by shareholders or by other stakeholders, (b) the product and process regulation of small enterprises by large multinational corporations along the supply chain, (c) the regulation of financial aspects of firms governed by rating agencies and accounting firms, (d) the regulation of transnational employment standards promoted by unions and international organizations such as ILO, and (e) the regulation of environmental aspects.

TPR is generally voluntary, mirroring domestic private regulation. Parties who wish to join the regulatory bodies participating to the regime are free to do so, however, once they are in, they are legally bound and violation of the rules is subject to legal sanctions⁴. This freedom can be partially

¹ This paper is part of a wider research project that I coordinate at the EUI/RSCAS on: "The Constitutional Foundations of Transnational Private Regulation. Governance Design.", supported by HUIL. Information and papers on the research project can be found at www.privateregulation.eu. Part of it will be published in the Journal of law and society, another part in a book edited by HUIL. It was developed while teaching a course on transnational regulation in the fall of 2009 at NYU School of Law and a seminar at EUI in the fall of 2010. I am also thankful for conversations with Eyal Benvenisti, Cindy Estlund, Katharina Pistor, Dick Stewart who provided me with a rich and stimulating intellectual environment. Thanks to Linda Senden, Colin Scott, Peer Zumbansen and in particular to Tony Prosser for useful comments on previous drafts and to Federica Casarosa and Rebecca Schmidt for research and editorial assistance. The usual disclaimer applies.

² For this distinction and its implications see Braithwaite, *Regulatory capitalism*, (2008).

³ Different goals are pursued by these two forms. Individual firms often regulate to promote product differentiation, trade associations to standardise and make rules uniform, sometimes creating barriers to entry for newcomers.

⁴ This definition differs from that of standards adopted in the TBT explain this agreement under Annex 1.

limited when the participation in a private regime and compliance with its standards is the condition to access to other regimes which provide market opportunities for the regulated entities. Often, subscription to a regime or compliance with a set of standards condition the access to the market or the ability to compete thereby reducing the freedom to choose. Voluntariness can be undermined by public intervention changing the regime from voluntary to compulsory. Less frequent than those observed at the domestic level are the examples of delegated private regulation to be found at the transnational level, where an explicit act of delegation by an IO or an IGO empowers a private body with regulatory power and makes the regime mandatory for the regulated entities. More diffused are the examples of *ex post* judicially recognised private regulation, when domestic courts recognise privately produced standards as part of customary public or private (international) law, making it binding.

TPR, like many international regimes, produces direct effects beyond the signatories or members of the organization. This produces a knock on effect on the behaviour of a wide number of regulated parties and beneficiaries which have not given their *ex ante* consent to the rules they are subject to. The conventional principles of contract law and those of private organizations are useful (though inadequate) in describing these new forms and need to be rethought and transformed to accommodate the regulatory functions⁵. Unlike public international law where *jus cogens* and custom operate as spreading mechanisms to produce legal effects on all States beyond the signatories, TPR has not yet developed common principles with general binding effects; rather each sector has devised its own tools⁶.

TPR subscribes to a comprehensive concept of regulation which includes both responses to market/government failures and distributional effects⁷. It starts from the conventional definition that includes rule-making, monitoring and enforcement. It focuses on how shifting from public to private and from domestic to transnational may redistribute financial resources and institutional capabilities from developed to developing economies and, within the latter, among different stakeholders. It does not subscribe to a notion of regulation, which necessarily restricts and limits private parties' freedom; it seeks to distinguish between capability enhancing and capability reducing regulatory regimes.

This paper proceeds as follows. In section II, the factors driving towards the emergence of new TPR are identified in comparison with, on the one hand, *lex mercatoria* and, on the other hand, international public regimes. In section III, the focus is on the private sphere, looking at both the different conflicts of interests arising in the regulatory relationships and the need for governance responses. In section IV institutional complementarity between public and private regimes is examined. In light of this approach, the claim that differences between public and private at the global level exist is substantiated. The public-private divide is analysed, comparing the domestic and the transnational level. Four different models of interaction are identified: hybridisation, collaborative law-making, coordination and competition. Section V summarises the results of the analysis reconsidering the boundaries between public and private at transnational level. Concluding remarks follow.

⁵ The inadequacies of private law for regulatory purposes are examined by Collins, *Regulating contracts*, (1999).

⁶ An interesting comparison, beyond the scope of this paper, concerns the function of public interest norms in public international law and that of public function/public interest in transnational private regulation.

⁷ See Stiglitz, 'Regulation and failure' in Moss and Cisternino (eds), *New Perspectives on regulation*, (2009) 12.

2. The Emergence of New TPR: Drivers and Patterns

The growth of TPR is often associated to, if not made dependent upon, the shortcomings of the regulatory state as a global regulator⁸. These weaknesses have fostered the emergence of international institutions in the first half of the last century, followed by the development of transnational private regulators in the second half and, particularly, in the last quarter of the twentieth century⁹. The transformations brought about by the new private regulatory regimes have also modified the unit of analysis, moving from regulatory state to regulatory capitalism¹⁰. This change concerns not only rule making but also compliance and enforcement¹¹.

The increasing role of non-state regulators, both at domestic and transnational level, has not cancelled the differences between private and public but has forced a reconsideration of their functions and the boundaries between the two spheres¹². In particular, it obliges one to ask whether private transnational institutions should be considered as alternatives to international organizations or whether they complement them at the global level and, in a multilevel structure, nation-states at domestic level¹³. Clearly the answer to this question depends on the degree of assimilation between public and private that is believed to exist¹⁴. The consolidation of effective TPR frequently occurs when strong public institutions are in place to complement rather than supplement public regulation at the domestic level¹⁵. Thence, effective private regulation often consolidates in combination with strong public institutions. However, it is also possible that TPR precedes the creation of public regimes when, in order to fill regulatory gaps, private organizations design new markets and new institutions to be later supplanted by hybrids.

The emergence of a new generation of TPR is linked to different factors: some related to the institutional dimension, others more to the economic consequences of market and trade integration¹⁶. Market liberalisation and the diffusion of universal fundamental rights have been powerful drivers of transnational regulation generating sector specific regimes, often in conflict. In many instances, they develop to increase prevention and deterrence for risk that cannot any more be monitored and

⁸ See Abbott and Snidal, 'Governance triangle' in Mattli and Woods (eds.), *The politics of global regulation*, (2009) 50. On the correlation between globalisation and the increasing power of transnational private actors, see Cutler, *Private power and global authority: Transnational merchant law in the global political economy* (2003).

⁹ The increasing influence of private power in the global sphere has been observed for a long time. See Dezalay and Garth, *Dealing in virtue. International arbitration and the construction of a transnational legal order* (1996); Cutler, supra n. 8; Sassen, *Territory, authority, and rights from medieval to assemblages*, (2006); Callies and Zumbansen, *Rough Consensus and Running code* (2010). The question had been already debated in the thirties in the US with the pioneering work by Jaffe. See Jaffe, 'Law Making by Private Groups' (1937) *Harvard Law Review* 201, 213.

¹⁰ See Levi-Faur and Jordana: 'The rise of regulatory capitalism: The global diffusion of a new order', *The Annals of the American Academy of Political and Social Sciences*, (2005), p. 200; Levi-Faur, 'Varieties of regulatory capitalism: Sectors and nations in the making of a new global order', *Governance Special Issue* (2006) p. 363.

¹¹ See Braithwaite, supra n. 2, 185 ff.

¹² The presence of non state actors in the global governance system is seen by many as a characteristic of global governance. See von Bogdandy, Dann and Goldmann, 'Developing the publicness of public international law: towards a legal framework for global governance activity', 9 *German Law Journal* (2008), 1375, part. 1378 ff.

¹³ See Abbott and Snidal, 'The governance Triangle', in Mattli and Woods, supra n. 8, 66.

¹⁴ Those who claim that private actors exercising regulatory authority should be considered functionally equivalent to public actors and thus be subject to the same regime erase the complementarity. My claim is that functional, let alone structural, assimilation is a mistake and the distinction between public and private should be maintained even within a common set of principles concerning compliance with democracy and the rule of law.

¹⁵ Food safety provides a good illustration of a much wider phenomenon which concerns many sectors.

¹⁶ See Hadfield, 'The public and private in the provision of law for global transactions', in V. Gessner (ed.) *Contractual certainty in international trade: Empirical studies and theoretical debates on institutional support for global economic exchanges* (2009); and Davis, 'Privatizing the Adjudication of International Commercial Disputes: The Relevance of Organizational Form', in Cafaggi (ed.) *Enforcement of transnational regulation, EE*, forthcoming (2011).

managed at¹⁷. Consensus exists over the weaknesses of nation states to regulate markets that operate across state boundaries¹⁸. Similarly, the difficulties of individual states in securing compliance with fundamental rights have been underlined¹⁹. Divergences emerge in relation to the role of States in trans-nationalized regulation²⁰. Some believe that they lose their intended role to become rule takers; others claim that they maintain a dominant position²¹. The list that follows exemplifies some of the factors contributing to the emergence and consolidation of TPR

1) Need for International Harmonisation

The most frequently recalled rationale is the need to overcome normative fragmentation of market regulation, often associated with divergent state legislation²². Sometimes however, TPR reacts to divergent private regulatory regimes in place at the local level by generating new uniform private rules at the transnational level²³. The creation of a TPR may thus be a response to either the multiplication of private regimes or diverging domestic public legislation. Harmonization of rules, within which private harmonisation has gained relevant importance, constitutes one response to normative fragmentation. Harmonization may be driven by general objectives or by specific ones. Fragmentation of state legislation, for example, constitutes a barrier to trade and one that has been tackled by trade regimes, promoting standardisation. Delegation to IGO constitutes a different partial response to fragmentation. However this delegation is often limited to standard setting with limited implementation capacity²⁴

A more recent phenomenon is the proliferation of TPR at the global level²⁵. Many competing TPRs have emerged in the area of food safety and that of environmental protection with numerous certification processes, applying different standards to same products or processes²⁶. Even within the global dimension, the initial response to local fragmentation through the emergence of transnational regulation has changed into a different form of international fragmentation, driven by private regulatory competition. We hence observe a shift from local to global fragmentation within the private field, the former primarily territorial, the latter predominantly functional.

¹⁷ This is clear in the area of product safety and in particular that of food safety. See Coglianese, Finkel and Zaring (eds.), *Import safety. Regulatory governance in the global economy*, (2009).

¹⁸ See Kingsbury, Krisch & Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15, at p. 16; Abbott and Snidal, supra n. 13.

¹⁹ See Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights', Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April (2008).

²⁰ See Cutler, Haufler and Porter, *Private Authority and International Affairs* (1999); Cutler, supra n. 8; Sassen, supra n. 9.

²¹ Drezner, *It is all politics*, (2007).

²² See Leebron, 'Lying down with Procrustes: an analysis of harmonization claims', in Baghwati and Hudec (eds), *Economic analysis of fair trade and harmonization* (1996), 41.

²³ Legal harmonisation by private parties can translate into an agreement similar to a Treaty or into the creation of an organization comparable to an IO or an IGO.

²⁴ Abbott and Snidal, supra n. 13, 67. But see, in relation to ILO, Helfer, 'Monitoring compliance with unratified treaties: the ILO experience', *Law and Contemporary Problems* (2008) 1983.

²⁵ See Vogel, The private regulation of global corporate conduct, in Mattli and Woods, supra fn. 8, 151 ff.. highlighting the differences with conventional self-regulation part. 156 ff.. In a different perspective, Peters, *et al*, *Non-State actors as standard setters*, (2009).

²⁶ See Meidinger, 'Private import safety regulation and transnational new governance', in Coglianese *et al*, supra n. 17, 233, part. 236.

2) Weaknesses of States as Global Rule-Makers

Public regulation by states through international treaties has proven difficult to achieve and even when international standards exist, they are rarely uniformly implemented²⁷. Often, though not always, TPR emerges as a response to intergovernmental failures, such as the inability to reach political consensus over a proposed international treaty²⁸. Evidence suggests that failure to reach political consensus over treaty-based solutions has triggered TPR. In the environmental field, the failures of the Rio conference in 1992 facilitated the emergence of private NGO-led forestry protection regimes. Another example can be seen in the emerging private carbon trading systems that complement the existing pattern of regimes regulating climate change counter measures²⁹.

3) Weaknesses of State Regulation in Monitoring Compliance with International Standards

State institutions are not only often ineffective rule makers but they are also poor at monitoring and enforcing violations of transnational regimes³⁰. Therefore, the effectiveness of states' implementation is often questioned³¹. Frequently transnational rule making is complemented by domestic administrative and judicial enforcement giving rise to vertical complementarity between private and public. The use of domestic monitoring frequently brings about conflicting results, which contradict the fundamental rationales of transnationalising regulation³². Localised monitoring follows incentives of individual states or litigants in Courts which may not be aligned with those of transnational regimes. Monitoring resources might be deployed to promote domestic interests at the expense of the protection of the global common good, as the experience of environmental regulation shows. This is not to say that domestic monitoring and enforcement does or should not play a role. On the contrary, the role of national Courts is quite significant. However, it is important to recognise its limitations. Food safety and financial markets provide illustrations of how countries importing goods and capital may be unable to control violations that have occurred in exporting states³³. States' implementation of transnational regulation may be biased. The emergence of TPR with innovative implementation techniques attempts to respond to these shortcomings.

²⁷ See generally, Abbott and Snidal, *supra* n. 13, 59 and 67.

²⁸ There is wide consensus over the birth of private forestry certification systems. See for an overview, Meidinger, 'The Administrative Law of Global Private – Public Regulation: the Case of Forestry', 17 *European Journal of International Law* (2006) 47.

²⁹ See Keohane and Victor, *The Regime Complex for Climate Change*, (2010), p. 26.

³⁰ These difficulties, among other factors, have led to the supply chain approach in food safety where direct responsibility for ensuring safety has been distributed among the private operators of the supply chain. See Henson and Humphrey, 'The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes', Paper Prepared for FAO/WHO, (2009); 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 2006.

³¹ See the critique of conventional international law and its weaknesses by Kingsbury, *et al.*, *supra* n. 18, p. 15; Kingsbury and Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order', *European Journal of International Law* (2006) 1; von Bogdandy *et al.*, *supra* n. 12; Kingsbury, 'The concept of law in global administrative law', *European Journal of International Law* (2009) 23; and the responses by Somek, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury', *European Journal of International Law* (2009), 985 and Ming-Sung Kuo, 'The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury', *European Journal of International Law* (2009) 997.

³² See Cafaggi, 'Enforcing transnational private regulation', and Stewart, 'Enforcement of transnational public regulation', forthcoming in Cafaggi *supra* n. 16.

³³ Food safety crises in the nineties showed that importing States were unable to control food safety hazards and changed the approach placing monitoring responsibility on the supply chain. This shift in monitoring policies, from public to private, produced additional transformations in rule making, increasing transnational private regulation by retailers. See Henson and Humphrey, *supra* n. 30: and for a broader picture Coglianesi, *et al.*, *supra* n. 17.

4) Weaknesses of Public International Law.

The weakness of individual states and the necessity of multilateral responses contributed to the growth of international law beyond its conventional domains at the beginning of the twentieth century³⁴. The dynamics of regulatory power transfers, from the nation-states to international organizations, has profoundly changed since then³⁵. The central role of domestic executives and IGOs has been partly substituted by the creation of networks and other forms of international players outside the conventional forms recognized by public international law³⁶.

The international system is still based on the assumption that state responsibility is the primary factor in ensuring effective incentives to implement transnational regulation. The limits of a system based on state responsibility in ensuring the effectiveness of the regulatory regimes suggest (1) the necessity of overcoming the States' normative intermediation problems and (2) of establishing direct applicability of transnational regimes towards parties affected by the regulatory processes³⁷. The limits of international law and, in particular, the inability to regulate rule-making by non-state actors and international public entities has generated a number of effects³⁸. On the one hand, a transformation of the public sphere can be observed with the emergence of new bodies, applying new principles of global administrative law (GAL). On the other hand, these limitations have favored the development and consolidation of TPR.

5) Technology

Another factor contributing to the growth of TPR is the development of new technologies that redistribute rule-making power in favor of private actors and transform the role of the nation state. ICT and, in particular, Internet regulation provides an illustration of the role of technology in shifting rule-making power from national to transnational and from public to private³⁹. In fact, the characterizing feature is that of hybridity. The conflict and the subsequent agreement between Google and the People's Republic of China (PRC) highlights new modes of regulation at the global level based on contracts between multinational firms and states.

IPR constitutes another area where international public goods and states' interests can collide⁴⁰. Although it is clear that states maintain a significant role, especially in relation to security and the protection of fundamental rights, the regulatory patterns show an increasingly transnational private dimension⁴¹.

³⁴ Koskenniemi, 'History of International Law, since World War II', in *Max Planck Encyclopedia of International Law*, (2007).

³⁵ Alvarez, *International organizations as law makers*, (2006).

³⁶ Slaughter, *A New World Order*, (2004); Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', *Michigan Journal of International Law* (2003), 1041.

³⁷ Slaughter (2003), supra n. 36, 1056. In general on legitimacy deficits of such networks see Picciotto, 'Networks in international economic integration: Fragmented states and the dilemmas of neo-liberalism', *Northwestern Journal of International Law and Business* (1996-1997), 1014, at 1045.

³⁸ Kingsbury, *et al.*, supra n. 18; Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation', *International Law and Politics* (2005), 662; von Bogdandy, *et al.*, supra n. 12, 1375 ff.

³⁹ See Deibert, Palfrey, Rohozinski and Zittrain (eds), *Access Denied, The Practice and Policy of Global Internet Filtering*, (2008); Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, (2006); Tambini, Leonardi, Marsden, *Codifying cyberspace- Communications self-regulation in the age of internet convergence*, (2008).

⁴⁰ See the different contributions in Maskus and Reichmann, *International public goods and transfer of technology under a globalized intellectual property regime*, (2005).

⁴¹ See Mattli and Woods, supra n. 8.

6) Technical standards

Technical standards have long been produced by private actors at the international level. They do not constitute a factor in the emergence of private regulation per se, but influence the emergence of private regulatory regimes. In particular, they play a role in the development of new forms of private regulation. Transnational public and private regulation in relation to safety have, for example, adopted a supply chain approach driven by the use of technical standards difficult for States to monitor. The boundaries between normative and technical standards have blurred and even if they can still be kept distinct the impact of technical standardisation on private regulation is strong. Technical standardisation bodies have increased their influence on regulatory regimes, moving from product to process standards and broadening the quality management standards. Private regulation often represents a combination of different standards, some of them directly produced by the private regulator, others by the technical standard-setters, subsequently endorsed or adopted by private regulators⁴².

Technical standards affect several dimensions of TPR: i) they contribute to a reduction of differences across sectors since there is a common denominator for technical standards concerning quality management control and ii) they also reduce the distance between public and private transnational regulation. Often, both public and private bodies refer to the same technical standards, as the examples of food safety, environmental protection and corporate social responsibility demonstrate.

7) Governance of Distributional Effects

The development of TPR produces important distributional effects connected with the costs of regulation and its impact. These effects cannot be governed only by fiscal policies of nation states. There is a cost-transfer from states to private actors, but also from Western developed economies to southern developing economies⁴³. Symmetrically, there is a transfer of power from southern states to private actors in developed economies with the emerging role of BRIC (Brazil, Russia, India and China)⁴⁴. The internalisation of distributional effects has produced different responses. Sometimes, other private regimes have been created to manage distributional effects. For example, many NGO-led regimes have emerged to provide distributional responses to public and private trade regimes. At other instances, internal governance structures have tried to govern the redistribution of resources and capabilities. Specialized IGO continue to play an important role to ensuring growth of regulatory capabilities, but are ever more supported by new private actors.

A second distributional effect is related to the impact of private regulation and the distribution of rule making power on market structures, particularly on the degree of market concentration and the distribution of market power among private actors according to the size of the regulated firms. Therefore, there are distributional consequences of a re-allocation of regulatory powers but also effects in the size of firms. It is difficult, if not impossible, for small suppliers to afford the costs of private regulation rendering it impossible to gain or maintain market access. As a result, private regulation increases the power and the market share of significantly sized suppliers and reduces the market share of small ones, driving some of them away⁴⁵.

⁴² Examples range from ISO to professional standards like those drafted by IASB in the accounting profession.

⁴³ The example of food safety is paramount. See Codex Alimentarius Commission Joint FAO/WHO food standard programme, Considerations of the impact of private standards, CX/CAC 10/33/13.

⁴⁴ Private regulation is designed by associations mainly controlled by private actors, businesses and NGOs located in Western countries, but it is implemented and monitored in developing economies. Thus the costs of compliance is often shifted to suppliers upstream and then partly transferred to final consumers in the west.

⁴⁵ There is relative widespread consensus over the distributional effects of private regulation although the measurement of the effects vary significantly sector by sector See in the field of food safety, OECD supra n. 31; Henson and Humphrey supra n. 30; Amekawa, 'Reflections on the Growing Influence of Good Agricultural Practices in the Global South',

These factors are, at the same time, both causes and effects; they constitute, and may trigger in the future, the emergence of new regimes and institutions to address uneven distribution⁴⁶.

3. Disentangling the Private Sphere: Exploring Conflicts of Interest and Responses from Governance Regimes

By now it should be clear that the private sphere is not homogeneous and needs to be disentangled⁴⁷. TPR encompasses numerous regimes, reflecting the complexity of the private sphere⁴⁸. Some are mainly driven by industries; some are promoted by NGOs; others by the joint endeavour of industry and NGOs, often complemented by public intervention, giving rise to tripartite or multiparty agreements⁴⁹. While at first sight they are all governed by private actors, they pursue different objectives and incorporate multiple degrees of public interest, depending on the composition of their respective governance bodies and the effects they have on the general public. Plurality of interests often translates into different regulatory strategies or a concentration on different stages of the regulatory process. As we shall see, while industry-driven regimes focus more on rule-making, NGO-led regulators are primarily concerned with firms' compliance and frequently deploy certification⁵⁰. These differences are often reflected in the choice of governance models and enforcement mechanisms, particularly in the balance between judicial and non-judicial enforcement⁵¹. The relevance of governance in TPR highlights the necessity to include it as an additional dimension together with procedural and functional aspects in an inclusive approach to accountability.

Private actors have different, often conflicting, incentives for the creation and implementation of transnational private regimes. Their preferences may differ not only concerning the choice of the optimal level between state, regional and global but also in relation to the normative architecture to be adopted by the specific regime. Certainly NGO-led private regulatory regimes differ remarkably from traditional forms of private rule-making, but even industry-driven regimes, focused on regulatory needs, present very different features from those conventionally associated with *lex mercatoria*⁵². Conflicts are not restricted to the different components of the private sphere but also within them. Within NGOs, conflicts may arise between value based and interest based organizations⁵³.

In order to demonstrate how the combinations among private actors may lead to different regimes and in particular different governance structures I build on the concept of regulatory relationship

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Journal of Agricultural Environ Ethics (2009), 531; Busch & Bain, 'New! Improved? The Transformation of the Global Agrifood System', Rural Sociology (2004) 321. In the environmental field for the carbon foot print labelling, Mayson, 'Carbon footprint labelling in Climate finance', in Stewart, Kingsbury and Rudyk, *Climate Finance*, (2009) 281, at p. 283.

⁴⁶ See Cafaggi and Pistor, 'The distributional effects of TPR', unpublished paper on file with the author.

⁴⁷ See Vogel, supra n. 25, 156; and before, Id. 'Private Global Business Regulation', Annual Review of Political Science (2008), 261; Shaffer, 'How business shapes law: a socio legal framework', Connecticut Law Review (2009) 147. In a different and closer perspective to the text see Levi-Faur, 'The global diffusion of regulatory capitalism', Annals of the American academy of political and social science (2005) 12.

⁴⁸ For an interesting conceptual map, see Abbott and Snidal, supra n. 13, 57-62.

⁴⁹ The tripartite model is frequent in the sector of labour and employment but it has also application in that of environment and food safety. The unilateral model is diffused in the area of financial regulation and e-commerce.

⁵⁰ Compare for example Forest Stewardship Council or Marine Stewardship Council with IFRS in the accounting profession or IATA in the air transport.

⁵¹ See Cafaggi, supra n. 32.

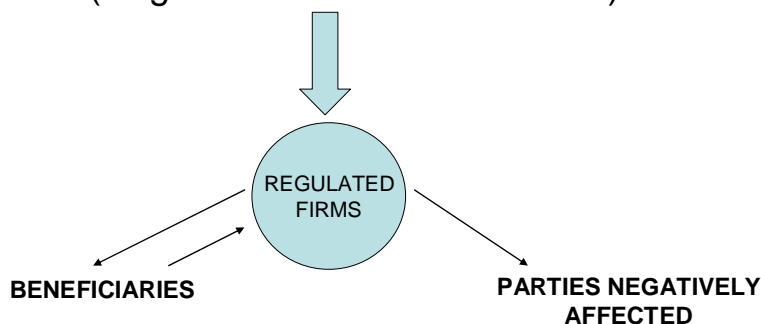
⁵² The differences are wider with the so called European continental view and more limited with the American perspective where differences within *lex mercatoria* are widely recognised.

⁵³ See Abbott and Snidal, supra fn. 13, 61.

developed in earlier work⁵⁴. This includes not only the regulator and the regulated, but also the beneficiaries of the regulatory process, those who are supposed to benefit from compliance with the regulation and are harmed by their violations.

The regulatory relationship

- Private regulator
- (single firm or trade association)



The use of a regulatory relationship structure, one which includes the beneficiaries, redefines the nature of responsiveness and the means through which effectiveness of the regulation should be measured. Effectiveness does not only measure regulatees' compliance but looks at the effects of the regulatory process on the final beneficiaries⁵⁵.

The four following illustrations depict the different regulatory relationships depending on the dominant actors within the regulatory body; their brief description suggests the implications for rule making and conflicts of interest. The range of examples offered below is meant to illustrate that governance models have common features across sectors.

3.1. Industry driven

This model represents an ideal type of structure where the regulator and regulated coincide whereas the beneficiaries are outside the regulatory body, i.e. they are not members but are affected by the regulatory process. It is the opposite of a public regulation structure in which the regulator and regulated have to differ, and capture of the regulator by the regulatees is one of the main governance problems⁵⁶.

Examples of this model are trade associations regulating the conduct of their members or industry cartels created by market players. They often concur and the choice between the two variants is

⁵⁴ See Cafaggi (ed.), *Reframing self-regulation in European Private Law* (2006), 3; and for a more recent elaboration Cafaggi, 'Governance of transnational private regulation', in Levi-Faur, *Handbook of governance*, forthcoming (2011).

⁵⁵ See Cafaggi, 'Compliance and effectiveness in transnational private regulation', on file with the author.

⁵⁶ Differentiation does not imply lack of dialogue. Increased need of responsiveness has changed the regulatory model in the public domain increasing forms of dialogue between the regulator and the regulated.

dependent on the market structure and the governance model of the associations⁵⁷. In the real world, even in industry driven models, perfect coincidence between regulators and regulated is often lacking. Three examples show these divergences and their governance implications.

In the area of financial markets, accounting standards are generated by professional firms to regulate listed companies for the benefit of investors⁵⁸. This is the IASB (International accounting standard board) that produces International financial reporting standards (IFRS), adopted by firms to comply with requirements expressed by Stock Exchanges, the Financial Stability Board and other entities⁵⁹. Here, concurrence is not always at the maximum level between the regulators (a few professional firms operating in an oligopolistic market) and the regulated (their clients). The professional independence of the regulator from the regulated entities is highly disputed; pressure from public entities and, to a certain extent, market institutions has generated important transformation and the due process handbook was meant to address some of the accountability problems arising out of the professional relationship between some of the regulators and the regulated⁶⁰. De facto, interests of the regulator and those of the regulated are aligned and incentives to monitor in the interest of the beneficiaries might be weak.

A second example can be found in the area of food safety when competing retail trade associations produce food safety standards to be applied along the supply chain by suppliers and retailers. This can be found only of the various private standard setting models developed in the last 15 years⁶¹. Trade associations regulatory products are, for example, the codes produced by the British retail association later endorsed also by the Dutch retail associations (BRC), or those drafted by the IFS (a Franco German alliance).

A more general example is the International Chamber of Commerce (ICC), which issues policy documents and standard contract forms in almost all relevant business sectors and hosts one of the most important arbitral institutions⁶². The difference from the second and the third model below is not so much related to the issue of whether there is a single stakeholder or multi-stakeholders but rather to the lack of representation of the beneficiaries' interest in the governance body.

3.2. A second model is primarily organizational and led by NGOs

In this model, the regulators and regulated differ, but regulators and (some) beneficiaries coincide. The regulatory body is governed by NGOs while the regulated are firms. This model is deployed in certification where NGOs define requirements to certify products and services that firms have to

⁵⁷ The hypothesis to be verified in empirical research is that, in oligopolistic markets, the powerful actors will form cartels while in highly competitive markets associations will play a more important role. However, in some cases big players will use associations to exercise their powers using cartels as purely informal mechanisms.

⁵⁸ See Buthe and Mattli, *Private global regulation: The politics of setting standards for international products and financial markets*, (2011); and before Buthe and Mattli, 'Global Private Governance: Lessons From a National Model of Setting Standards in Accounting', *Law and contemporary problems*, (2005) 225.

⁵⁹ For an overview concerning SE explicitly requiring listed firms to comply with IFRS, see at <http://www.iasplus.com/country/useias.htm>.

⁶⁰ For instance, the board of IASB consists of 15 experts appointed by the IFRS board of trustees, according to either their experience in standard setting or as a member of the user, accounting, academic or preparer communities, see: <http://www.ifrs.org/The+organization/Members+of+the+IASB/Members+of+the+IASB.htm>. See Buthe and Mattli (2011), supra n. 58; Buthe and Mattli, 'International standards and standard-setting bodies', in Coen, Wilson, and Grant (eds), *The Oxford Handbook of Business-Government Relations*, (2009) 440.

⁶¹ See OECD, supra n. 31; Meidinger, supra n. 26. See also GLOBALGAP, General Regulations, Integrated Farm Assurance, Part II 3.1 (vii), available at: http://www.globalgap.info/cms/front_content.php?idart=14..

⁶² See ICC homepage: <http://www.iccwbo.org/id97/index.html>.

comply with in order to benefit the final consumers. But often these organizations contribute to monitoring and enforcement of consumer rights.

Consumer International is an independent non governmental organizations with members and affiliate. Its legal status is that of a not for profit company limited by guarantee regulated by English law. Full members are consumer organizations which must be not for profit and politically independent. Affiliate members can be private or government organizations.

Oxfam International is a foundation incorporated in the Netherlands. The foundation was founded in 1995 by a group of NGOs. It consists of 14 member organizations, called affiliates, each represented by a voting trustee in the board of trustees⁶³. Oxfam is composed only of NGOs, but its role as regulator is limited primarily to lobbying national governments.

Another example is that of Amnesty International. Amnesty International started campaigning in 1961 and now has 2.2 million members in about 150 countries in the world⁶⁴. As provided by its statute, Amnesty International “consists of sections, structures, international networks, affiliated groups and international members”.⁶⁵ It also operates by means of the publication of reports that can raise controversial themes. Its main activity is related to monitoring rather than standard setting.

3.3. Expert-led model

A different type of private regulation from those just described is primarily expert-led. This is generally the case for issues of technical standardisation, though frequently the ‘capture’ by industry dilutes their neutrality and objectivity⁶⁶. The definition of experts has changed over time and in some area expertise has become much less hierarchical. In the field of Internet governance, the diffusion of epistemic communities self-regulating themselves has bloomed, giving rise to a multiplicity of non-profit organizations or informal networks. In this model the rules are mainly technical; the regulator is a private non profit organization, supposedly independent from the industry and from the final beneficiaries but often subject to capture. The regulator differs from the regulated and from the beneficiaries and its legitimacy is based on expertise.

3.4. Multi-stakeholder model

A fourth category is the multi-stakeholder model where both the regulated and the beneficiaries are represented in the regulatory body with differences concerning interest representation. Occasionally public bodies are also part of the governance either directly or as observers. There are two variants of this model: one organizational and one contractual.

In the *organizational* variant, the regulatory bodies, associations, foundations, non profit corporations, for profit organizations are composed of multiple constituencies. It should be pointed out that often the organizational model carries out regulatory tasks by using different types of regulatory contracts, often reaching outside the membership of the regulatory body. The two most recurring features are those of the federation (for example a second tier representative body of national organizations) or a functional multi-stakeholder model where both individuals and organizations participate. Within the governing body, different stakeholders are represented in the board and in the general assembly.

⁶³ There is no governmental or industry involvement in the foundation, see for the constitution of Oxfam: http://www.oxfam.org/sites/www.oxfam.org/files/constitution_0.pdf,).

⁶⁴ See: <http://www.amnesty.org/en/who-we-are/history>.

⁶⁵ See <http://www.amnesty.org/en/who-we-are/accountability/statute-of-amnesty-international>.

⁶⁶ See Schepel, *Constitution of private governance*, (2005).

Even within multi-stakeholder organizations there are differences dependent upon the distribution of power among the constituencies. In some, there is a leading constituency, shaping the choice of regulatory regime and its enforcement mechanisms while leaving the others some degree of control by voice or exit. In others, the power is distributed symmetrically often producing a more principled based regulation which is later specified at the stage of implementation⁶⁷. This model is best illustrated by ICANN in the field of Internet governance. ICANN is a not-for-profit public benefit organization, incorporated under California law. ICANN is not based on membership. It is governed by a board of directors whose members are appointed by different, primarily technical, organizations on the basis of a global representation principle which should ensure wide geographical representation. The interesting features are related to the combination of technical and non technical composition of the governing board and to the nature of the regulated which encompass international organizations, states, firms and consumers.

A second illustration is provided by the Forest Stewardship Council (FSC) and the Marine Stewardship Council (MSC). The former is an association, regulated by Mexican law⁶⁸. The latter is a UK based company limited by guarantee and it has been registered as a charity with the Charity Commission⁶⁹. The FSC is composed of three chambers representing different interests (social & indigenous organizations, environmental organizations and economic organizations) which are then coordinated by the general assembly and fully and equally represented in the multi-stakeholder board. Clearly the two chambers of indigenous & social organizations and environment organizations lead the FSC, while the economic interests of industry are voiced by the third chamber enjoying one third of the voting power⁷⁰. Here conflicts of interests between the regulator and regulated are less frequent since the regulator encompasses in its governing structure both the regulated and beneficiaries. However, some conflicts might still arise and organizational responses are required⁷¹.

A third example is ISDA (International Swaps and Derivatives Association)⁷². This association was born out of the initiatives of financial institutions and the technical advice of international law firms and has fundamentally defined the rules for the OTC (over the counter market).⁷³ The rules concerning transactions in swaps and derivatives are cast in a Master Agreement drafted by ISDA to be subsequently adapted and tailored to State legislation⁷⁴. ISDA is an example of private regulation associated with soft law at international level and hard law at State level.

The organizational model also features collaboration among private and public actors. Examples including States can be found in the field of sports and corporate social responsibility: WADA and

⁶⁷ Typically in multistakeholder models, regulation is incomplete at the stage of rule-making when compromises lead to vague rules. Regulatory contract completion occurs only later.

⁶⁸ See for a good overview, Meidinger, Elliott, Oesten, 'The Fundamentals of Forest Certification', in Meidinger, Elliott, and Oesten (eds.), *Social and Political Dimensions of Forest Certification*, (2003), 3; Meidinger, 'Multi-Interest Self-Governance through Global Product Certification Programs', Buffalo Legal Studies Research Paper, (2006), n. 16.

⁶⁹ The organizational structure consists primarily of three bodies the Board of Trustees, the Stakeholder Council and the Technical Advisory Board.

⁷⁰ See Meidinger, *supra* n. 28, 53 and in particular fn. 30; furthermore, for an overview of the organizational setup, see: <http://www.fsc.org/governance.html>. for the FSC and <http://www.msc.org/about-us/governance/structure> for the MSC.

⁷¹ See for instance the reform of the enforcement system which has recently been introduced in FSC. See also, Meidinger *et al.* (2003), *supra* n. 68.

⁷² For a succinct description see Morgan, 'Market formation and governance in international financial markets: the case of OTC derivatives', *Human relations* (2008) 637. For further information also see ISDA's homepage at: <http://www.isda.org/>.

⁷³ "The association is composed of three categories (1) primary members (the sellers) (2) associate members (primarily law firms and expertise providers) (3) the subscribers". See ISDA Bylaws available at <http://www.isda.org/>.

⁷⁴ See ISDA Master Agreement (2002).

The UN Global Compact⁷⁵. WADA is the world antidoping agency in charge of regulating and monitoring rules regarding antidoping. It is composed of private and public organizations representing different sports constituencies⁷⁶. The UN Global Compact is a voluntary policy initiative launched by the UN in 2000 with the two main goals of crystallising 10 universally accepted principles for corporate behaviour. Global Compact addresses, first and foremost, companies whose actions it intends to regulate. However standards have been developed involving other stakeholder groups, such as governments, labour and civil society organizations, and the United Nations, as well⁷⁷.

In the domain of expert-led organization, we find multi-stakeholder organizations like ISO. It is an association incorporated in Switzerland and subject to the Swiss Civil code. Its membership is made of national standard setting bodies⁷⁸. While in developed countries these bodies are primarily private, in developing countries they are mainly represented by governmental departments or agencies. ISO develops predominantly voluntary standards sold in the marketplace. With this said however, mandated adoption of ISO standards by international organizations is growing, featuring one instance of horizontal institutional complementarity.

The second variant is represented by the *contractual* model. It operates through regulatory contracts in the form of multilateral contracts, network contracts and master agreements. Regulatory contracts are often used in the field of corporate social responsibility (CSR) but diffused also in other areas: from financial markets to environmental protection and food safety. Within CSR, the leaders are often retailers but it also includes suppliers, workers and consumers⁷⁹. In other circumstances, it is driven by producers but includes also distributors and consumers. This private regulatory model uses commercial contracts along the supply chain to coordinate and regulate the activity of different enterprises (i.e. retailers and suppliers), and the relationships between second or third tier suppliers and their employees. The most powerful illustration is in the field of food safety where the specific endorsement of the supply chain approach demonstrates the regulatory function of (bilateral and multilateral) contracts often in the network form⁸⁰. Here, the main governance question is related to the incentives of retailers, often the most powerful players in the regulatory process, to act on behalf of the beneficiaries, employees of the suppliers and their final consumers. While incentives to regulate safety on behalf of the final consumers are rather powerful, (even if safety is often a credence good), employment standards is often lacking or weak. In particular the enforcement of labour and other CSR standards seems to be problematic since, unless strong pressure is exercised by consumers, significantly sized retailers might not have sufficient incentives to monitor, let alone to enforce, violations.

This brief comparative account of the various models shows both the complexity of the private sphere but also the necessity to incorporate the beneficiaries into the analysis so as to engage in cross sector analysis. The models just described highlight various regulatory relationships defined by the choice of governance arrangement in each regime on the basis of the different positions occupied by regulatees and beneficiaries. They all represent a departure from traditional self-regulatory arrangements, where the regulators and regulated coincide whilst the beneficiaries are left out of the

⁷⁵ For an overview of the different models see Ruggie, 'Business and human rights: The evolving international Agenda', 101 *American Journal of International Law* (2007) p. 819.

⁷⁶ WADA was founded in 1998 as an independent Agency composed of a foundation board, an executive committee, as well as several specialised committees. (see also: http://www.wada-ama.org/Documents/About_WADA/Statutes/WADA_Statutes_2009_EN.pdf).

⁷⁷ For a more detailed overview over the governance scheme see: http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html.

⁷⁸ See articles 3.1. and 3.1.1 of ISO Bylaws.

⁷⁹ See Ruggie, supra n. 75.

⁸⁰ See Codex Alimentarius Commission (CAC), Considerations on the impact of private standards, (2010) available at http://www.fsis.usda.gov/PDF/2010-CAC/cac33_13e.pdf, at 8.

picture. The different positions of the beneficiaries either placed inside or outside the organizations, generate different governance architectures shedding light on the overly simplistic representation of private regulation. Disentangling the private sphere permits one to reframe legitimacy questions depending on how conflicting interests are aligned or misaligned within the organizations.

Hence, these models present different legitimacy questions, associated with the different typologies of conflicts and illustrate different governance responses. A high degree of unsolved conflicts lowers both internal and external legitimacy. The different organizational options suggest that the distinctive feature is not only the internalisation of the beneficiaries in the regulatory relationship but also the recognition and solution of conflicts among different interests of the regulated entities⁸¹. The challenges posed by the emergence of the new regimes concern the effectiveness of current organizational models in governing conflicts of interests and in providing accountability to parties who are external to the organization but internal to the regime⁸². In the next section we analyse the relationship between the private sphere and the public sphere, so as to identify how different features of institutional complementarity operate.

4. The Public/Private Divide and the Approach of Institutional Complementarity in Multilevel Systems

After disentangling the private sphere and providing a brief description of the different models, a new framework is needed to describe the interaction between the private and the public sphere at transnational level⁸³. First, it is necessary to describe the changes in the allocation of rule-making power and then infer which normative implications can be drawn.

The reallocation of rule-making power between public and private actors at the State level has been taking place for at least four decades, when structural transformations of the regulatory state were initially promoted in the Anglo-American area, spreading subsequently across the Western world⁸⁴. The change from the welfare to the regulatory model has further developed into the creation of different forms of cooperation and/or competition between public and private regulatory bodies⁸⁵. The conventional division of tasks between global markets and nation-states has been profoundly transformed⁸⁶. Not only have States withheld from direct intervention in the market by privatising and regulating many activities, but also the regulatory dimension has been radically transformed, giving rise to different forms of regulatory capitalism⁸⁷. Private actors, as we have seen, have come to play new roles, engaging in different forms of private regulation. This phenomenon might imply various characterisations depending on (1) who is considered to be part of the private sphere (industry,

⁸¹ To simplify the classification we have implicitly assumed homogeneity of regulatees, while underlining that beneficiaries' interests can differ.

⁸² See for a more detailed analysis of the governance dimension see Cafaggi (2011), supra n. 54.

⁸³ See Cafaggi (2006), supra n. 54.

⁸⁴ See Baldwin and Cave, *Understanding Regulation*, (1999); Streeck, *Reforming capitalism*, (2008); Bruszt & Holzacker, *The Transnationalization of Economies, States, and Civil Societies*, (2009); Scott, 'Regulatory governance and the challenge of constitutionalism', in Oliver, Prosser and Rawlings (eds). *Regulation After the Regulatory State* (2010); Prosser, *The regulatory enterprise*, (2010).

⁸⁵ See Black, 'Constructing and contesting legitimacy and accountability in polycentric regulatory regimes', LSE law, society and economy working papers, n. 02-2008, (2008) p. 44; Scott, 'Regulating private legislation', and Prosser, 'Regulatory agencies, regulatory legitimacy and European private law', both in Cafaggi and Muir Watt, *Making European private law*, (2008), at 235 and 254. For a comparative analysis see de Burca and Scott (eds), *Law and New Governance in the European Union and the United States*, (2006); Sabel and Zeitlin, *Experimentalist Governance in the European Union, Towards A New Architecture*, (2010).

⁸⁶ See Abbott and Snidal, supra n. 13.

⁸⁷ Levi-Faur and Jordana, supra n. 10.

experts, NGOs), (2) what is the scope of the regulatory activity, and (3) which sectors are examined (market regulation or fundamental rights).

Different forms have been employed: from express transfer of rule making power to private actors to informal delegation, from co-regulatory arrangements with different allocation of tasks to shifts between *ex ante* regulation to *ex post* liability, triggering bargaining among litigants potentially translating into private regulation⁸⁸. At the state level, these modes are constrained by constitutional limitations⁸⁹. Delegation of law-making power is limited in many legal systems by 'state action' doctrines or functional equivalents; the limits are partly due to the general principles of the non-delegation doctrines, partly due to specific, often constitutional constraints, that states face when divesting their powers in favour of private actors⁹⁰. These transfers are often interpreted as the consequence of decreased state capacities to regulate, either because of capture of the regulator or because of a lack of technical expertise.

The search for legitimacy for these various regulatory forms requires different answers depending upon the origins and effects of the rule-making power⁹¹. Regimes based on freedom of contract and association need different legitimacy responses from those based on the protection of fundamental rights or the environment.

Transfer of rule-making power, however, is not the only form affecting its redistribution. In many contexts the newly globalized fields (like Internet or CSR) generate innovative modes of governance, which translate into different forms of power-sharing between public and private. What is the nature of the relationship between public and private actors concerning the reallocation of regulatory power at State and at the international level?

Three distinctive features of the public sphere are modifying the relationship with the private sphere at transnational level: (1) the significantly increased use of soft law, (2) the limited delegability of law-making power by IO and IGO to private regulators, (3) the limited, albeit increasing, direct effects on private parties of public regulatory regimes. For reasons of space I will focus on the first dimension.

Soft law can be used either as an alternative or as a complement to private regulation. At transnational level, soft law may increase competition between public and private regulation and decrease cooperation when deployed as an alternative to private regulation. When used as a complement it reinforces coordination, since it needs private law to render its principles binding at domestic level. The expansion of soft law at transnational level may reduce the number of 'formal' co-regulatory arrangements, based on the combined use of public and private regulation, while increase *ex post* recognition of privately designed standards by international organizations. Private law, especially at national level, may become an instrument to harden international soft law albeit with limited reach, giving rise to vertical institutional complementarity with the public operating in the international domain and the public at domestic level.

While the preferences of private actors for international organizations choosing hard or soft law have been, albeit to a limited extent, analysed, little work has been done on the influence of (and choice of) soft law on the forms and substance of transnational private regulation. Often soft law is coupled with self-regulation in a single category, unified by the assumed non-binding nature of both. I

⁸⁸ See Majone, 'International regulatory cooperation. A neo institutional approach', in Bermann, Herdengen and Lindseth, *Transatlantic regulatory cooperation*, (2001), 109; Cafaggi, 'Rethinking self-regulation in European Private law', in Cafaggi supra n. 54.

⁸⁹ See Cafaggi, 'Private law making and European integration', in Oliver, *et al.*, supra fn. 84.

⁹⁰ For a detailed analysis concerning the US see Metzger, 'Private delegation, due process and the duty to supervise', in Freeman and Minow, *Government by contract*, (2009) 291. For an overview see Cafaggi, supra n. 88.

⁹¹ Black, supra fn. 85.

have shown in previous work that this is not an accurate account since private regulation is 'voluntary' but binding, and should not be identified with soft law⁹².

4.1 Refining Institutional Complementarity

Institutional complementarity may take different forms: horizontal complementarity when public and private regimes co-exist at the transnational level; vertical complementarity when a transnational private regime is complemented by public legislation at the national level or vice-versa. The two forms give rise to different forms of coordination and consequently different governance issues.

The institutional complementarity approach, developed in earlier work, suggests that at the transnational level the effectiveness of private regulation strongly depends on the credibility and legitimacy of public institutions, including that of the judiciary both at domestic and international level. But perhaps surprisingly, TPR contributes to a strengthening of the legitimacy of public regimes as well. The conventional view that associates legitimacy to the public sphere and effectiveness to the private is deeply unsatisfactory. It is the nature of complementarity between the spheres and the relationship between legitimacy and effectiveness which varies at the transnational level.⁹³

In many circumstances, TPR regimes are functionally correlated to the existence and the nature of public regimes. Institutional complementarity between international public organizations and transnational private regulation may materialise in different ways depending on the specific regulatory function⁹⁴. Within rule-making there is a wide spectrum, from delegation to endorsement, from regulatory agreements with mutual obligations to public-private partnerships, including organizational integration with the creation of networks or other kinds of collaborative ventures. Each regulatory mode poses different problems of legitimacy, effectiveness and their correlation⁹⁵.

Transnational private rule-making may complement international treaties or soft law or may be complemented by public enforcement through domestic Courts. Complementarity may take place through forms of endorsement or recognition similar to that occurring at the national level, where the State recognises self-regulatory arrangements of professionals or collective agreements between trade and consumer organizations. Often private regulatory regimes are endorsed by international organizations and become binding, at least within the jurisdictions of those organizations⁹⁶. For instance CSR standards may be recognised by the ILO, private technical standards produced by ISO may be endorsed by WTO when complying with SPS or TBC agreements⁹⁷.

⁹² See Cafaggi (2006), supra n. 54.

⁹³ Such complementarity becomes particularly relevant when conflicting regimes attempt to externalise costs on the each other because the typical States' institutions that govern these processes are missing. Private macro-governance acquires greater importance.

⁹⁴ It should be underlined that unlike law making by international organizations, in the field of transnational private regulation we are far away from the identification of common rules for all the regimes. The gap-filler function is primarily played by different private domestic laws. Given their strong differences, the construction of a set of common principles is a very delicate and challenging task.

⁹⁵ This is the key issue addressed by GAL. See Kingsbury *et al.*, supra n. 18, part. 19 ff. and then Kingsbury and Stewart, 'Legitimacy and accountability in global regulatory governance: The emerging global administrative law and the design and operation of administrative tribunals of international organizations', available at: <http://www.iilj.org/aboutus/documents/LegitimacyAccountabilityandGAL.UNATvolumefinalAug82008.pdf>.

⁹⁶ See for example the explicit recognition of the ISO/IEC system as internationally accepted standards by the TBT Agreement. See, on the financial markets sector, Black and Rouch, 'The development of the Global Markets as Rule-Makers: Engagement and Legitimacy, Law and Financial Markets Review', (2008) 218, at p. 223.

⁹⁷ See Ruggie supra n. 75; Id., 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development', (2008); Stiglitz, 'Regulating multinational corporations: towards principles of cross-border legal frameworks in a globalized world balancing rights with responsibilities', American University International law review, (2008), 451.

The claim in this essay is that the public and the private spheres are mutually influential: (1) the distribution between hard and soft law within the public domain affects the functions of TPR; (2) the choice among different regulatory models, implying different regulatory relationships, reflects but also affects the nature of the public international regime. When hard law, including international treaties, is in place, private regulation acts as a complement to specify rules, tailoring them to specific markets, and frequently, formal or informal, delegation takes place. When soft law is chosen, private regulation mainly operates as a vehicle to harden soft law, providing binding force. In the former case, it increases effectiveness, in the latter, it confers higher legitimacy. Obviously there are TPR regimes that operate independently from any public regime and they seek legitimacy on different grounds.

5. The Public/Private Divide at Transnational Level: Patterns and Institutions

This section provides a preliminary answer to the following questions: are the patterns of relationship between public and private regulation at the transnational level similar to or different from those occurring at national level? Do public and private regulators present similar or different governance features at domestic and transnational level? What are the features of the redistribution of rule-making power between public and private actors at transnational level? What are the main determinants when this redistribution occurs?

It should be stated at the outset that the private-public distinction exists also at the transnational level, but it displays very different features from those developed at State level. The modes of allocation of rule-making power between public and private actors at State level cannot be transposed at the transnational level *sic et simpliciter*⁹⁸.

Differences between the public and private sphere concern in particular the legal framework. While international public law is composed of a general part, applicable to all states and international organizations, and a specific part binding only on the signatory states; TPR lacks, so far, a common legal framework, and tends to be sector specific and influenced by domestic private law regimes. Furthermore, rules of interpretation differ. While in the public domain the rules are those of the Vienna Convention on the law of Treaties (art. 31, 32), in addition to the specific rules stated by each legislative instrument, and the practice of institutions; in the field of TPR interpretation rules are those related to the instrument deployed to constitute the regime (contract, association, corporate law). They depend on the domestic system chosen to incorporate when the regulatory body takes on an organizational form, and on the place of performance if a regulatory contract has been used to set up the regulatory system.

The shift from the national to the transnational level produces remarkable phenomena concerning the reallocation of rule-making power from the public to the private. Private power and authority have grown in the past years acquiring a larger regulatory share⁹⁹. The apparent paradox is that the transfer of regulatory power from public to private at transnational level occurs within the framework of the legalisation of international relations, historically associated with the emergence of State and the public sphere¹⁰⁰. This 'apparent' paradox explains the differences with other patterns of the growth of the private sphere which have coincided with de-juridification and de-legalisation¹⁰¹. Strategic considerations entice private players to choose the transnational level. Some industries promote this

⁹⁸ See Cassese, *supra* n. 38, part. 670 ff.

⁹⁹ See Cutler *et al*, *supra* n. 20; Braithwaite and Drahos, *Global business regulation*, (2000); Cutler, *supra* n. 8.

¹⁰⁰ There is a general phenomenon of the legalisation of international relations. This is partly the consequence of increased interdependences, associated with systemic risks, which demand greater coordination and a global governance response. But it takes different forms and organizational models. On the issue of the legalisation of international relations see already Goldstein, Kahler, Keohane, Slaughter, *Legalization and world politics*, (2001).

¹⁰¹ See Teubner (ed.), *Global law without a State*, (1997).

evolution not only to respond to trade integration and international competition, but also to improve their relative position by enhancing their influence and effectiveness at transnational level, hoping to have greater impact on domestic policy.

There are at least four different forms of transformation of the relationship between the public and private dimension: hybridisation, collaborative rule-making, coordination, and competition¹⁰².

Hybridisation between private and public law tools occurs in both directions: administrative law principles are applied to private organizations exercising rule-making power at transnational level¹⁰³; contract and organizational law rules and principles are applied to the activity of IO and IGO to regulate firms and other entities.

Collaborative Rule Making occurs when private and public actors engage in a process by which rules are jointly drafted. A variant is when private actors draft rules and the public actors subsequently approve or endorse them. Clearly when the latter occurs the private actor internalises the principles upon which the public actor will endorse the private rules¹⁰⁴. Collaborative rule making can take place within multi-stakeholder organizations encompassing both private and public actors or through regulatory contracts in the form of agreement or MoU.

Coordination implies *interdependence* between independent private and public regimes. Unlike collaborative rule-making, here the two regimes are autonomous but their regulatory activities are mutually influenced. Coordination has different goals. In some cases, it serves to improve deterrence. A typical example is that of a public regime defining due diligence in relation to compliance with private standards. In other instances, it increases effectiveness by using targeted monitoring of transnational rules. Coordination favours legal transplants across regimes; it promotes transfer of regulatory strategies and enforcement from private to public and vice-versa as is the case for the 'supply chain approach' adopted in many public safety regimes¹⁰⁵. Often private regulators design rules to be later endorsed by the public regulator, either through judicial or administrative recognition.

Competition between public and private regimes at transnational level occurs when private actors raise the standards defined by the public actor, thereby decreasing the legitimacy of public regulation and taking leadership without being subject to the procedural requirements applied to international public law regimes. To some extent, even competition can produce legal transplants when those who are winning the competition are imitated by newcomers. Competition takes place both in vertical complementarity between transnational regulators and States and in horizontal complementarity between IO and IGO and private regulators.

The four modes suggest that institutional complementarity may take different forms depending on (1) the identity of the participants and, in particular, which private actors play a dominant role, (2) the instruments adopted, contractual or organizational and (3) the objectives of the regulatory regimes: increasing legitimacy and/or improving effectiveness. Incentives of parties to adopt one or the other may vary depending on the sector, the level of market integration and its structure. While it was emphasised that changes in the public sphere have been an important factor in determining if and how private regulation developed, the forms of complementarity depend significantly upon the model of private regulators.

In relation to the private parties, the different combinations of governance models between regulatees and beneficiaries may affect the choice. Empirical research is needed to clarify whether

¹⁰² For different perspectives see Kingsbury, *supra* n. 31; and von Bogdandy, *et al.*, *supra* n. 12.

¹⁰³ See Kingsbury *et al.*, *supra* n. 18.

¹⁰⁴ One increasing phenomenon is the negotiation of standards between big MNCs and strong individual developing countries or clusters of them. On these phenomena in relation to financial markets see Pistor, 'Global network finance: Institutional innovation in the global financial market place', *Journal of comparative economics* (2009) p. 552

¹⁰⁵ See Cafaggi, 'Legal transplants in TPR: new challenges for comparative law', on file with the author.

general patterns exist to distinguish between forms of complementarity selected by NGO-led regulators versus forms of complementarity chosen by industry-led private regulators. Linking the four models of TPR described before with the four modes of complementarity just outlined will provide new insights on how the transnational regulatory space is defined. I now focus on two forms: hybridization and coordination.

5.1. Hybridization of public and private law in transnational regulatory regimes

Hybridization is a form of transnational regulatory integration between public and private that can take different forms. But at least two are easily recognizable and rather diffused.

5.1.1. Gap-filling function of private domestic organizational law¹⁰⁶ in charters and bylaws of transnational private regulators

The regulatory bodies at transnational level choose different legal forms, ranging from informal to formal and, within the latter, both international organizations and private entities. Among private entities we find contractual and organizational models. The latter can be further distinguished between 'for' profit and 'not for' profit¹⁰⁷. Often, given the complexity of the regulatory activity, the organization creates a corporate group with a not for profit at the apex and for profit or foundation acting as operative entities. An example of this organizational model is provided by the already mentioned Forest Stewardship Council (FSC), where the association, incorporated in Mexico and regulated by the Mexican law of association, has created a German limited liability company GmbH, incorporated in Germany, to provide accreditation to bodies that should certify firms' compliance with the FSC Principles¹⁰⁸.

The distinction between for profit and non profit plays an important role not only in the selection of governance models but also in the definition of the combination between individual and public interest. In the for profit domain the activity is often driven by profit motives, although there might be circumstances where the choice is motivated by organizational features that make the for profit more attractive even when public interest is the primary concern.¹⁰⁹

In the not for profit area there are foundations and associations. The non-distribution constraint is meant to signal that the goals are not profit driven. Within this category the distinction between mutual and public benefit distinguishes between club like models and open organization designed to benefit third parties. Within the associational model at least two types of associations exist: those which create or stabilize an existing network and those which provide the basis for multi-level governance. An example of the former is the IATA, while examples of the latter include ISO, ICANN, ISDA, to name

¹⁰⁶ In the context of this essay domestic private law is considered publicly produced law. Thus hybridization occurs between private national law and transnational privately produced regulation.

¹⁰⁷ See Davis, *supra* fn. 16.

¹⁰⁸ See Nowrot, 'Forest Stewardship Council', in Tietje and Brouden (eds), *Handbook of transnational economic governance regimes*, (2009), p. 864 ff.; Meidinger, *supra* fn. 28.

¹⁰⁹ In the for profit area many examples concern e-commerce and financial markets. Here the corporate model designs trading platforms whose transactions are regulated by contracts like users agreement. For example eBay is a for profit corporation regulating electronic trading platforms. For a general overview of the auction site model, see Casarosa, 'Online auction site: an example of regulation of the electronic communities?', *European Review of Private Law*, (2009), 1, 5.

a few¹¹⁰. Another example is the International Olympic Committee whose constitutional statute is the Olympic Charter¹¹¹.

Less frequently the foundational model is adopted. An example in the accounting field is the already mentioned IASB¹¹². Standards are drafted at the international level by IASB which is part of a complex architecture built around the IASC (International Accounting standard committee, a foundation whose members are appointed by trustees, established in a different form in 1973¹¹³). The process of the internationalization of standards is related to the need to promote capital flows and the creation of an integrated capital market. Differences in accounting standards would produce hurdles to capital mobility. This process has had to cope with significant institutional and substantive diversity as between the Anglo-American and continental European systems. They reflect different views of the profession's role and in turn a different relationship between the State's oversight and professional regulatory activity¹¹⁴. The process of internationalization has also changed the power allocation among private actors: international auditing firms have gained more influence compared to national associations, which are more divided and reflect the expression of national interests. This is a relatively common feature of transnationalized private governance. IFRS constitutes a comprehensive example of the different types of relationships because they have been endorsed by other private regulators (Stock Exchanges) by international networks operating through soft law (Financial stability Board, IOSCO) and by States deploying hard law.

IFRS have been selected in the Compendium of Standards drafted by the Financial Stability Board, previously Financial Stability Forum¹¹⁵. They are also deployed by World Bank and IMF. This is an example of transnational private regulation incorporated in soft law, redeployed by international organisations and implemented (often through) hard law at the regional (EU) or State level¹¹⁶. The EU, for example, has recognised the standards, sometimes in full, sometimes only partially, and has allowed MSs to adopt stricter standards at national level.

A second example is provided by Credit rating agencies. Notice that in both the examples concerning the financial sector, credit rating agencies and accounting firms, the transnational landscape is characterized by an oligopolistic market with a few players. It is clear that when markets are not fully competitive the standardization process may lead to barriers to entry. These market features pose further questions as to the interplay between private and public actors since the adoption of these standards by public or hybrid bodies can legitimize the anti-competitive function. The

¹¹⁰ See for an overview over the particular structures: IATA: <http://www.iata.org/about/Pages/corporate-structure.aspx>; ISO: http://www.iso.org/iso/about/governance_and_operations.htm; Iann: <http://www.icann.org/en/about/>; and ISDA: <http://www.isda.org/>, all last visited December 2010.

¹¹¹ IOC is a multilevel network structure that is related to national Olympic committees and International federations. See IOC Olympic Charter, available at: http://multimedia.olympic.org/pdf/en_report_122.pdf, last visited December 2010.

¹¹² See the Constitution articles of the Foundation created in 2001 stating its mission. In particular art. 2 lett (a) "to develop, in the public interest, a single set of high quality, understandable and enforceable global accounting standard that require high quality, transparent and comparable information in financial statements and other financial reporting to help participants in the world's capital markets and other users make economic decisions;[...] (d) to bring about convergence of national accounting standard and international accounting standards and international financial reporting standards to high quality solutions."

¹¹³ See, for an overview over the development of the IASC and later IASB: Camfferman and Zeff, *Financial Reporting and Global Capital Markets*, (2007).

¹¹⁴ See Botzen, 'Transnational export-driven standardization. Accountancy governance from a professional point of view', in Graz and Nolke, *Transnational private governance and its limits*, (2008), p. 44 ff. part. 48-49

¹¹⁵ See Compendium of Standards available at: http://www.financialstabilityboard.org/cos/key_standards.htm, last visited December 2010.

¹¹⁶ See, Black and Rouch, *supra* fn. 96.

adoption of private standards developed by private regulators, acting in a deficient competitive setting, should require stronger complementary accountability systems, based on governance and liability¹¹⁷.

In these two models regulators are primarily professional firms; the regulated (the firms having to comply with the standards) enjoy great influence in the standard-setting process while the final beneficiaries, the investors and creditors, have little or no say in making the rules and use primarily national liability systems to challenge those standards and monitor their compliance¹¹⁸.

These private organizations are incorporated in one country and their governance is regulated by the bylaws and the law of that country. The ISO is regulated by the Swiss civil Code, since it is an association incorporated in Switzerland¹¹⁹, IOC is regulated by Swiss law, ICANN is regulated by California law, EASA is regulated by Belgian law, FSC is regulated by Mexican law¹²⁰. While in theory it is possible for incorporation to be accompanied with a choice of law option in favour of a different country, this generally does not happen.

Private charters and bylaws or contracts are complemented by State law where the organization is incorporated to acquire legal personality or, in the case of private regulators created through multilateral agreement the State law indicated by the parties or defined through the rules of private international law.

Since incorporation is generally driven by political rather than legal consideration the choice of the gap-filler might not be the optimal one. In addition the diversity of places of incorporation and that of national laws makes it rather difficult to create a common set of principles that would operate as general principles for transnational private regulators as it happens with reference to IO and IGO

5.1.2. Application of administrative law to private regulators

Application to organizational models

Hybridization also consists of applying principles developed within national administrative law, primarily in the US but also in the EU, to the internal activity of those organizations regulated by national private law¹²¹. This phenomenon has taken place at the national level in relation to forms of government outsourcing which have characterized the transformation of the regulatory state¹²². Mistakenly often outsourcing of service provisions is associated to contracting out regulatory functions. In this essay, I look only at regulatory functions transferred to private actors at transnational level conditional upon transformation of both governance structure and activity.

¹¹⁷ See Cafaggi, 'The accountability of private regulators: the complementarity of voice, exit and loyalty', presentation made in The Hague, October 8/9, 2009.

¹¹⁸ See the Brazilian legislation that makes the IASB standards applicable (Instrução CVM n 457, 13/07/2007) and the legislation of the U.S. SEC enabling the use of these standards in the US (release n 33-8879). They are enforced through the normal enforcement procedures of these securities exchange commissions.

¹¹⁹ See for example Art. 17 of ISO Statutes which also selects the Canton of Geneva as the competent court for disputes arising between the members of the Organization.

¹²⁰ ICANN, for example, has been involved in a number of cases within the U.S. mostly involving anti-trust and unfair competition claims, but also First and Fifth Amendments claims; see, *Coalition For ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, C.A.9 (Cal.),2010; *Prism Technologies LLC v. VeriSign, Inc.*, 579 F.Supp.2d 625 D.Del., 2008; *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1369 (Fed.Cir.2008); *Verisign, Inc. v. Internet Corp.*, 2004-1 Trade Cas. (CCH) P 74428, 2004 WL 1945561 (C.D. Cal. 2004); *McNeil v. Verisign, Inc.*, 127 Fed. Appx. 913 (9th Cir. 2005).

¹²¹ See Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law', 68 LCP (2005) 63; von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field', 9 German Law Journal (2008), 1909; Anthony, Auby, Morrison and Zwart, *Values in global administrative law*, OUP, 2010.

¹²² See Freeman and Minow, supra FN. 90; Prosser, supra n. 84; Oliver *et al.*, supra fn. 84.

Rules concerning transparency, participation, reason-giving, judicial or non-judicial review are generally applied to these private bodies¹²³. They have modified their own private charters, bylaws or they have annexed guidelines, including these principles and making them binding.

Examples of adoption of GAL principles range from financial to technical standard sectors to environmental and consumer protection. In the area of accounting, IASC has drafted a due process handbook for the IASB that reflects the mission stated in the articles of its Constitution where the public interest function and the goal of standards' harmonization are clearly stated¹²⁴. ICANN provides an example of internal rules of a private organization incorporating due process¹²⁵ and other GAL principles in Internet governance¹²⁶. ISO has also enacted rules concerning the standard-setting process to increase the accountability by introducing procedural requirements¹²⁷.

Private organizations should not be lumped up in a single category. The degree of openness and transparency varies and the application of GAL type principles has been different in relation to associations, foundations, trusts, for profit corporations. Internal organizational rules concerning membership, participation, transparency, delegation of rule-making powers differ: the associational model tends to be more responsive to stakeholders than the foundational model, which reflects a managerial architecture. Thence, different private organizational models have required tailored strategies. But the drivers of organizational change have been numerous. Three different sets of factors have promoted these changes:

Internal factors

External factors. Other regimes, public or private;

Judicial intervention.

- a) Internal factors refer to stakeholders pressure exercised to increase transparency and accountability in different ways: either through direct influence when membership allowed or by way of litigation. Voice is reflected in different mechanisms including social and market accountability. Pressure exercised by stakeholders who have market or social relationships with the regulatees or directly with the regulators has produced some changes. NGOs have played a prominent role in promoting hybridization instrumental to promote their access to standard setting and increasing bargaining influence. They have often used litigation to start bargaining processes with controlling stakeholders that could produce internal reforms.
- b) A second way to promote hybridization comes from the influence of other regimes. In particular public regimes and organizations have made access conditional upon the adoption and compliance with GAL principles. Examples range from the WTO code of practice to the conditionality practice of the World Bank¹²⁸. While these processes are often promoted by public regimes it has also happened that private regimes, mainly in the field of CSR and

¹²³ See for example the Global GAP Standards and Certification Procedure, available at: http://www.globalgap.org/cms/front_content.php?idcat=3; or the FSC provisions concerning dispute resolution: <http://www.fsc.org/706.html>. See also Kingsbury *et al.*, cit supra n. 18; Cassese, supra n. 38, p. 664; Stewart, 'The Global Regulatory Challenge to U.S. Administrative Law,' 37 *NYU Journal on International Law and Politics* (2006), 695; and Kingsbury and Stewart, supra n. 95.

¹²⁴ See International Accounting Standards Committee Foundation, Due process Handbook for the IASB, approved by the Trustees, October, 2008, available at <http://www.iasb.org/NR/rdonlyres/1E8D75B7-927F-495B-BE4A-04C9BE967097/0/DueProcess09.pdf>, last visited December 2010.

¹²⁵ See the Uniform Domain-Name Dispute Resolution System rules at <http://www.icann.org/en/udrp/udrp.htm>, last visited December 2010.

¹²⁶ See Cassese, *Il diritto globale. Giustizia e democrazia oltre lo Stato*, (2009).

¹²⁷ For an analysis extended to US, Mc Donnelly, *Delegation of Governmental Power to Private Parties. A Comparative Perspective*, (2007); for the US see Freeman and Minow, supra n. 90.

¹²⁸ See Stewart, Ratton Sanchez Badin, 'The World Trade Organization and Global Administrative Law', IILJ Working Paper 2009/7, Global Administrative Law Series, available at: <http://www.iilj.org/publications/documents/2009-7.StewartRatton-Sanchez.pdf>.

fundamental rights protection, have forced other regimes, for example, trade and electronic commerce, to introduce GAL principles in order to enhance accountability. It is important to point out that the promotion of hybridization has been associated to that of international harmonization. The WTO presumption of compliance with trade rules associated with the adoption of international standards is an important factor of international harmonization which has been applied also to hybridization. The diffusion of GAL principles has thus occurred through the channels of international harmonization¹²⁹.

- c) A third way to promote the introduction of procedural rights has been through litigation before domestic Courts and, to a more limited extent, before private enforcers¹³⁰. In some instances private regulators have been asked to modify their rules by Courts. This has happened when the public function of the regulatory process was not compatible with internal rules. Courts have asked for stronger functional separation between law making and enforcement, providing the enforcer with higher level of independence.

Application to contractual models

A third form of hybridization concerns the use of regulatory contracts, when public organizations outsource or delegate functions to private entities¹³¹. Organizations, created by international public law, can operate through contract both when they organize their activities and when they confer power to private entities through delegation of rule-making power or monitoring and enforcement functions as it happens when disputes are settled by independent organizations¹³². While in the former case administrative law principles concerning the regulatory activity are applied to the governance of private organizations, in the latter case private law instruments like contracts are deployed to allocate rule-making, monitoring and enforcement power from IO or IGO to other international organizations or to private bodies¹³³.

Different forms of delegation to transnational private regulators by States and international organizations have been taking place at transnational level¹³⁴. These forms of delegation have often a contractual nature and confer to the delegated body the function of specifying rules and/or implementing them¹³⁵. In some contexts they attribute to the body in question the power to raise the

¹²⁹ See *ibid.*

¹³⁰ See Benvenisti, 'Reclaiming democracy: the strategic uses of foreign and international law by national Courts', *The American Journal of International Law*, vol. 102, 2008, 241, Kingsbury 'Weighing global regulatory rules and decisions in national Courts', *Acta juridical* (2009); Whytock, 'Domestic Courts and global governance', 84 *Tulane L. R.* 67 (2009), Howse and Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters', 1 *Global Policy* (2010), 127.

¹³¹ See, in relation to US, Freeman and Minow, *supra* n. 90.

¹³² See for instance, forms of delegations within the WTO that refers directly in its TBT Agreement to international technical standards (Article 2.4 TBT Agreement) which also include private standards such as ISO; or in the public area the references in the SPS agreement to standards established by the Codex Alimentarius Commission (see Art. 3 (a) SPS Agreement; on this see furthermore: Büthe, 'The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization', 71 *Law & Contemp. Probs.* (2008) 219.

A further example is the Cooperation Agreement signed between the UN Global Compact and the Global Reporting Initiative, in which GRI agreed to develop guidance for the Global Compacts 10 Principles and integrate those principles in its sustainability reports and in turn the Global Compact will recommend GRI reporting for its corporate members (see http://www.globalreporting.org/NR/rdonlyres/A72A4645-B6FA-40B5-A1EE-A64E6F0CFBB2/0/260607_COP_MTC.PDF).

¹³³ For a map Abbott and Snidal, *supra* fn. 13, 50 and in a different perspective Buthe and Mattli (2011), *supra* fn. 58.

¹³⁴ See Hathaway, 'International Delegation and State Sovereignty', 71 *Law & Contemp. Probs.* (2008) 115 and Büthe, *supra* fn. 132, both are however predominantly concerned with delegation to public institutions.

¹³⁵ The boundaries between rule-making and implementation are often blurred.

minimum standards defined by public international law (as in the case of food safety)¹³⁶. These contracts are almost by definition incomplete since they allocate on the private body (or bodies) the regulatory function. Regulatory contract incompleteness generates severe agency problems concerning oversight and thus accountability deficits. Each regime has developed its own (inadequate) rules and general principles concerning delegation to transnational private regulators are missing.

A second aspect of contracting out regulatory function is related to contractualizing accountability mechanisms. In relation to private actors judicial review often has limited scope. If the delegating authority wants to increase contractual accountability of the delegatee, specific contractual provisions have to be integrated in the contract. By contractualizing accountability tasks, what in the domain of public regulation is generally performed by judicial review becomes a liability issue and can therefore become the subject matter of litigation.

These forms of hybridization reflect, to a limited extent, analogous phenomena taking place at the national level where reciprocal borrowing takes place. This is particularly true in those legal systems like UK and Italy where administrative law has shifted from a hierarchical to a consensual-contractual approach¹³⁷. Similar questions have arisen in the US and, in a different fashion, Australia and New Zealand¹³⁸. However, it should be pointed out, contractualizing public administration and outsourcing government functions are quite different things. With outsourcing what used to be thought as government 'inherent' functions have been externalized to private actors. The extent to which the functions remain public, even if performed by private actors, is a matter concerning modes of delegation and degree of public oversight. Certainly a key question is associated with judicial review¹³⁹.

The transnational level presents even greater challenges since a strong public apparatus does not exist. Both transnational public oversight and judicial review are unavailable. Privatization of regulatory functions through outsourcing has followed different approaches at the national level and these divergences make it difficult to resort to domestic institutions to exercise control¹⁴⁰.

The combined use of administrative law principles and private law devices reflects a more general trend of convergence of hierarchy and market forms of oversight towards the network dimension which legally shares features of both ideal types¹⁴¹. They pose important challenges to both public and private enforcers because they require revision of principles concerning the application of judicial review, standing, remedies and, more generally, procedural due process. The transplant of domestic administrative law principles has to be accompanied by strong governance reforms to reduce the tension between public law principles and private law organizational models.

¹³⁶ Delegated bodies may have their own regulatory power to which the delegated rule making power is added or may be created with delegation and their power is entirely dependent on the delegation. In the first case the combination of original and conferred rule making power may generate some conflicts.

¹³⁷ See for the UK see Craig, *Administrative law*, 6th ed. 2008 and Vincent Jones, *The New Public Contracting: Regulation, Responsiveness, Relationality*, (2006); Prosser, *supra* n. 84; for Italy see Cassese, *Il diritto amministrativo: storia e prospettive*, (2010).

¹³⁸ For the US, see Freeman and Minow, *supra* n. 90. For Australia and New Zealand, Braithwaite, *supra* n. 2.

¹³⁹ Clearly if functions that were subject to judicial oversight become purely discretionary and left only to internal control or at best bureaucratic oversight the potential conflict with democratic values and compliance with the rule of law is high. If similar or complementary accountability mechanisms are provided these risks are minimized. In terms of hybridity one should look more at the quality rather than the quantity of public law devices applied to regulatory activities outsourced to private actors.

¹⁴⁰ For a comparative analysis concerning EU and US see Mac Donnelly, *cit. supra* n. 127.

¹⁴¹ On the combination of public and private accountability mechanisms see Freeman and Minow, *supra* n. 90, p. 16. For a broader analysis of the interplay between market and public accountability see Cafaggi, *supra* fn. 88, p. 3. For the use of network as organizational forms to implement regulation see Cafaggi, 'Product Safety, Private Standard Setting and Information Networks', in Cafaggi and Muir Watt, *Regulatory Functions of European Private Law*, (2009), p. 289.

To some extent this hybridization is the outcome of a process whereby new *equilibria* are generated between legitimacy and effectiveness in transnational regulation. The principles of administrative law can be seen as enhancing legitimacy, the use of private law rules as increasing effectiveness and good governance. But theoretically the two should not always be juxtaposed and this leads to a call for more nuanced answers about the causes and consequences of hybridity between private and public regimes.

5.2. Collaborative transnational regulation

A second form of interaction between public and private regimes is based on actors more than instruments. Several public-private partnerships (PPP) have been created to engage in collaborative rule-making or to design a regulatory process where the division of tasks concerns different regulatory functions: in the former case the private innovates and the public stabilizes, in relation to the latter the public (IO or IGO) defines the rules that firms have to comply with, while the private (trade associations, independent bodies or NGOs) monitors their compliance and national Courts enforce them when violations occur. Collaboration may therefore occur within the same stage or across different stages of the regulatory process. Collaborative rule making can take different forms.

A first form is collaboration through the participation to a common network or organization or through entering into agreements. In the first example an organization is created that drafts rules to be applied to both public and private actors. For example in the area of sports this is the case for WADA code, the antidoping code drafted by the Antidoping world agency. In the second example public entities (international or intergovernmental organizations) and private actors sign agreements that might (private contracts) or might not (international soft law) be directly binding on the signatories.

A second form of collaboration is that of delegation. Rule making power can be delegated to private regulators by States or by IGO and or IO. Delegation implies collaboration since the agent should implement the indications provided by the principal(s) in a cooperative fashion by keeping its interests aligned with those of the delegator and when the latter is a public entity with the citizens, the final beneficiaries. The delegation transfers the power to the delegatee who exercises it under the supervision of the delegator and/or third parties designated by the delegator to monitor the private regulator. The accountability and effectiveness of delegation depend upon the scope and structure of delegation. If the regulatory contract is principle-based, with little specifications about contractual performance, the private regulator enjoys high discretion, which may increase effectiveness because it confers flexibility, but decreases accountability. The oversight power is combined with some degree of judicial oversight. Direct judicial review may be complemented by civil liability claims when third parties are given the power to bring claims towards the private regulator for breach of rules related to the delegation. Civil liability may increase the costs of regulation in the short run but can certainly provide incentives to design effective agency contracts where the balance between *ex ante* specification and *ex post* control of discretionary power is well designed.

Constitutional limits to delegation are common to various legal systems which differ both on the degree and control over these transfers and the obligations imposed on the delegatee *vis a vis* the delegator and towards third parties¹⁴². An international common approach to delegation is missing and each sector has produced different rules. Factors leading to delegation are to some extent similar to those driving delegation at domestic level: higher expertise, greater ability to keep up with regulatory innovation, to design flexible standards and increase compliance. But differences are also significant.

¹⁴² For a specific analysis concerning delegation of government power to private entities under US law see Metzger, supra n. 90, p. 291 ff. p. 293 ff. For a comparative analysis on delegation to private parties see Mac Donnelly, supra fn. 127.

6. International soft law and transnational private regulation: alternative or complements?

While hybridization at the global level partly mirrors phenomena of integration between administrative and private law occurring at the national level, other relationships between the private and public spheres take original forms.

Institutional complementarity between private and public can be intentionally pursued or may develop to respond to weaknesses of both transnational public and private regulation. In the former case public and private regulators explicitly coordinate and refer to each others instruments by, for instance, incorporating soft law into contracts. In the latter case coordination is implicit and it implies some overlap of cooperation and competition between private and public regimes. For example, private regulators enact higher standards implicitly relying upon minimum legal standards approved at national level by public entities.

The growing deployment of soft law at the international level depends on several factors¹⁴³. In some cases, as that of UN, ILO and OECD, to name a few, the organizational strategy has changed over time, shifting from Treaty-based regulations to Recommendations and Guidelines¹⁴⁴. In other cases the use of soft law depends upon a lack of law-making power on the part of an IO or IGO due to the absence of delegation by States¹⁴⁵. In other contexts, it depends on the informal nature of the organisation, as it is often the case with new global networks¹⁴⁶. Networks operating at transnational level range from purely informal to semi-formalised by using the associational or the contractual form¹⁴⁷.

Functionally, international soft law may either represent the first step towards more structured and legally binding agreement or may never evolve into hard law arrangements, in order to grant flexibility and regulatory innovation¹⁴⁸. Private regulation complementing soft law reflects these two different patterns. The use of soft law instead of, or in addition to, international treaties has different goals:

¹⁴³ In this contribution I assume the existence of soft law without engaging into a normative analysis concerning its desirability. For a good overview see Pollack and Shaffer, 'Hard and soft law: Alternatives, Complements, and Antagonists in International Governance', *Minnesota L.R.* (2010), 706; Thürer, 'Soft Law', *Max Planck Encyclopedia of International Law*, (2009), available online, with further references; see also Nasser, 'Sources and Norms of International Law: A Study on Soft Law', Galda, Wilch, (2008); Hillgenberg, 'A fresh look at soft law', 10 *EJIL* (1999), 499-515. With regard to factors that influenced the growing application of soft law see, Kirton and Trebilcock, 'Hard Choices and Soft Law in Sustainable Global Governance', in Kirton and Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards In Global Trade, Environment And Social Governance*, (2004), 3 ff..

¹⁴⁴ The most common example is the UN Global Compact, information available at: <http://www.unglobalcompact.org/>, last visited December 2010. Furthermore, with regard to the OECD, see OECD Guidelines for Multinational Enterprises, available at: <http://www.oecd.org/dataoecd/56/36/1922428.pdf>, last visited December 2010; with regard to the ILO see ILO Declaration on Social Justice for a Fair Globalization, adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_099766.pdf, last visited December 2010.. A good overview with regard to the shifts in the legislative strategies of the ILO and OECD can be found in: Abbott and Snidal, 'Hard and Soft Law in International governance', 54 *International Organization* (2000). 421, 434 *et seq.* A general overview is also found in Kirton and Trebilcock, *supra* fn. 143.

¹⁴⁵ See generally on (law making) powers of international organizations: Alvarez, *supra* fn. 35, in particularly chapter 3 and there p. 120 ff.; Klabbers, *An Introduction to International Institutional Law*, (2009), 2 ed., p. 206; Schemers and Blokker, *International Institutional Law*, (2003), chapter 3; Sarooshi, *International Organizations and their Exercise of Sovereign Powers*, (2007).

¹⁴⁶ See Slaughter (2004), *supra* fn. 36.

¹⁴⁷ See for an example of an informal network of Competition authorities ICN. See on this network, its scope and instruments Fox, *International lawyer*, (2009), p. 515.

¹⁴⁸ See Abbott and Snidal, 'Pathway to cooperation', in Benvenisti and Hirsch, *The impact of international law on international cooperation*, (2004), p. 50 ff.; and Meyer, 'Soft law as delegation', 32 *Fordham International Law Journal* (2009), p. 888.

some related to higher flexibility, some concerned with the difficulty to reach political consensus, some dependent upon the low enforcement of international law by way of conventional sanctions through States' responsibility¹⁴⁹.

References to international soft law may take different forms. In some cases soft law international standards are considered part of international customary law, thus part of international law¹⁵⁰. In other contexts, because of their soft nature, they are considered outside of the domain of international law and mainly referred to as technical standards¹⁵¹. National courts facing litigation between transnational actors or between them and domestic actors vary in devising the distinction between international soft law and international custom¹⁵². These differences affect also the relationship between standard creation and judicial innovation. When standards are included in industry custom, judges can use them only insofar as the majority of industry in the sector has already adopted them. Judicial recognition operates as a stabilizer of soft law standards. When private regulatory standards are considered outside of customary practices Courts have higher discretion and can deploy them even if they have not been adopted by the whole industry. In this frame judicial recognition operates as an agent of innovation in standard-setting transforming minority practices into legally binding standards. Clearly a difference should be made by Courts between industry created standards, standards generated by NGOs and standards created by multi-stakeholder organisations. However, so far, national courts have paid relative attention to the modes of standard formation and to the participation of single or multiple stakeholders in the rule-making process.

The direct application of international soft law to private parties faces two difficulties: (1) its non-binding nature, (2) the direct inapplicability (*rectius* the limited direct applicability) of international law, including soft law, to private parties.

(1) Soft law is generally associated to non-binding rules¹⁵³. While it is certainly true that the degree of 'bindingness' is lower than (that of) hard law, it should be clearly acknowledged that domestic and

¹⁴⁹ See Abbot and Snidal, *supra* fn.144, p. 422, examining comparative advantages of hard and soft law, "By using hard law to order their relations, international actors reduce transaction costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting...". And further on: "Soft legalization also provides certain benefits not available under hard legalization. It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time. In addition soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power." p. 423. Factors that may justify preference for soft law include: "sovereignty costs, uncertainty divergence among national preferences, differences in time horizons and discount rates, and power differentials among major actors" p. 436.

¹⁵⁰ See in particular, the jurisdiction of the Indian Supreme Court regarding international environmental soft law instruments. The Court incorporated principles of the Stockholm and Rio Declarations as "law of the land" on the basis that they have to be regarded as customary international law. *Vellore Citizen's Welfare Forum v. Union of India and others* (1996) 5 SCC 647; *AP Pollution Control Board v Nayudu*, 1999 SOL Case No. 53, 27 January 1999, unreported.

¹⁵¹ Good examples are technical standards, as for example those set by ISO. Courts normally refer to the national members of ISO (e.g. DIN or ANSI), who often implement ISO standards into their national systems. For decisions that refer to those technical standards, see below fn. 162.

¹⁵² See, e.g. the decisions of the Indian Supreme Court (above fn. 150) that saw a particular soft law regime as so evolved a that it constituted customary international law; see furthermore Thürer, *supra* fn. 143, para 32 who states that soft law can be in particular relevant for the constitutive elements of customary law, by shaping state practice and opinion *iuris*.

¹⁵³ According to Article 38 I of the ICJ-Statute the Court decides applying the following sources: treaties, customary law and general principles as primary, and judicial decisions as well as scholarly opinions as secondary sources. Thus, these norms are of decisive character while other possible sources are not listed and therefore, at least formally, non-binding. See, generally also, Thürer, *supra* fn. 143; Francioni, 'International "Soft law": A Contemporary Assessment', in Lowe and Fitzmaurice (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, (1996), 167.

international Courts have granted binding effects to soft law through different avenues: international customary law, private law, mainly contract and civil liability¹⁵⁴.

(2) Limited direct applicability to private parties. The limited direct applicability of soft law to private parties derives from the more general principle of public international law which, conventionally, imposes primary responsibility on States¹⁵⁵. This view has been criticized and increasingly international law obligations are also applied directly to private parties¹⁵⁶. However, the overall applicability of soft law to private parties is still limited¹⁵⁷.

The wider use of soft law has two apparently opposite consequences on the forms and on the domains of transnational private regulation: on the one hand, it reduces the legitimacy-enhancing function of public law; on the other hand, it provides similar flexibility to that conventionally associated with private regimes, making it a better alternative to private regulation, thereby reducing the latter's comparative advantages.

As we have seen in domestic regimes, hard law, in the form of mandatory legislation that defines the principles and then delegates the implementation to private actors, often provides legitimacy to private regulation and empowers private regulators to reach parties who would not otherwise be

¹⁵⁴ Courts have referred to soft law as part of international customary law; see for example the decisions of the Indian Supreme Court when assessing international environmental soft law instruments. The Court incorporated principles of the Stockholm and Rio Declarations as "law of the land" on the basis that they have to be regarded as customary international law. *Vellore Citizen's Welfare Forum v. Union of India and others* (1996) 5 SCC 647; *AP Pollution Control Board v. Nayudu*, 1999 SOL Case No. 53, 27 January 1999, unreported. Courts have used soft law as one component of the standard of care in the tort of negligence.

See, e.g., decisions by the German Bundesgerichtshof with regard to DIN-Norms (DIN is the German member of ISO): BGH VI ZR 137/82, Decision of November 29 1983, NJW 1984, 801, 802; BGH, VI ZR 272/86, Decision of March 1, 1988, BGHZ 103, 338, 342; BGH, VI ZR 142/00, Decision of March 13, 2001, NJW 2001, 2019, 2020; BGH, VI ZR 447/00, Decision of December 4, 2001, NJW-RR 2002, 525, 526; BGH, VI ZR 95/03, Decision of February 3, 2004, VersR 2004, 657, 658. Furthermore, the Bundesgerichtshof held that they could shift the burden of proof concerning the causality between the violating act and the damage: BGH, V ZR 165/89, Decision of April 26, 1991, BGHZ 263, 275-76.

In the USA a similar approach is taken, in *W.D. Louisiana v. Nabors Drilling USA, LP, et al.*, 2010 WL 2629815; for example, the District Court held with regard to ANSI (member of ISO) that: "Violations of ANSI and API standards are not bases for negligence per se as they are not legislative enactments, laws or regulations. See *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 709 (5th Cir.1981) (requiring a "legislative enactment" to establish negligence per se). Nevertheless, in some cases, those standards might be applicable to establish the standard of care under a general negligence analysis." See furthermore, *Dixon v. International Harvester Co.*, 754 F.2d 573, 581-82 (5th Cir.1985); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 (5th Cir.1982); *Melerine*, 659 F.2d at 710-12.

See also Senden, *Soft Law in European Community Law*, (2004), in particular 361 *et seq.*, who focuses on the application of soft law in an European context. With regard to judicial decisions Senden mainly sees in soft law an interpretative tool.

¹⁵⁵ Traditionally states were, apart from a small number of exceptions, the only subjects of international law. They possessed international legal personality, based on the fact that they were regarded as sovereign, equal and independent. For a good overview concerning the development in this regard, see Walter, 'Subjects of International Law', *Max Planck Encyclopedia of Public International Law*, supra fn. **. See in particular also ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949.

¹⁵⁶ See, e.g., Case 36/74, *Walrave v. Association Union Cycliste Internationale*, 1974 E.C.R. 1405, where the ECJ held that anti-discriminatory provisions of the Treaty of Rome also apply to private entities (employment discrimination); *Presbyteriam Church of Sudan v. Talisman Energy*, 244 F.Supp.2d. 289 (2003), affirmed that private actors can as well be held liable for jus cogens violations; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2007), concerned the involvement in with Apartheid regime (case was dismissed); see also, Francioni, *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea*, (2008). Vázquez, C. M. Direct vs. Indirect Obligations of Corporations Under International Law, *Columbia Journal of Transnational Law*, 43 *Colum. J. Transnat'l L.* (2005) 927; Stiglitz, 'Regulating Multinational Corporations: Towards principles of Cross-Border legal frameworks in a globalized world balancing rights with responsibilities', 23 *American University International Law Review* (2007-2008) 451.

¹⁵⁷ See in particular Peters, 'Membership in the Global Constitutional Community', in Klappers, Peters, and Ulfstein, *The Constitutionalization of International Law*, (2009), 153, 251, who examines ways by which business actors enforce international hard and soft law.

affected by their regulatory activities. The obstacles generated by privity of contract and by lack of membership in private organizational models, are often overcome by the use of legislation that recognises or approves private regulation. International soft law can not transfer law-making power to private regulators to a similar degree as hard law would¹⁵⁸. This is certainly true when the use of soft law is linked to a lack of legislative competence as would be the case if the EU, in areas where it does not have legislative competences and uses soft law, delegates law-making power to private parties. But to some degree it is also true for those areas where, despite legislative competences, the use of soft law is preferred over that of hard law. Recognition of private regulation by soft law does not in principle lead to *ultra vires* effects of privately enacted rules. Thus a code of conduct recognised by guidelines of an IO would not gain binding effects to non signatories.

While forms of delegation to private parties based on soft law are not unknown, the lower level of normativity for this phenomenon implies a greater difficulty in transferring authority to private actors in order to exercise law-making power. Furthermore, since soft law is often preferred when uncertainty is higher, delegation to private parties would be extremely costly. Monitoring costs for the principals (regulatory beneficiaries) increase when uncertainty broadens agents' discretion (private regulators). On the other hand, cooperative ventures between public and private actors may be handled incurring lower (contracting and monitoring) costs if soft law is deployed.¹⁵⁹ But a full analysis of this point is beyond the scope of this paper¹⁶⁰.

When soft law is associated to private regulation as an implementing device additional legitimacy enhancing mechanisms are needed to make it effective and enforceable. An example of the combination of soft law-private regulation is provided by the reference in the Basel II Capital Accord (International Convergence of capital measurement and capital standards) to Credit rating Agencies¹⁶¹. A second example, in the food safety area, concerns HACCP and its endorsement by private codes of

¹⁵⁸ Formally one should say that no delegation can take place since only binding law can be delegated. In fact, this is not true and, both theoretically and empirically, there is room for limited delegation even in the context of soft law. Two major examples for this can be found in agreements concluded between the GRI and the UN Global Compact as well as the UN Environment Program (UNEP). As outlined above GRI and the UN Global Compact signed an agreement under which the GRI will adopt guidance concerning the Compact's 10 Principles and will furthermore incorporate them into its upcoming Sustainability Reporting Guidelines.

With regard to the second example, cooperation is already taking place for a longer period of time. There exists a memorandum of understanding and cooperation has taking place in certain standard drafting (Financial Sector Supplement) see <http://www.globalreporting.org/AboutGRI/Alliances/GRIAlliancesPage.htm>, last visited at December 2010.

¹⁵⁹ In this situation conventionally it is contended that lower commitment by the regulator is traded with higher flexibility. I would object to the idea that flexibility lowers commitment and contend that in certain contexts higher flexibility increases commitment. For a similar point in the context of international agreements see Raustiala, 'Form and substance in international agreements', 99 AJIL 581 (2005).

¹⁶⁰ For a more structured analysis concerning governance and the use of soft law mechanisms in the European system see Sabel, 'Learning from Difference: the New Architecture of Experimentalist Governance in the EU', (2008) 14 ELJ 271.

¹⁶¹ This remains largely unchanged in Basel III. As the Basel Committee noted in its December 2009 report, the removal of external ratings from the Basel II framework would present the Committee with two alternative and equally unsatisfying approaches for assessing regulatory capital against the affected exposure. The first option would be to return to a "Basel I-type" approach that would assign all exposures, regardless of credit quality to the same risk weight category. Alternatively, under the IRB approach, the Committee could permit the use of banks' internal credit risk models to derive estimates of a securitisation exposure's capital requirement using its estimated PD and LGD. However, "the Committee has not been in favour of allowing banks to use their own internal credit risk models due to the uncertainty and lack of data with respect to asset correlations, which is the reason that supervisory established correlations are used in the Basel II framework." See BCOBS, Consultative Document - Strengthening the resilience of the banking sector (December 2009), par. 184 and 185. It is worth noting that at the same time in the US Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act), enacted on July 21, 2010 requires the agencies to establish, to the extent feasible, uniform standards of creditworthiness to replace references to, or requirements of reliance on, credit ratings for purposes of the agencies' regulations.

conduct or standards and then by contracts between retailers and suppliers enforceable before domestic Courts and arbitrators¹⁶².

In the following two sections I focus on a particular form of coordination, i.e. vertical complementarity between international soft law and transnational private regulation, exploring how the combined use of contract and tort law at domestic level contributes to the application of international soft law. Domestic Courts play a very significant role in this process: not only have they provided binding force by enforcing standards through contract, tort and sometimes even through property law, but they also have also contributed to legal transplants between the public, national, and the private transnational sphere¹⁶³. This phenomenon has been complemented by other avenues through which standards designed by soft law in the food safety have become binding. Primarily this has occurred with the endorsement of the WTO and other international or intergovernmental organizations¹⁶⁴.

6.1. Multi-level complementarity between public and private law: contract law as a vehicle to harden transnational soft law

Contracts may be a powerful vehicle for hardening soft law and promoting the harmonization of standards at transnational level¹⁶⁵. Transnational contracting in supply chains for example has contributed to the enforcement of international soft law¹⁶⁶.

The contractual design in private regulation may be contained in guidelines or rule books to be specified in annexed protocols, subject to frequent modifications according to 'flexible' rules. These features are often associated to soft law regimes. Thus, when deciding about the legal form of a transnational regime, States may consider the alternative between a primarily public soft law regime and a public-private regime based on formal (i.e. hard law) delegation to private bodies. Let us first examine how contracts can harden soft law and then address more broadly the harmonization function of transnational regulatory contracts.

In the area of corporate social responsibility supply chain contracting constitutes a device to implement international soft law standards. For example, the standards defined by UN Global Compact, the Tripartite declaration concerning multinational enterprises and social policy, the OECD Guidelines for multinational enterprises, the Equator Principles, etc. are all referred to international contracts and agreements¹⁶⁷. The evolution of corporate social responsibility towards spheres of

¹⁶² See the Global Food Safety Initiative which was a project launched by the business forum CIES in 2000 to harmonise international food safety standards and reduce the need for multiple supplier audits. The CIES members include the worlds leading retailer organisations and food manufacturers. Rather than create another Standard the GFSI Technical Committee identified the key components necessary for good food safety Standards and the operating protocols for the delivery of certification and created a benchmarking document. Standard owners such as the BRC were invited to submit their Standards for benchmarking. Now only 4 Standards are recognised as meeting the GFSI requirements: BRC Global Standard for Food Safety Issue 5; International Food Standard issue 5; Dutch HACCP Standard; SQF 2000 Level 2.

¹⁶³ See Cafaggi, *supra* fn. 105.

¹⁶⁴ See Howse, 'New device for creating international legal normativity : the WTO technical barriers to trade agreement and "international standards"', in Joerges and Petersman, *Constitutionalism, multilevel trade governance and social regulation*, (2006), 383; Livermore, 'Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius', 81 NYU L.R. (2006), p. 766; Scott, *Commentary on the Sanitary and Phytosanitary Measures Agreement*, (2007); Wouters et al., 'In Search of a Balanced Relationship: Public and Private Food Safety Standards and International Law', Working Paper No. 29 - June 2009.

¹⁶⁵ For the case of financial markets see, Black and Rouch, *supra* fn. 96, 224.

¹⁶⁶ See in the field of food safety Cafaggi, 'Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety', EUI RSCAS; 2010/10; Private Regulation Series – 03, available at http://cadmus.eui.eu/bitstream/handle/1814/13219/RSCAS_2010_10.pdf?sequence=1.

¹⁶⁷ Ruggie, *supra* fn. 75.

influence going beyond the activity of the single corporation was restated by the Global Compact and its 10 Principles¹⁶⁸. The legal dimension of liability for complying with those principles covers the whole supply chain, imposing obligations to comply with human rights standards in contractual relationships with suppliers and subcontractors¹⁶⁹.

In the area of environmental protection as well private contracting has been deployed to secure compliance with environmental standards along the whole supply chain¹⁷⁰. They concern both performance and management standards¹⁷¹. Often contractual clauses between retailers and suppliers do not distinguish between international soft law and international private technical standards. Similar issues arise for standards' implementation¹⁷². Like in the CSR example, effectiveness of contract as a vehicle to harden soft law depends on the position of regulatory beneficiaries and their ability to have an enforceable contractual claim. Right-holders are usually third parties in these contracts and third party beneficiary doctrine permits a very selective use of contract liability for violations of standards¹⁷³.

A third area, where the use of contract law to harden international soft law can be observed, is food safety. The FAO Voluntary Guidelines and the Codex Alimentarius constitute a good illustration of soft law principles hardened by way of contract law in the supply chain. Food safety clauses incorporate standards that concern the final product's safety but also process standards, for example HACCP¹⁷⁴. Principles concerning food safety can either be directly integrated into the contract or can be incorporated by reference¹⁷⁵. These clauses either refer directly to soft law principles or to Codes of

¹⁶⁸ See Human Right Council Report of the Special Representative at UN A/HRC/8/16 and for a critical assessment of the concept of spheres of influence in relation to due diligence see A/HRC/8/5 p. 72 "The scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities."

¹⁶⁹ See Ruggie, supra n. 19.

¹⁷⁰ Examples range from carbon footprinting to ISO 14001. See for instance the case of large retailers or other multinational enterprises requiring their suppliers to comply with certain environmental standards, e.g. environmental management standards, see Morrison and Roht-Arriaza, 'Private and Quasi-Private Standard Setting', in Bodansky *et al.*, *International Environmental Law*, (2007), 498 and in particular p. 514 where they refer to the Ford Motor Company, General Motors, Dole Standard Fruit Company, IBM, and Bristol-Myers Squibb as examples.

¹⁷¹ See Stewart, 'Instruments choice', in *Oxford Handbook of International environmental law*, (2007).

¹⁷² See Vandenberg, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance', 54 *UCLA L. R.* (2007) 913.

¹⁷³ See *Doe v. Wal-Mart* 572 F.3d 677 (9th Circ. 2009), where the court denied workers the status of third party beneficiaries, arguing that the clause incorporated in the contract with the supplier did not constitute a promise on behalf of Wal-Mart towards the workers as it would have been necessary in order to establish third party beneficiary. In the eye of the court the requirement that the suppliers were to provide sufficient working conditions and the clause that gave Wal-Mart the right to conduct inspections of the working side whether those requirements were kept, concerned purely the relationship between the two contracting parties but had no beneficial effect to the workers themselves.

¹⁷⁴ See Cafaggi, supra fn. 166; Scott, 'A Theory of Self-Enforcing Indefinite Agreements', 103 *Colum. L. Rev.* 1641. See the case of Barilla which, as final producer of wheat products, in order to achieve a high quality level of raw products supplied negotiate a wide number of supply contracts ('*contratti di coltivazione*') with individual or organised farmers which strictly defined not only the final product to be provided but also its qualitative and technological characteristics. Each contract, moreover, includes the '*Disciplinare Barilla di coltivazione e conservazione del grano duro*' where the safety requirements are clearly defined for each phase. In this case food quality and safety provision are tightly intertwined in the production phase, in particular technological requirements focus on the proteins contents of wheat, its colour and the gluten quality. The latter two are mainly related to the genetics of the wheat cultivated, while the former descends from the agricultural practices adopted. Thus, the contracts are negotiated with suppliers of specific types of wheat and impose strict control over the use of phytosanitary.

¹⁷⁵ See the Italian case of supply chain coordination between the UNAPROA (National association of fruit and vegetables producers) and Auchan and SMA (large distribution chain), which signed in 2003 a framework contract concerning their mutual obligations in the distribution of apples. The contracting parties also drafted a template for supply contract which

Conduct adopted by firms which, in turn, make references to international soft law. In the supply chain retailers often include in their contracts with suppliers clauses concerning employment standards, product safety standards, and environmental protection standards. Retailers/suppliers contracts cover a wider range of issues related to the transformation of regulatory standards. The shift to process regulation and to procedural fairness have further changed the content and the function of contracts along the supply chain: from primarily trade-facilitating instruments to regulatory devices of enterprises conducts. The terms of the exchange have incorporated clauses related to suppliers' compliance with rules concerning their relationships with third parties like employees, but also process-related hazards like environmental protection. Monitoring contractual performances requires a far more sophisticated apparatus than that deployed in ordinary contractual relationships, but it also responds to a different incentive structure. Clauses in the supply contracts are often inserted to foster workers and consumers' rights. Retailers act as 'agents' and their incentives to monitor and enforce the clauses might be not perfectly aligned with the principals¹⁷⁶. Thus, monitoring and enforcement of these clauses poses serious governance problems well beyond the conventional approach.

The problem with using contract is associated with the current limits of contract law. Contract law concerns the enforceability of these contractual obligations by third parties who are the main beneficiaries of those provisions i.e. workers, consumers, environmental organizations¹⁷⁷. The promise is made by the supplier to the retailer for the benefit of workers, consumers, environmental organizations. Those who have incentives to monitor and to ensure compliance by the supplier are third parties who have reasons to enforce the clauses against the retailer, the party with higher contractual power and deeper pockets. In theory they could bring a legal claim against the supplier for not complying with obligations undertaken in the contracts with the retailers or against the retailers for breaching the duty to monitor suppliers' compliance. However, contracts are often designed so as to ensure that the retailers have the right to monitor and to seek compliance but not the duty to ensure supplier's compliance. Judicial control over retailer's monitoring is very difficult for the limits related to third party beneficiary doctrines in many contractual legal systems. Third party beneficiary doctrine allows seeking remedies from the supplier who is generally located in countries where contractual enforcement is not easy. Only a change in the doctrine of third party beneficiary, allowing the pursuit of remedies against the retailer, would ensure a high level of compliance of suppliers' obligations¹⁷⁸. Otherwise the other avenue is tort law.

The matter is even more complicated since the overall mechanism is based on consumers' perception of compliance with the standards via eco-labeling. Environmental protection is entrusted in consumers choices concerning certified products whose environmental standards are negotiated between retailers and suppliers. Customers of importing firms, environmental and consumer organizations, choosing certified products act as principals in relation to environmental protection

(Contd.) _____

should be used in the following negotiations among the local distributors and the individual supplier. In particular it includes the provision of specific safety requirements to be evaluated in the product supply. See art. 3.4. of the template contract: *"Il fornitore garantisce che il Prodotto fornito avrà le caratteristiche previste dal Reg. CE n. 85/2004 ed è conforme , per quanto riguarda I Prodotti a 'marca privata' al capitolato tecnico di acquisto emesso in data ... dal servizio qualità del gruppo Auchan/SMA, mentre per i Prodotti '1° prezzo' e 'convenzionale' alle relative schede tecniche da definirsi di comune accordo tra le parti"*.

¹⁷⁶ The agency relationship arises because legal systems do not provide third party rights to enforce the clauses. Workers are often unable to bring claims before Courts and private enforcement bodies to enforce clauses breached by suppliers.

¹⁷⁷ See Cafaggi, 'Private regulation in European private law', in Hartkamp et al, *Towards a European civil code*, 4th ed. 2011. In relation to CSR in the USA see Estlund,***, in Cafaggi, supra fn. 16.

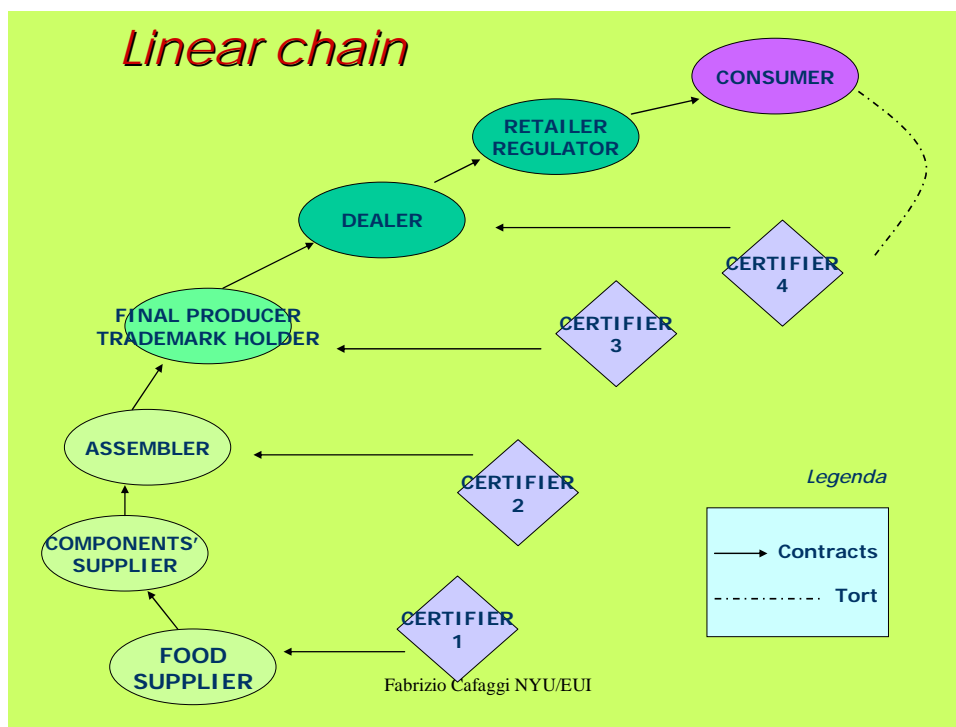
¹⁷⁸ See *Doe v. Wal-Mart* 572 F.3d 677 (9th Cir. 2009) "Workers at factories operated by large international discount retailer failed to allege contractual promise, enforceable by suppliers that retailer would enforce labor standards incorporated into its supply contracts and because retailer made no promise to monitor suppliers, no such promise flowed to suppliers' employees as third party beneficiaries; language and structure of the agreement showed that retailer reserved right to inspect suppliers but did not adopt a duty to do so".

goals. Agents are exporting firms that produce the goods in compliance with the environmental standards¹⁷⁹.

6.1.1. Exploring the supply chain structure and the potential of self-enforcing contracts

Supply chain contracts have acquired a strong regulatory function. Not only do they organize the system of exchanges along the chain from suppliers of raw material all the way to distribution and retailers, but they also govern coordination of regulatory obligations among different enterprises. They design rules and incentives that ensure compliance with employment, environmental and consumer standards across states' boundaries¹⁸⁰. These contracts, often organized around multinational corporations dealing with multiple suppliers, are associated with governance devices for monitoring compliance and to enforcement mechanisms able to administer different types of sanctions¹⁸¹.

These contractual obligations can be enforced in several ways: through judicial or private enforcement or by self-enforcing mechanisms. Contractual clauses provide a right to cancellation by the retailer, if the supplier does not comply. The threat to termination constitutes a sufficient deterrent mechanism to give first tier suppliers incentives to comply. Private enforcement mechanisms are often more effective than judicial ones. Within the supply chain a compliance committee is frequently created whose main task is to monitor the agreement that defines standards and when violations are detected to ensure that private enforcement mechanisms are in place. These often call for arbitration bodies created on an *ad hoc* basis or sitting permanently with international organizations who have participated to the drafting of the agreement¹⁸². These examples show multi-level complementarity of soft law and self-regulatory contractual arrangements, drafted at transnational level, which become binding through contractual clauses enforceable before national Courts.



¹⁷⁹ See C. Coglianese *et al*, supra fn. 17.

¹⁸⁰ See G. Gereffi et al, 'The governance of global value chains', 12 *Review of International Political Economy* (2005), 78.

¹⁸¹ These functions are ever more often outsourced to third parties.

¹⁸² See Cafaggi, supra fn.16.

In conclusion contracts and domestic contract laws often constitute the vehicle through which soft law becomes enforceable at domestic level but only to a limited extent due to the current doctrinal and functional limitations of contract law in different legal systems, in particular privity requirements and its functional equivalents.

6.2. Multi-level complementarity between public international soft law and private law: tort law as a vehicle to harden transnational soft law

In other areas international soft law is hardened through the use of civil liability or tort. In domestic systems, private regulation is often a complement to tort law¹⁸³. Horizontal complementarity between transnational regimes is often combined with vertical complementarity between international soft law and domestic civil liability. Civil liability is a non consensual vehicle through which domestic courts make private and public transnational standards binding even for regulatees and certainly for beneficiaries who have not participated to the rule making process. This mechanism differs from contract law because regulated entities do not opt-in as in the case of contracts, but are rather forced to comply with the private standard by national courts as a matter of civil liability. In this case private standards are made binding by judicial recognition even for those who have not subscribed to them. Compliance with standards voluntarily adopted does not exclude liability but violations of these standards frequently constitute sufficient evidence to hold regulated entities liable in tort.

Tort can affect both liability regimes and remedies concerning international soft law standards. When defining the standard of care in negligence, judges may refer to international standards contained in soft law principles¹⁸⁴. Similarly, in food product liability the notion of defective product may refer to safety standards defined by soft law principles such as the Codex Alimentarius; in employment the Tripartite declaration concerning multinational corporations in relation to corporate social responsibility can provide standard for tort committed by multinational corporations. In the context of supply chains, tort law can be used to establish vicarious liability of the retailer for breaches committed by the upstream supplier.

Within tort liability an important question concerns the structure of the supply chain and in particular the relationship between parents and subsidiaries. The limitations to expanding tort liability from the subsidiary to the parents have progressively been reduced and now some jurisdictions allow a legal claim to be brought against the parent for torts committed by the subsidiary in a different country¹⁸⁵.

¹⁸³ See Cafaggi and Muir Watt, *supra* fn. 149.

¹⁸⁴ With regard to technical standards see fn. 139, 158. Furthermore, in the environmental field, Environmental Management Standards can constitute a measure to avoid criminal prosecution or civil penalties, or might be used as a requirement for settlement by public agencies, see United States Environmental Protection Agency, Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects, June 12, 2003, available at: <http://www.epa.gov/compliance/resources/policies/civil/seps/emssettlementguidance.pdf>, and EPA's Strategy for Determining the Role of Environmental Management Systems in Regulatory Programs, April 12, 2004, available at: http://www.nssga.org/environment/links/EMS_and_the_Reg_Structure_41204F.pdf.

For the case of e-commerce see in Europe: Tribunal Grand Instance /Troyes – 4 June 2008, *Hermes v M., eBay.Inc and eBay International* ; Tribunal Grand Instance – 13 May 2009, *groupe L'Oreal v eBay.inc and eBay sarl* ; Tribunal d'Instance /Rennes – 23 March 2007, *L v eBay.inc and eBay sarl* ; Tribunal de commerce – 30 June 2008, *Louis Vitton v eBay.inc and eBay sarl*. For US caselaw see *Durick v. eBay*, 2006 WL 2672795 (Ohio Ct. App. Sept. 11, 2006); *Bergraft v. eBay* (N.J. Super. Ct. Oct. 1, 2003).

For the case of food safety see *Hazlewood Grocery Ltd v Lion Foods Ltd* [2007] EWHC B5 (QB), [2007] EWHC B5 (QB) where the judge acknowledged the breach of contract between a supplier and a final producer also taking into account the absence the most updated certification system..

¹⁸⁵ See *Connelly v. RTZ corporations plc and others* [1998] AC 854 and *Lubbe v. Cape plc* [2000] 4 ALL ER 268.

In the area of corporate social responsibility, international soft law has provided the basis for corporate criminal and civil liability concerning human rights violations¹⁸⁶. The debate concerning spheres of influence triggered by the UN Special Representative John Ruggie contributes to define the scope of liability both for corporate own conduct and for conducts of third parties over which multinational corporation can exercise control¹⁸⁷.

In the area of financial markets tort litigation has been brought for lack of compliance with international standard accounting. Within financial markets another example is provided by credit rating agencies (CRAs) liability where rating methodologies, based on the IOSCO code of conducts but essentially defined by CRAs themselves, have been the subject of judicial scrutiny¹⁸⁸. In Europe the previous regime linked the Code of conduct (international soft law) to Recommendations by the European Commission to MS (European soft law). The direct impact of the Code on CRAs was limited since it was not directly binding. Only the incorporation by reference in national legislation provided binding force. Recent reforms, introducing hard law legislation concerning rating agencies have modified the binding nature of the principles in the Code and made easier references to the Code as a standard, violations of which will be framed under a negligence standard. Significant differences exist between US and Europe. In the US, liability of CRAs for negligence rating has been rejected on First Amendment grounds. In Europe liability has been founded on the basis of negligence when rating did not accurately reflect the value of the rated company's asset.

Domestic Courts can hold regulated entities liable for torts committed either in their territory or even abroad when they are granted jurisdiction for violation of international soft law¹⁸⁹. Extraterritorial civil liability has for example been found by US Courts with the application of the Alien Tort Statute¹⁹⁰. A comparative analysis of the case law concerning liability of private regulators shows however that in certain areas US Courts are more restrictive than some European Courts, often granting immunity by upholding disclaimers in contract clauses.

In the conventional scheme civil liability operates *ex post*, while regulation defines and monitor *ex ante*¹⁹¹. Private regulation, however, unlike traditional command and control, often adopts a more complex scheme where there is iterative interaction between regulators and regulated or monitors and regulated¹⁹². For example, in the field of advertising the increasing using of copy advice has shifted from *ex post* to *ex ante* control but within a cooperative framework. The positive evaluation of the private regulatory does not have a binding effect either on the private SRO in charge of enforcement

¹⁸⁶ See Ruggie, supra n. 19, par. 23 p. 8 “The corporate social responsibility to respect human rights is the second principle. It is recognised in such soft law instruments as the tripartite declaration of principles concerning multinational enterprises and social policy and the OECD Guidelines for multinational enterprises...It is one of the commitments companies undertake in joining the Global Compact.”

¹⁸⁷ Ruggie, Clarifying the Concepts of “Sphere of Influence” and “Complicity” (15 May 2008), UN Doc. A/HRC/8/16, and as a response to that: S. Wood, Defining the Boundaries of Social Responsibility: ISO 26000, John Ruggie, and the “Sphere of Influence” Debate (forthcoming); see furthermore, Ruggie, supra n. 75; Id., supra fn. 19.

¹⁸⁸ See, e.g. *In re Moody's Corp. Sec. Litig.*, 612 F. Supp. 2d 397; *Reese v. Bahash*, 248 F.R.D. 58; or *Indiana Laborers Pension Fund v. Fimalac, S.A.*, No. 1:08 CV 05994 (SAS). However the Agencies claimed in these cases a 1st Amendment protection of free speech defense. See for an overview: T. Nagy, Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protection to Subprime Mortgage Litigation, 94 *Minnesota Law Review* (2009), 140.

¹⁸⁹ Goldsmith and Sykes, 'Lex loci delictus and global economic welfare'. 120 *Harvard L.R.* 1137 (2007), Sykes, 'Transnational forum shopping as a trade and investment issue', 37 *Journal of legal studies* 339 (2008).

¹⁹⁰ See Broeker, 'Alien Tort Statute litigation and transnational business activity. Investigating the potential for a bottom-up global regulatory regime', *IILJ emerging scholars paper* 16 (2010); Sykes, supra fn. 189.

¹⁹¹ See Scott, 'Enforcing of consumer protection laws', in Howells *et als* (eds), *Handbook of Research on International Consumer Law*, forthcoming (2010).

¹⁹² See Black, 'Regulatory conversations', 29 *Journal of Law and Society* (2002) 163, 170; Scott, 'Regulating in Global Regimes', available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598262.

and *a fortiori* on the domestic Court before which the infringement is brought. Thus, private regulation and civil liability share some features concerning decentralised and *ex post* approaches. At transnational level soft law regulation is often more similar to private regulation than to conventional state public hierarchical regulation. Similar complementarities occur when civil liability regimes are deployed to 'harden' international soft law.

7. The challenges of TPR and the effects on global governance

The development of TPR contributes to redefining the regulatory space at the global level. The transfer of regulatory power from national to transnational and from public to private is not without consequences. TPR poses new challenges to national sovereignty, the concept of democracy and the rule of law. Governance responses are needed to ensure accountability and improve effectiveness. Both public and private regulators often operate in a multilevel structure that includes international and domestic levels. They interact horizontally when two or more regulate in the same area, or vertically when private regulators set global standards to be implemented by legislation and/or Courts at the domestic level. These regulators at times cooperate and at times compete for regulatees.

In this essay I have claimed that the relationship between the private and the public regulatory spheres present distinctive features at transnational level in relation to the domestic level. Two different regulatory chains have been explored: one where private regulators define the rules at transnational level to be implemented by legislation at domestic level, the other where international soft law rules are made binding by private regulation (in particular contracting along the supply chain) and enforced through domestic private law. The growing use of soft law, while increasing flexibility and adaptability, decreases legitimacy and requires TPR to play new functions. Domestic contract and civil liability contribute in different ways to 'harden' soft law and make it binding. However, the remarkable differences among legal systems bring about different outcomes: in some legal systems Courts are more inclined to refer to international soft law rules to fill in general standards concerning contractual performance and/or the duty of care, in other countries Courts are more reluctant to refer to international standards and fill gaps by reference to domestic standards. These divergent attitudes towards international soft law produce differentiations, which undermine the goal of harmonization. On the other hand, judicial divergences may produce a fertile dialogue both among Courts and between domestic enforcers and transnational rule-makers, which may improve the effectiveness and legitimacy of the regulatory process.

Clearly the challenges posed by the growing importance of TPR require a complex menu of responses that varies across sectors and is dependent upon the countries involved. A new set of instruments both in the public and private domains have been created. Most of them reflect an evolution of domestic tools, some represent real innovations. The research agenda for the future requires not only mapping and rationalizing what has happened but evaluating the long-term implications in terms of redistribution of resources and capabilities.

8. Conclusions

In this contribution I have looked at the different models of TPR: from pure self-regulatory regimes, characterised by the coincidence between regulators and regulated, to multi-stakeholders including business, NGOs and public entities, including both regulated and beneficiaries in their governance structure; from integrated forms of cooperation between public and private through regulatory contracts to formal or informal *ex ante* delegation, when the regulatory power is conferred to private regulators by IOs, IGOs or directly by international law; from private regulation, *ex post* endorsed by public entities, through judicial or administrative recognition to guidelines and principles directing private parties with the threat of introducing hard law legislation.

Two distinguishing conceptual features characterise the approach taken in this essay: (1) the link between governance of the private regulator and regulatory activity, (2) the shift of focus from single organizations to regimes. The link between governance and activity is built around the regulatory relationship. As it has become clear when exploring the different models of regulatory relationship, the boundary of a private organization, exercising regulatory functions may be legally defined by membership. But often, the beneficiaries are outside the legal boundaries of the organization albeit within the regime. Incorporating the beneficiaries in the regulatory relationship contributes to shifting from self to private regulation while changing the nature of regulation as a collective good from a club to a semi-public one¹⁹³. On the one hand, contemporary private regulation reduces the degree of excludability, typically a feature of club goods. On the other hand, it limits the degree of negative externalities by internalising, within the regulatory process, the product and the interests of the final beneficiaries.

The shift from organizations to regimes permits the capture of inter-organizational together with intra-organizational dynamics in private regulation. The notion of regime in this context is not primarily based on who the members are, rather on what the effects of regulation might be. In the adopted framework, organization is an actor-based definition, whilst regime is an effect-based definition. Regimes as units of analysis allow a functional rather than a structural definition of regulation, fitting better with the purpose of analyzing the scope of TPR. They define common rules to regulate the activities of regulated entities often on behalf of third parties, the final beneficiaries of the regulatory process.

The global regulatory space is fast changing; new players have acquired powers and influence, partly at the expense of old and conventional players, partly occupying new fields, thereby posing challenges to the conventional concepts of democracy, representation and sovereignty. The growth of TPR reflects a redistribution of regulatory power from domestic to transnational levels and from public to private entities. This redistribution is, however, neither uniform nor uni-directional. In some circumstances, even the opposite pattern is observed shifting from private to public, with an increasing role for international public regulation, especially in terms of oversight of private regimes and a stronger role for regional institutions ranging from new political entities to trade agreements (EU, NAFTA, Mercosur).

The private sphere at transnational level includes different components, often holding conflicting views on both the model of regulation and its enforcement. Changes in the private sphere have occurred over time both in the allocation of power between industry and NGOs but also within the same industry, where multinational corporations, located in developed economies, have different regulatory preferences from those of small and medium enterprises in developing countries. In this context, allocation of market power translates into the distribution of rule-making power among market players. Market regulatory shares become thence slices of global sovereignty.

Conventional wisdom claims that private regulation provides the regulator with greater flexibility, both in terms of regulatory design and sanctions, while public hard law is more rigid but (sic!) provides higher legal certainty and stability. In fact, TPR allows a much broader spectrum of sanctions, especially when one considers a combination of legal and non legal ones. This picture, if at all convincing, has been seriously challenged by the increasing use of soft law which also provides higher flexibility as opposed to hard law treaty based regimes. The relationship between the private and public sphere has profoundly changed giving rise to new combinations not yet fully explored.

Significant differences exist between the domestic and transnational levels. These differences are caused more by the transformation of the public sphere than the private one. The sweeping use of soft law as an instrument of international regimes modifies the functions of private law instruments to regulate firms' behaviour in the international arena. Often contract and tort are deployed to harden soft

¹⁹³ See Cafaggi, *supra* n. 105, and Katz, 'Taking private ordering seriously' 114 University of Pennsylvania L.R.

law at domestic level and make binding rules that would not otherwise have been enforceable. From this perspective, private law instruments lend strength and legitimacy to international soft law regimes reverting the conventional view that private regulation is more effective but less legitimate than public regulation. From a broader institutional perspective, the general conclusion that effective private regulatory regimes arise when strong public institutions are in place holds for transnational regulation as well.

Soft law may operate either as an alternative or as a complement to private regulation. The increased expansion of soft law at the transnational level may reduce the number of 'formal' co-regulatory arrangements based on the combined use of public and private regulation and increase *ex post* recognition of privately designed standards by international organizations. Private law, especially at national level, may become an instrument used to harden international soft law, giving rise to vertical institutional complementarity.

Unlike the conventional view, that sees public and private regulation primarily as alternatives and suggests that public regulation should be chosen when private regulation fails and vice-versa, I have argued that strong public institutions are needed for private regulation to operate effectively and with credibility. This is the institutional complementarity approach. Effective and legitimate private regulation requires, both at the national and transnational levels, a very strong set of institutions operating within a solid constitutional framework.

It should however be recognised that private regulation does often, in practice, operate as a substitute for public regulation. This occurs because public regulation is slower, more costly and less effective. When private regulation precedes, public regulation often follows and subsequently internalises private rules and even practices by way of *ex post* recognition in legislative or administrative acts or different forms of endorsement. Thus, descriptively, private regulation is both a complement and a supplement; normatively it should primarily operate as a complement.

Complementarity operates not only within one stage of regulatory process (*i.e.* standard setting) but also along the different phases. Recently public-private partnerships, engaging in cooperative rule-making, have been complemented by a more complex architecture, where rule-making is mainly carried out by one actor monitored by private actors at transnational level (jointly by firms and NGOs) and enforced at the national level by Courts. These regimes imply the existence of both horizontal and vertical complementarities.

Horizontal complementarities occur when at the transnational level public and private regulatory regimes interact (this is the case for many food safety regulatory regimes but it is also common in environmental law). This complementarity is reflected on the use of different regulatory instruments. However, TPR lacks a common legal framework, similar to that provided by international general law and develops specific tools to coordinate and solve conflicts¹⁹⁴. TPR does not yet have a common set of principles to fill gaps for each regime. Domestic private law is primarily deployed to perform this function. However, given the differences among state private laws, this gap filling method generates fragmentation and inconsistencies within the same regime.

Vertical complementarities occur when there is a multilevel hybrid regime: one activity (*i.e.* rule-making) operates at transnational level and the other(s) at national level (for example, monitoring or enforcement, or both). Sometimes, the private regime is transnational and is implemented by public legislation at the state level (for example, accounting standards)¹⁹⁵; sometimes a public regime is defined by hard or soft law at the international level and implemented primarily by private regulation at the national level. Multi-level regimes imply coordination both between the transnational and the

¹⁹⁴ See Cafaggi, *supra* fn. 141.

¹⁹⁵ Advertising provides a good illustration of multilevel complementarity between transnational private law and 'regional' or State legislation.

national level, but also among the different national levels. For example, in the case of decentralised enforcement multi-level regime needs coordination among national courts, enforcing the same regime in order to avoid too high a degree of differentiation. Incentives for judicial coordination may be fostered by legal provisions applying a duty to loyal cooperation which exist in the domain of public institutions and can be inferred from the principle of good faith in the domain of private institutions. Clearly the judicial power to enforce such a duty is limited in relation to private-public multilevel system.

Within the private sphere trans-nationalisation produces significant rule making transfers from developing to developed countries. These transformations take place in a context where public international hard law suffers from limitations concerning its scope and instruments giving rise to soft law on the one hand, and to transnational private regulation on the other. Private western actors, including both firms and NGOs have acquired more rule-making power.

The regulatory regimes discussed here are sector specific and often represent conflicting interests at the global level. These include conflicts between industry and NGOs and trade unions, between large multinational corporations and small suppliers that require coordination and rules. Often, domestic courts have provided techniques to define the boundaries and the jurisdiction over regulated entities and to secure compliance with democratic principles. Still these regimes – whose regulatory effects go well beyond the sphere of the regulator, encompassing regulated entities and beneficiaries that did not voluntarily opt-in at the time of drafting – pose serious accountability challenges. They challenge States' sovereignty when regulating matters traditionally subject to domestic legislation. Their private nature limits the scope for judicial review by domestic courts and often allows escaping from accountability mechanisms deployed in the domestic arena. Those challenges require normative responses that call for changes in the governance of private regulators and in the regulatory process to enhance voice and exit options for regulatory beneficiaries.

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