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New Foundations of Transnational Private Regulation

FABRIZIO CAFAGGI*

In section I of this article, the factors driving towards the emergence of new transnational private regulation (TPR) are identified in comparison with, on the one hand, merchant law and, on the other, international public regimes. In section II, 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 III, 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: hybridization, collaborative law-making, coordination, and competition. Section IV summarizes the results of the analysis, reconsidering the boundaries between public and private at transnational level.

INTRODUCTION

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 communi-

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ties, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation. Its recent growth reflects, first, a reallocation of regulatory power from the domestic to the global sphere and, second, 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 merchant law. 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, interacting 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 emphasizes to a greater extent the role of the state as a rule taker as opposed to a rule maker.¹ 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 merchant law 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 unions.² It comprises:

- (i) regulatory frameworks concerning individual enterprises, promoted by shareholders or by other stakeholders;
- (ii) the product and process regulation of small enterprises by large multinational corporations along the supply chain;

1 For this distinction and its implications see J. Braithwaite, *Regulatory Capitalism* (2008).

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

- (iii) the regulation of financial aspects of firms governed by rating agencies and accounting firms;
- (iv) the regulation of transnational employment standards promoted by unions and international organizations such as ILO;
- (v) the regulation of environmental aspects.

TPR is generally voluntary, mirroring domestic private regulation. Parties who wish to join the regulatory bodies participating in 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.³ This freedom can be partially limited when participation in a private regime and compliance with its standards is the condition for 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 retrospective judicially recognized private regulation, when domestic courts recognize 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. The effects of these regulatory regimes are far-reaching, going well beyond the sphere of the members of the regulatory body. This produces a knock-on effect on the behaviour of a wide number of regulated parties and beneficiaries which have not given their consent beforehand 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 functions.⁴ 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 tools.⁵

TPR subscribes to a comprehensive concept of regulation which includes

- 3 This definition differs from that of standards adopted in the Agreement on Technical Barriers to Trade (TBT) under Annex 1.
- 4 The inadequacies of private law for regulatory purposes are examined by H. Collins, *Regulating Contracts* (1999).
- 5 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.

both responses to market/government failures and distributional effects.⁶ 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 I, the factors driving towards the emergence of new TPR are identified in comparison with, on the one hand, merchant law and, on the other, international public regimes. In section II, 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 III, 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: hybridization, collaborative law-making, coordination, and competition. Section IV summarizes the results of the analysis, reconsidering the boundaries between public and private at transnational level.

I. THE EMERGENCE OF NEW TPR: DRIVERS AND PATTERNS

The growth of TPR is often associated, if not made dependent upon, the shortcomings of the regulatory state as a global regulator.⁷ These weaknesses 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 century.⁸

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

7 See K.W. Abbott and D. Snidal, 'Governance triangle' in *The Politics of Global Regulation*, eds. W. Mattli and N. Woods (2009) 50. On the correlation between globalization and the increasing power of transnational private actors, see A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003).

8 The increasing influence of private power in the global sphere has been observed for a long time. See Y. Dezalay and B.G. Garth, *Dealing in Virtue. International Arbitration and the Construction of a Transnational Legal Order* (1996); Cutler, id.; S. Sassen, *Territory, Authority, and Rights from Medieval to Assemblages* (2006); G.P. Callies and P.C. Zumbansen, *Rough Consensus and Running Code* (2010). The question had been already debated in the thirties in the United States with the pioneering work of Jaffe. See L. Jaffe, 'Law Making by Private Groups' (1937) 51 *Harvard Law Rev.* 201–53, at 213.

The transformations brought about by the new private regulatory regimes have also modified the unit of analysis, moving from regulatory state to regulatory capitalism.⁹ This change concerns not only rule making but also compliance and enforcement.¹⁰

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 spheres.¹¹ 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 multi-level structure, nation states at domestic level.¹² Clearly the answer to this question depends on the degree of assimilation between public and private that is believed to exist.¹³ The consolidation of effective TPR frequently occurs when strong public institutions are in place to complement rather than supplement public regulation at the domestic level.¹⁴ 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 are related to the institutional dimension, others more to the economic consequences of market and trade integration.¹⁵ Market liberalization and the

9 See D. Levi-Faur and J. Jordana, 'The Rise of Regulatory Capitalism: The Global Diffusion of a New Order' (2005) 598 *Annals of the Am. Academy of Political and Social Sci.* 200–17; D. Levi-Faur, 'Varieties of Regulatory Capitalism: Sectors and Nations in the Making of a New Global Order' (2006) 19 *Governance* 363–6, at 363.

10 See Braithwaite, op. cit., n. 1, p. 185 ff.

11 The presence of non-state actors in the global governance system is seen by many as a characteristic of global governance. See A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activity' (2008) 9 *German Law J.* 1375–400, at 1378 ff.

12 See Abbott and Snidal, op. cit., n. 7, p. 66.

13 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.

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

15 See G.K. Hadfield, 'The Public and Private in the Provision of Law for Global Transactions' in *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges*, ed. V. Gessner (2009); J. Davis, 'Privatizing the Adjudication of International Commercial Disputes: The Relevance of Organizational Form' in *The Enforcement of Transnational Private Regulation*, ed. F. Cafaggi (2011, forthcoming).

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 can no longer be monitored and managed.¹⁶ Consensus exists over the weaknesses of nation states in regulating markets that operate across state boundaries.¹⁷ Similarly, the difficulties of individual states in securing compliance with fundamental rights have been underlined.¹⁸ Divergences emerge in relation to the role of states in trans-nationalized regulation.¹⁹ Some believe that they lose their intended role to become rule takers; others claim that they maintain a dominant position.²⁰ The list that follows exemplifies some of the factors contributing to the emergence and consolidation of TPR.

1. *The need for international harmonization*

The most frequently identified rationale is the need to overcome normative fragmentation of market regulation, often associated with divergent state legislation.²¹ Sometimes, however, TPR reacts to divergent private regulatory regimes in place at the local level by generating new uniform private rules at the transnational level.²² The creation of a TPR may thus be a response to either the multiplication of private regimes or diverging domestic public legislation. The harmonization of rules, within which private harmonization has gained importance, constitutes one response to normative fragmentation. Harmonization may be driven by general objectives or by specific ones. The fragmentation of state legislation, for example, constitutes a barrier to trade and one that has been tackled by trade regimes, promoting standardization. Delegation to IGO constitutes a different partial response to fragmentation. However, this delegation is often limited to standard setting with limited implementation capacity.²³

16 This is clear in the area of product safety and in particular that of food safety. See C. Coglianese, A. Finkel, and D. Zaring (eds.), *Import Safety. Regulatory Governance in the Global Economy* (2009).

17 See B. Kingsbury, N. Krisch, and R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–62, at 16; Abbot and Snidal, op. cit., n. 7.

18 See J. Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights* (2008).

19 See A.C. Cutler, V. Haufler, and T. Porter, *Private Authority and International Affairs* (1999); Cutler, op. cit., n. 7; Sassen, op. cit., n. 8.

20 D. Drezner, *All Politics is Global* (2007).

21 See W. Leebron, 'Lying Down with Procrustes: An Analysis of Harmonization Claims' in *Economic Analysis of Fair Trade and Harmonization*, eds. J. Baghwati and R.E. Hudec (1996) 41.

22 Legal harmonization by private parties can translate into an agreement similar to a treaty or the creation of an organization comparable to an IO or an IGO.

23 Abbott and Snidal, op. cit., n. 7, p. 67. But see, in relation to ILO, L.R. Helfer, 'Monitoring Compliance with Unratified Treaties: The ILO Experience' (2008) 71 *Law and Contemporary Problems* 193–218.

A more recent phenomenon is the proliferation of TPR at the global level.²⁴ 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 processes.²⁵ 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 therefore observe a shift from local to global fragmentation within the private field, the former primarily territorial, the latter predominantly functional.

2. The 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 implemented.²⁶ Often, though not always, TPR emerges as a response to intergovernmental failures, such as the inability to reach political consensus over a proposed international treaty. Evidence suggests that failure to reach political consensus over treaty-based solutions has triggered TPR.²⁷ 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-measures.²⁸

3. The 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 regimes.²⁹

24 See D. Vogel, 'The Private Regulation of Global Corporate Conduct' in Mattli and Woods, *op. cit.*, n. 7, pp. 151 ff., highlighting differences from conventional self-regulation; also pp. 156 ff. In a different perspective, see A. Peters et al. (eds.), *Non-State Actors as Standard Setters* (2009).

25 See E. Meidinger, 'Private Import Safety Regulation and Transnational New Governance' in Coglianese et al. (eds.), *op. cit.*, n. 16, p. 233.

26 See, generally, Abbott and Snidal, *op. cit.*, n. 7, pp. 59, 67.

27 There is wide consensus over the birth of private forestry certification systems. See, for an overview, E.E. Meidinger, 'The Administrative Law of Global Private – Public Regulation: the Case of Forestry' (2006) 17 *European J. of International Law* 47–87.

28 See R.O. Keohane and D.G. Victor, *The Regime Complex for Climate Change* (2010) 26.

29 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 S. Henson and J. Humphrey,

Therefore, the effectiveness of states' implementation is often questioned.³⁰ 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 transnationalizing regulation.³¹ Localized monitoring follows the 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 not or should not play a role. On the contrary, the role of national courts is quite significant. However, it is important to recognize 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 states.³² States' implementation of transnational regulation may be biased. The emergence of TPR with innovative implementation techniques attempts to respond to these shortcomings.

4. *The 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 century.³³ The dynamics of

The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes (2009); OECD, 'Final Report on Private Standards and the Shaping of the Agro-Food System', AGR/CA/APM (2006) 9/FINAL (2006).

30 See the critique of conventional international law and its weaknesses by Kingsbury et al., op. cit., n. 17, p. 15; B. Kingsbury and N. Krisch, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European J. of International Law* 1–13; von Bogdandy et al., op. cit., n. 11; B. Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European J. of International Law* 23–57, and responses by A. Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20 *European J. of International Law* 985–95 and Ming-Sung Kuo, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2009) 20 *European J. of International Law* 997–1004.

31 See F. Cafaggi, 'Enforcing Transnational Private Regulation' and R. Stewart, 'Enforcement of Transnational Public Regulation' in Cafaggi, op. cit., n. 15.

32 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, op. cit., n. 29 and, for a broader picture, Coglianese et al., op. cit., n. 16.

33 M. Koskeniemi, 'History of International Law since World War II' in *Max Planck Encyclopedia of International Law* (2007).

regulatory power transfers, from the nation-states to international organizations, has profoundly changed since then.³⁴ 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 law.³⁵

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 (i) the necessity of overcoming the state's normative intermediation problems and (ii) of establishing the direct applicability of transnational regimes towards parties affected by the regulatory processes.³⁶ The limits of international law and, in particular, the inability of non-state actors and international public entities to regulate rule making has generated a number of effects.³⁷ 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).³⁸ On the other hand, these limitations have favoured 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 favour of private actors and transform the role of the nation state.³⁹ 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 private.⁴⁰ In fact, the characteristic feature is that of hybridity. The conflict and the subsequent agreement between Google and the People's Republic of China

34 J.E. Alvarez, *International Organizations as Law Makers* (2006).

35 A.-M. Slaughter, *A New World Order* (2004); A.-M. Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy' (2003) 24 *Michigan J. of International Law* 1041–76.

36 id. (2003), p. 1056. On legitimacy deficits of such networks in general, see S. Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-liberalism' (1996) 17 *Northwestern J. of International Law and Business* 1014–56, at 1045.

37 Kingsbury et al., op. cit., n. 17; A. Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' (2005) 37 *J. of International Law and Politics* 663–94; von Bogdandy et al., op. cit., n. 11, pp. 1375 ff.

38 See Kingsbury, id., p. 17.

39 Cassese, op. cit., n. 37.

40 See R. Deibert, J. Palfrey, R. Rohozinski, and J. Zittrain (eds.), *Access Denied. The Practice and Policy of Global Internet Filtering* (2008); Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006); D. Tambini, D. Leonardi, and C. Marsden, *Codifying Cyberspace – Communications Self-Regulation in the Age of Internet Convergence* (2008).

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 collide.⁴¹ 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 dimension.⁴²

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 as such 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 standardization on private regulation is strong. Technical standardization bodies have increased their influence on regulatory regimes, moving from product to process standards and broadening of 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 regulators.⁴³

Technical standards, produced by private or hybrid organizations, affect several dimensions of TPR: they contribute to a reduction of differences across sectors since there is a common denominator for technical standards concerning quality management control and 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

41 See the different contributions in K.E. Maskus and J.H. Reichmann, *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (2005).

42 See Mattli and Woods, *op. cit.*, n. 7.

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

governed only by the fiscal policies of nation states. There is a cost transfer from states to private actors but also from Western developed economies to southern developing economies.⁴⁴ 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).⁴⁵ The internalization 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. In other instances, internal governance structures have tried to govern the redistribution of resources and capabilities. Specialized IGOs continue to play an important role in ensuring the growth of regulatory capabilities but are increasingly 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 the distributional consequences of a reallocation of regulatory powers but also effects on 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 away.⁴⁶

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 distribution.⁴⁷

44 The example of food safety is paramount. See Codex Alimentarius Commission (CAC), *Joint FAO/WHO Food Standard Programme: Considerations of the Impact of Private Standards* (2010), at <http://www.fsis.usda.gov/PDF/2010-CAC/cac33_13e.pdf>.

45 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.

46 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, op. cit., n. 30; Henson and Humphrey, op. cit., n. 29; Y. Amekawa, 'Reflections on the Growing Influence of Good Agricultural Practices in the Global South' (2009) 22 *J. of Agricultural and Environmental Ethics* 531–57; L. Busch and C. Bain, 'New! Improved? The Transformation of the Global Agrifood System' (2004) 39 *Rural Sociology* 321–46. In the environmental field, for carbon footprint labelling, see S.G. Mayson, 'Carbon Footprint Labelling in Climate Finance' in *Climate Finance*, eds. R.B Stewart, B. Kingsbury, and B. Rudyk (2009) 283.

47 See F. Cafaggi and K. Pistor, 'The Distributional Effects of TPR', unpublished paper on file with the author.

II. 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 disentangled.⁴⁸ TPR encompasses numerous regimes, reflecting the complexity of the private sphere.⁴⁹ 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 agreements.⁵⁰ While at first sight they are all governed by private actors, they pursue different objectives and incorporate multiple dimensions and 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 certification.⁵¹ These differences are often reflected in the choice of governance models and enforcement mechanisms, particularly in the balance between judicial and non-judicial enforcement.⁵² 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 merchant law.⁵³

48 See Vogel, *op. cit.*, n. 24, p. 156; D. Vogel, 'Private Global Business Regulation' (2008) 11 *Annual Rev. of Pol. Sci.* 261–82; G.C. Shaffer, 'How Business Shapes Law: A Socio Legal Framework' (2009) 42 *Connecticut Law Rev.* 147–84. In a different and closer perspective to the text, see D. Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the Am. Academy of Pol. and Social Sci.* 12–32.

49 For an interesting conceptual map, see Abbott and Snidal, *op. cit.*, n. 7, pp. 57–62.

50 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.

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

52 See Cafaggi, *op. cit.*, n. 31.

53 The differences are wider with the so-called European continental view and more limited with the American perspective where differences within merchant law are widely recognized.

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 organizations.⁵⁴

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 developed in earlier work.⁵⁵ 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 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 beneficiaries.⁵⁶

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.

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, that is, 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 problems.⁵⁷

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 dependent upon the market structure and the representation and governance model of the associations.⁵⁸

54 See Abbott and Snidal, *op. cit.*, n. 7, p. 61.

55 See F. Cafaggi (ed.), *Reframing Self-Regulation in European Private Law* (2006) 3 and, for a more recent elaboration, F. Cafaggi, 'Governance of Transnational Private Regulation' in *Handbook of Governance*, ed. D. Levi-Faur (2011, forthcoming).

56 See F. Cafaggi, 'Compliance and Effectiveness in Transnational Private Regulation', on file with the author.

57 Differentiation does not imply lack of dialogue. The increased need for responsiveness has changed the regulatory model in the public domain, increasing forms of dialogue between the regulator and the regulated.

58 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.

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 investors.⁵⁹ The International Accounting Standards Board (IASB) produces international financial reporting standards (IFRSs), adopted by firms to comply with requirements expressed by Stock Exchanges, the Financial Stability Board, and other entities.⁶⁰ 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 regulated.⁶¹ The interests of the regulator and those of the regulated are de facto 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 years.⁶² 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 institutions.⁶³ The difference between this and the second and the third

59 See T. Buthe and W. Mattli, *Private Global Regulation: The Politics of Setting Standards for International Products and Financial Markets* (2011); T. Buthe and W. Mattli, 'Global Private Governance: Lessons from a National Model of Setting Standards in Accounting' (2005) 68 *Law and Contemporary Problems* 225–62.

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

61 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, op. cit., n. 59; T. Buthe and W. Mattli, 'International Standards and Standard-setting Bodies' in *The Oxford Handbook of Business-Government Relations*, eds. D. Coen, G. Wilson, and W. Grant (2009) 440.

62 See OECD, op. cit., n. 29; 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>.

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

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.

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

Consumer International is an independent non-governmental organizations with members and affiliates. 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 on the board of trustees.⁶⁴ 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 world.⁶⁵ As provided by its statute, Amnesty International 'consists of sections, structures, international networks, affiliated groups and international members'.⁶⁶ 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. The 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 standardization, though frequently their 'capture' by industry dilutes their neutrality and objectivity.⁶⁷ The definition of experts has changed over time and in some areas expertise has become much less hierarchical. In the field of internet

64 There is no governmental or industry involvement in the foundation, see constitution of Oxfam, at <http://www.oxfam.org/sites/www.oxfam.org/files/constitution_0.pdf>.

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

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

67 See H. Schepel, *Constitution of Private Governance* (2005).

governance, the diffusion of self-regulating epistemic communities 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.

4. The 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, and 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, frequently 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.

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 principle-based regulation which is later specified at the stage of implementation.⁶⁸ This model is best illustrated by ICANN in the field of internet governance. It is a non-profit public-benefit organization with the legal status of a corporation, organized 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 members of the governing board and to the nature of the regulated, which encompass international organizations, states, firms, and consumers.

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

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 law.⁶⁹ The latter is a British-based company limited by guarantee and registered as a charity with the Charity Commission.⁷⁰ The FSC is composed of three chambers representing different interests (social and indigenous organizations, environmental organizations, and economic organizations) which are then coordinated by the general assembly and fully and equally represented on the multi-stakeholder board. Clearly the two chambers of indigenous and 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 power.⁷¹ 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.⁷² However, some conflicts might still arise and organizational responses are required.⁷³

A third example is the International Swaps and Derivatives Association (ISDA).⁷⁴ This 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).⁷⁵ The rules concerning transactions in swaps and derivatives are cast in a master agreement drafted by ISDA, and subsequently adapted and tailored to state legislation.⁷⁶ 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

69 See, for a good overview, E.E. Meidinger, C. Elliott, and G. Oesten, 'The Fundamentals of Forest Certification' in *Social and Political Dimensions of Forest Certification*, eds. E.E. Meidinger, C. Elliott, and G. Oesten (2003) 3; E.E. Meidinger, 'Multi-Interest Self-Governance through Global Product Certification Programs' in *Responsible Business? Self-Governance in Transnational Economic Transactions*, eds. O. Dilling, M. Herberg, and G. Winter (2008) 259–91.

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

71 See, for an overview of the organizational setup, <<http://www.fsc.org/governance.html>> for the FSC and <<http://www.msc.org/about-us/governance/structure>> for the MSC.

72 Meidinger, op. cit., n. 69.

73 See, for instance, reform of the enforcement system recently introduced in FSC. See, also, Meidinger id.

74 For a succinct description, see G. Morgan, 'Market Formation and Governance in International Financial Markets: The Case of OTC Derivatives' (2008) 61 *Human Relations* 637–60. For further information, see ISDA's homepage at <<http://www.isda.org/>>.

75 '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 at <<http://www.isda.org/>>.

76 See ISDA Master Agreement (2002).

and corporate social responsibility: WADA and the UN Global Compact.⁷⁷ WADA is the world anti-doping agency in charge of regulating and monitoring rules regarding anti-doping. It is composed of private and public organizations representing different sports constituencies.⁷⁸ The UN Global Compact is a voluntary policy initiative launched by the UN in 2000 with the main goal of crystallizing ten 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 well.⁷⁹

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 up of national standard-setting bodies.⁸⁰ 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. This said, 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 consumers.⁸¹ 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 (that is, 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 form.⁸² Here, the main governance question is related to the incentives of retailers, often the most powerful players in the regulatory process, to act on

77 For an overview of the different models, see J.G. Ruggie, 'Business and Human Rights: The Evolving International Agenda', CSRI Working Paper no. 38 (2007).

78 WADA was founded in 1998 as an independent agency with foundation board, an executive committee, and several specialized committees, see <www.wada-ama.org/Documents/About_WADA/Statutes/WADA_Statutes_2009_EN.pdf>.

79 For a more detailed overview of the governance scheme, see <www.unglobalcompact.org/AboutTheGC/stages_of_development.html>.

80 See articles 3.1. and 3.1.1 of ISO Bylaws.

81 See Ruggie, *op. cit.*, n. 77.

82 See CAC, *op. cit.*, n. 44, p. 8.

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 are 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 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 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 picture. The different positions of the beneficiaries, placed either 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 internalization of the beneficiaries in the regulatory relationship but also the recognition and solution of conflicts among different interests of the regulated entities.⁸³ 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 regime.⁸⁴ 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.

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

84 See, for a more detailed analysis of the governance dimension, Cafaggi, *op. cit.* (2011), n. 55.

III. 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 level.⁸⁵ First, it is necessary to describe the changes in the allocation of rule-making power and then to try to infer which normative implications can be drawn.

The reallocation of rule-making power between public and private actors at 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 and then spread across the Western world.⁸⁶ 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 bodies.⁸⁷ The conventional division of tasks between global markets and nation-states has been profoundly transformed.⁸⁸ Not only have states withheld from direct intervention in the market by privatizing and regulating many activities but also the regulatory dimension has been radically transformed, giving rise to different forms of regulatory capitalism.⁸⁹ Private actors, as we have seen, have come to play new roles, engaging in different forms of private regulation. This phenomenon might imply various characterizations depending on (i) who is considered to be part of the private sphere (industry, experts, NGOs), (ii) what is the scope of the regulatory activity, and (iii) 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 poten-

⁸⁵ *id.*

⁸⁶ See R. Baldwin and M. Cave, *Understanding Regulation* (1999); W. Streeck, *Reforming Capitalism* (2008); L. Bruszt and R. Holzhaecker, *The Transnationalization of Economies, States, and Civil Societies* (2009); C. Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in *Regulation After the Regulatory State*, eds. D. Oliver, T. Prosser, and R. Rawlings (2010); T. Prosser, *The Regulatory Enterprise* (2010).

⁸⁷ See J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137–64; C. Scott, 'Regulating Private Legislation', and T. Prosser, 'Regulatory Agencies, Regulatory Legitimacy and European Private Law' in *Making European Private Law*, eds. F. Cafaggi and H. Muir Watt (2008) at pp. 235 and 254 respectively. For a comparative analysis, see G. de Búrca and C. Scott (eds.), *Law and New Governance in the EU and the US* (2006); C.F. Sabel and J. Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (2010).

⁸⁸ See Abbot and Snidal, *op. cit.*, n. 7.

⁸⁹ Levi-Faur and Jordana, *op. cit.*, n. 9.

tially translating into private regulation.⁹⁰ At the state level, these modes are constrained by constitutional limitations.⁹¹ 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 themselves of their powers in favour of private actors.⁹² These transfers are often interpreted as the consequence of decreased state capacities to regulate, either because of capture or because of a lack of technical expertise.

The search for legitimacy for these different regulatory forms requires different answers depending upon the origins and effects of the rule-making power.⁹³ Regimes based on freedom of contract and association have different legitimacy responses from those based on the protection of fundamental rights or the environment.

The transfer of rule-making power, however, is not the only form affecting its redistribution. In many contexts the newly globalized fields (like the 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 existing between the reallocation of regulatory power at state and that at the international level between public and private actors?

Three distinctive features of the public sphere are modifying the relationship with the private sphere: the significantly increased use of soft law; the limited delegability of law-making power by IO and IGO to private regulators; the limited, although 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 the transnational level may reduce the number of 'formal' co-regulatory arrangements based on the combined use of public and private regulation and an increased retrospective

90 See G.D. Majone, 'International Regulatory Cooperation. A Neo-institutional Approach' in *Transatlantic Regulatory Cooperation*, eds. G.A. Bermann, M. Herdengen, and P. Lindseth (2001) 109; F. Cafaggi, 'Rethinking self-regulation in European Private Law' in Cafaggi, op. cit. (2006), n. 55.

91 See F. Cafaggi, 'Private Law Making and European Integration' in Oliver et al., op. cit., n. 86.

92 For a detailed analysis concerning the United States, see G.E. Metzger, 'Private Delegation, Due Process and the Duty to Supervise' in *Government by Contract*, eds. J. Freeman and M. Minow (2009) 291. For an overview, see Cafaggi, id.

93 Black, op. cit., n. 87.

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.

While the preferences of private actors for international organizations choosing hard or soft law have been analysed to a limited extent, little work has been done on the influence of (and choice of) soft law on the forms and substance of transnational private regulation. Soft law is often coupled with self-regulation in a single category, unified by the assumed non-binding nature of both. I 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 law.⁹⁴

So far in this essay, the use of soft law has been associated with recourse to private regulation, emphasizing their complementarity. These regimes have been distinguished from those, dominant in domestic orders, combining hard law and private regulation. However, in certain conditions soft law may constitute an alternative rather than a complement to private regulation. It preserves the rule-making power held in public hands while providing a higher degree of flexibility and adaptability.

1. Refining institutional complementarity

Institutional complementarity may take different forms: horizontal complementarity when public and private regimes coexist 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 ascribes 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.⁹⁵

In many circumstances, TPR regimes are functionally correlated to (i) the existence and (ii) the nature of public regimes. Institutional complementarity

⁹⁴ See Cafaggi, *op. cit.* (2006), n. 55.

⁹⁵ Such complementarity becomes particularly relevant when conflicting regimes attempt to externalize costs on the each other because the typical states' institutions that govern these processes are missing. Private macro-governance acquires greater importance.

between international public organizations and transnational private regulation may materialize in different ways depending on the specific regulatory function.⁹⁶ 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 correlation.⁹⁷

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 recognizes 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 organizations.⁹⁸ For instance, CSR standards may be recognized by the ILO, and private standards produced by ISO may be endorsed by WTO when complying with SPS or TBT agreements.⁹⁹

The claim in this article is that the public and the private spheres influence each other: the distribution between hard and soft law within the public domain affects the functions of TPR, while 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 and it tailors them to specific markets and,

96 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.

97 This is the key issue addressed by GAL. See Kingsbury et al., op. cit., n. 17, pp. 19 ff.; B. Kingsbury and R.B. Stewart, 'Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations', at <www.iilj.org/aboutus/documents/LegitimacyAccountabilityandGAL.UNATvolumefinalAug82008.pdf>.

98 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, J. Black and D. Rouch, 'The Development of the Global Markets as Rule-Makers: Engagement and Legitimacy (2008) 2 *Law and Financial Markets Rev.* 218–33, at 223.

99 See Ruggie, op. cit., n. 77; J. Ruggie, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' A/HRC/8/5 (2008); J. Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2008) 23 *Am. University International Law Rev.* 451–558.

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.

IV. 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? 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 simply be transposed at the transnational level.¹⁰⁰

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 so far lacks 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 (articles 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 private international rule if a regulatory contract has been used to set up the 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 has grown in the past years acquiring a larger regulatory share.¹⁰¹ The apparent paradox is that the

¹⁰⁰ See Cassese, *op. cit.*, n. 37, pp. 670 ff.

¹⁰¹ See Cutler et al., *op. cit.*, n. 19; J. Braithwaite and P. Drahos, *Global Business Regulation* (2000); Cutler, *op. cit.*, n. 7.

transfer of regulatory power from public to private at transnational level occurs within the framework of the legalization of international relations, historically associated with the emergence of state and the public sphere.¹⁰² This ‘apparent’ paradox explains the differences with other patterns of the growth of the private sphere which have coincided with de-juridification and de-legalization.¹⁰³ Strategic considerations entice private players to choose the transnational level. (Some) industries promote this 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 four different forms of transformation of the relationship between the public and private dimension: (i) hybridization; (ii) collaborative rule making; (iii) coordination; (iv) competition.¹⁰⁴

- (i) *Hybridization* between private and public law tools occurs in both directions: administrative law principles are applied to private organizations exercising rule-making power at transnational level;¹⁰⁵ contract and organizational law rules and principles are applied to the activity of IO and IGO to regulate firms and other entities.
- (ii) *Collaborative rule making* occurs when private and public actors engage in a process by which rules are jointly drafted.¹⁰⁶ A variant is when private actors draft rules and the public actors subsequently approve or endorse them.¹⁰⁷ Clearly, when the latter occurs, the private actor internalizes the principles upon which the public actor will endorse the private rules.¹⁰⁸ 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.

102 There is a general phenomenon of the legalization 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 legalization of international relations, see J. Goldstein, M. Kahler, R.O. Keohane, and A.-M. Slaughter, *Legalization and World Politics* (2001).

103 See G. Teubner (ed.), *Global Law Without a State* (1997).

104 For different perspectives see Kingsbury, op. cit., n. 30 and von Bogdandy et al., op. cit., n. 11.

105 See Kingsbury et al., op. cit., n. 17.

106 Often cited examples are the code of good practice for setting social and environmental standards by ISEAL and the UN Global Compact.

107 Such collaborative rule making occurs within a multi-stakeholder organization: for example, the Anti Doping Code drafted by the WADA.

108 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 K. Pistor, ‘Global Network Finance: Institutional Innovation in the Global Financial Market Place’ (2009) 37 *J. of Comparative Economics* 552–67.

- (iii) *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, coordination 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; 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 regimes.¹⁰⁹ Often private regulators design rules to be later endorsed by the public regulator, either through judicial or administrative recognition.
- (iv) *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: the identity of the participants and, in particular, which private actors play a dominant role; the instruments adopted, contractual or organizational; the objectives of the regulatory regimes – increasing legitimacy and/or improving effectiveness. The incentives for parties to adopt one or the other may vary depending on the sector, the level of market integration, and its structure. While it was emphasized that changes in the public sphere had been an important factor in determining whether and how private regulation developed, the forms of complementarity depend significantly upon the model of private regulators.

In relation to private parties, the different combinations of governance models between regulatees and beneficiaries may affect the choice. Empirical research is needed to clarify whether 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 earlier with the four modes of complementarity outlined here will provide new insights into how the transnational regulatory space is defined.

109 See F. Cafaggi, 'Legal transplants in TPR: New challenges for Comparative Law', on file with the author.

CONCLUSIONS

In this article, I have looked at the different models of TPR: (i) from pure self-regulatory regimes, characterized by the coincidence between regulators and regulated, to multi-stakeholders including business, NGOs, and public entities, encompassing both regulated and beneficiaries in their governance structure; (ii) from integrated forms of cooperation between public and private through regulatory contracts to formal or informal delegation beforehand, when the regulatory power is conferred on private regulators by IOs, IGOs or directly by international law; (iii) private regulation, endorsed after the event by public entities, through judicial or administrative recognition; (iv) guidelines and principles directing private parties with the threat of introducing hard-law legislation. Two distinguishing conceptual features characterize the approach taken here: the link between governance of the private regulator and regulatory activity, and the shift of focus from single organizations to regimes.

The link between governance and activity is built around the regulatory relationship. As 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 one.¹¹⁰ On the one hand, contemporary private regulation reduces the degree of excludability, typically a feature of club goods. On the other, it limits the degree of negative externalities by internalizing, within the regulatory process, the product and the interests of the final beneficiaries.

The shift from organizations to regimes permits the capture of both inter-organizational and intra-organizational dynamics in private regulation. The notion of regime in this context is not primarily based on who the members are but, 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 analysing 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

110 See Cafaggi, *op. cit.*, n. 91, and A. Katz, 'Taking Private Ordering Seriously' (1996)

114 *University of Pennsylvania Law Rev.* 1745–63.

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 the 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 MNCs, 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. Hence, market regulatory shares become 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 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 measures. This picture, if at all convincing, has been seriously challenged by the increasing use of soft law which also provides greater 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 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 reversing 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. At the transnational level, it 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 requires private law to make its principles binding at domestic level.

But it can also affect the choice of private regulatory strategy, for example, between command and control and responsive regulation. In fact 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 later recognition of privately designed standards by international organizations. Private law, especially at national level, may become an instrument used to harden international soft law, albeit with limited reach, 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 credibly. 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 recognized 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 internalizes private rules and even practices by way of recognition after the fact 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 (that is, 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 (for instance, the public as it is the case for UN) 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 in 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 conflicts.¹¹¹ 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-

¹¹¹ See Cafaggi, *op. cit.*, n. 55.

filling method generates fragmentation and inconsistencies within the same regime.

Vertical complementarities occur when there is a multilevel hybrid regime: one activity (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);¹¹² 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 between both the transnational and the national level, but also among the different national levels. For example, in the case of decentralized enforcement, a 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 of loyal cooperation which exists 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 multi-level system.

Within the private sphere, trans-nationalization 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 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 escape 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.

112 Advertising provides a good illustration of multi-level complementarity between transnational private law and 'regional' or state legislation.