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# **‘The Conceptual and Constitutional Challenge of Transnational Private Regulation’**

**Colin Scott, Fabrizio Cafaggi & Linda Senden**

## **Abstract**

Transnational private regulation (TPR) is a key aspect of contemporary governance. At first glance TPR regimes raise significant problems of legitimacy because of a degree of detachment from traditional government mechanisms. A variety of models have emerged engaging businesses, associations of firms and NGOs, sometimes in hybrid form and often including governmental actors. Whilst the linkage to electoral politics is a central mechanism of legitimating governance activity we note there also other mechanisms including proceduralization and potentially also judicial accountability. But these public law forms do not exhaust the set of such mechanisms, and we consider also the contribution of private law forms and social and competitive structures which may support forms of legitimation. The central challenge identified concerns the possibility of reconceptualising the global public sphere so as to better embrace TPR regimes in their myriad forms, such that they are recognised as having similar potential for legitimacy as national and international governmental bodies and regulation.

## **1. Introduction**

It has been widely observed that governance powers that were once considered the prerogative of the nation state have emerged in a form where they are exercised by actors distinct from national governments. This transformation has involved both a shift of power towards international governance bodies and also to non-governmental bodies.<sup>1</sup> This diffusion of governance power is widely associated with processes of globalization which, though they do not render national governments powerless, nevertheless throw up challenges of coordination and regulation which national governments, acting on their own, cannot effectively address. Supranational governmental organisations such as those associated with the European Union, the Organisation for Economic Cooperation and Development and the United Nations, and many other treaty-based organisations, derive a good deal of their governance capacity in their decision making and their legitimacy from the direct participation of, or delegation from, national governments. Much of the implementation of such governance regimes does, in any case, fall to national governments. Transnational and non-governmental regulatory power does not so obviously have linkages to the electoral

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<sup>1</sup>C. Cutler, V. Haufler and T. Porter, *Private Authority and International Affairs* (1999).

politics associated with national governments. Arguably transnational private regulation (TPR) presents a greater challenge in terms of its constitutional standing and legitimacy.

Constitutional problems of TPR are accentuated within more state-centred conceptions of constitutional governance. If we are to follow the exercise of power beyond nation state institutions this argues for adopting a more pluralist conception of constitutionalism which gives greater recognition to the diversity of institutional structures. Within such a pluralist approach constitutional governance forms range from those associated with traditional electoral politics through inter-governmental activity to complete self-governance regimes.<sup>2</sup> Such a pluralist approach has the potential not only to embrace the activities of private actors, but also the instruments of private law, and in particular the contracts upon which much of this regulatory activity is dependent for its normative effects.<sup>3</sup>

The articles in this special issue are part of a larger project investigating the emergence, legitimacy and effectiveness of transnational private regulatory regimes (TPRERs), funded by the Hague Institute for the Internationalization of Law.<sup>4</sup> The project investigates the claims to legitimacy and effectiveness of TPR regimes across different sectors by combining theoretical and empirical research. In this article we offer an introduction to the constitutional challenges associated with TPR. We first discuss the variety of transnational private regulatory regimes which come within our conception of the phenomenon. This requires an examination of distinctions and commonalities between public and private actions. A central question in the examination of non-state regulation is the extent to which private regulation may be conceived of as serving collective interests. We then examine how each of the different types of regimes addresses core regulatory tasks of setting and enforcing norms. A variety of models have emerged engaging businesses, associations of firms and NGOs, sometimes in hybrid form and often including governmental actors<sup>5</sup>. Whilst the linkage to electoral politics is a central mechanism of legitimating governance activity there are clearly other mechanisms relating to proceduralization and potentially also to judicial accountability. But these public law forms do not exhaust the set of such mechanisms, and we consider also the contribution of private law forms and cooperative and competitive structures which may support similar legitimating functions. Accordingly the constitutional standing of TPRERs is considered from the perspective of the variety of mechanisms through which legitimacy may be achieved for private regulation.

## **2. Key Concepts of Transnational Private Regulation and the Constitutional Challenge**

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<sup>2</sup> N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317-359, at 341.

<sup>3</sup> O. Perez, 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts' (2002) 29 *Journal of Law & Society* 77-110.

<sup>4</sup> Further details may be found on the project website [www.privateregulation.eu](http://www.privateregulation.eu) – Accessed 4 September 2010.

<sup>5</sup> B. Kingsbury, N. Krisch & R. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15; S. Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation', *International Law and Politics* (2005),

The concept of transnational private regulation emerged, it has been claimed, to capture the idea of governance regimes which take the form of ‘coalitions of nonstate actors which codify, monitor, and in some cases certify firms’ compliance with labor, environmental, human rights, or other standards of accountability’.<sup>6</sup> They are transnational, rather than international, in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties (the latter being the principal territory of international law).<sup>7</sup> They are nonstate (or private, as we prefer) in the sense that key actors in such regimes include both civil society or non-governmental organisations (NGOs) and firms (both individually and in associations).

Such regimes address activities characterised in some instances by market-oriented needs for intervention and coordination, as with technical standards regimes,<sup>8</sup> but also provide a response to broader political conflicts over the appropriate balance between states and markets in determining such matters as entitlements to the protection of human rights and conservation of the environment.<sup>9</sup> Thus while standardization regimes might be evaluated to some extent by reference to market criteria, there is arguably a stronger political component to regimes which may be characterised as constituting global points of connection between civil society, business and government and, indeed, global governance without global government. For some this political engagement between civil society and government, represented in this case at transnational level, merits discussion and investigation of the emergence of a ‘new public sphere’.<sup>10</sup> Recent activity, engaging NGOs, governments and businesses in respect of employment rights provides a key example.<sup>11</sup> This point is well demonstrated by Fiona de Londras’ contribution to this special issue in which she argues that threats to human rights generated by the delegated activities of private airlines cannot be adequately addressed by conventional litigation strategies but are likely to require more institutionalised and hybrid responses drawing in both NGOs and associations of firms and governments in developing and implementing appropriate protective norms. Her approach involves a critical examination of the capacity for governance within the aviation industry, largely over technical matters, which might be turned towards effectively addressing human rights concerns. An underlying question in her approach is whether there are some activities for which privatization of provision and regulation are inappropriate. This is not simply a question of the limits to legitimate transfer to private firms of state functions, an issue that has been explored in the case of privatization of prisons,<sup>12</sup> but also the appropriate role and

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<sup>6</sup> T. Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 *American Journal of Sociology* 297-351, at 298.

<sup>7</sup> M.L. Djelic and K.S. Andersson, 'Introduction: A World of Governance: The Rise of Transnational Regulation' in *Transnational Governance: Institutional Dynamics of Regulation*, eds. M.L Djelic and KS Andersson (2006) 4.

<sup>8</sup> N. Brunsson and B. Jacobsson, 'The Contemporary Expansion of Standardization' in *A World of Standards*, eds. N Brunsson, B Jacobsson and Associates (2000).

<sup>9</sup> Bartley, *op. cit.*, n. 5, p. 299.

<sup>10</sup> M. Castells, 'The New Public Sphere: Global Civil Society, Communication Networks and Global Governance' (2008) 616 *Annals of the American Academy of Political and Social Science* 78-93, at 80, 89.

<sup>11</sup> D. O'Rourke, 'Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?' (2006) 34 *World Development* 899-918.

<sup>12</sup> R. Harding, *Private Prisons and Public Accountability* (1997).

limits of *private* regulation over such privatized activities. De Londras' claims that the institutional structures of private regulation, established to address issues of technical standards and safety, might be turned to address human rights issues is made not because of some normative superiority of such private regulation, but rather because this is where the capacity for such oversight is best developed.

The emergence of TPR regimes may produce transfers of power and authority from State to supranational level and from public to private, affecting traditional conceptions of sovereignty and self-determination.<sup>13</sup> Frequently built on mixed, co-regulatory bases private regulatory regimes exhibit a different structure at national and international level, due predominantly to the weaker governmental dimension at the global level. These developments have been subject to criticisms in literature and by policy makers, focusing on their lack of legitimacy. The emergence of powerful private regulators operating transnationally clearly raises challenges for ideas of constitutionalism which remain substantially rooted to electoral politics at national level and to the ambition to control governmental and legislative power by reference to principles concerned with the rule of law.<sup>14</sup> However we should recognise that theories of sovereignty and nation state have been able to operate alongside powerful transnational governance regimes of earlier eras, including the power of the Roman Catholic church and of large multinational enterprises and their predecessors in the great trading companies.<sup>15</sup> Furthermore the centrality of the state to contemporary constitutional governance has been increasingly challenged by the emergence both of international and private governance regimes.<sup>16</sup>

For some the idea of private regulatory power, particularly where it involves a degree of self-regulation, is tantamount to de-regulation or an abdication of regulation. On the contrary we believe that it is a form of regulation which can significantly enhance capacity for developing and implementing public-regarding norms, although requiring investigation as to its effects and effectiveness. We note that the standing and legitimacy of private regulation varies across different countries even within the European Union. For example, whereas self-regulation is well accepted and integrated into wider regimes of regulatory governance in the UK, the legitimacy of self-regulation is more fragile in some member states and also in the United States.

The principal objections to self-regulation at both national and supranational level include claims that such regimes are likely to be programmed to be soft or ineffective or, where they are effective, this is to enhance the position of regime members so as to cartelize a market, with not only positive effects for participants but also negative effects for others (both

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<sup>13</sup> N. McCormick, '*Beyond the Sovereign State*' (1993) 56 *Modern Law Review* 1-18; N. Rose and M. Valverde, '*Governed by Law?*' (1998) 7 *Social and Legal Studies* 541-551. F. Cafaggi, New foundations of transnational private regulation in this issue.

<sup>14</sup> J. Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 *Oxford Journal of Legal Studies* 427-455.

<sup>15</sup> P. Drahos, 'The Regulation of Public Goods' (2004) 7 *Journal of International Economic Law* 321-339, at 323.

<sup>16</sup> McCormick, *op. cit.*, n. 12; Walker, *op. cit.*, n. 2.

competitors and consumers). Indeed, it has been suggested that the existence of a TPR regime may indicate an absence of competition between firms within a sector.<sup>17</sup> The dismissal of non-state regulation on the grounds that it serves only private interests through ineffectiveness, cartelization or capture is too simple. In her contribution to this special issue Imelda Maher critically evaluates the modern tendency of competition law policies and agencies to operate a more-or-less blanket prohibition on cartel agreements, and asks what conditions would be required to satisfy some form of public interest justification for a cartel? She notes that in some contexts, notably export cartels, agreements lawfully evade such prohibitions without state involvement, while others seem to require public sanction and oversight to render them lawful, generating a hybrid form of regulation. Within this discussion there is potential for competition law to offer a means to regulate, in the public interest, private regulation through cartels, as an alternative to prohibition.

The promulgation and enforcement of norms are usually regarded as being public goods, in the sense that the taking of the benefits by one person does not reduce the stock of benefits available to others (non-rivalry) and that no one can be excluded from the benefits (non-excludability).<sup>18</sup> Indeed, it is possible to characterise much TPR as constituting the de-centred regulation of public goods associated with the good order of society, whether such outcomes are intended or not.<sup>19</sup> In principle it makes no difference to the public good qualities of effective norms whether they are publicly or privately promulgated. Put another way private regulation need not simply be about the production of club goods (that is norms which benefit the members of a regime only) and purely private goods. An important question is to what extent can public goods, such as effective regulation, be privately produced? For some the absence of an effective incentive structure for private provision of global public goods is problematic.<sup>20</sup> This is an issue we address in the next section of the article.

### **3. Emergence of Transnational Private Regulatory Regimes**

In many instances the production of effective private regulation is very closely tied to the interests of those putting the regime forward. This is a central theme of Elinor Ostrom's research on self-organising responses to problems associated with common resource goods (and the problem of excessive exploitation of commonly owned resources, the commons, more generally), such as fisheries. It may be in the interests of one person to take all the fish they can, but the aggregate welfare of all is affected by over-fishing. An apparent paradox identified by Ostrom is the demonstration that market failures associated with excessive depletion of common resources may be effectively addressed through action by the very

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<sup>17</sup> D. Mügge, 'Private-Public Puzzles: Inter-Firm Competition and Transnational Private Regulation' (2006) 11 *New Political Economy* 177 – 200, at 172.

<sup>18</sup> A Katz, 'Taking Private Ordering Seriously' (1996) 144 *University of Pennsylvania Law Review* 1745-1763, at 1749.

<sup>19</sup> Drahos, *op. cit.*, n. 14.

<sup>20</sup> A.C. Cutler, 'The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force' (2010) 8 *Social & Economic Review* 157-185, at 176.

same market actors whose conduct caused the problem, but now acting collectively rather than individually.<sup>21</sup> Whilst in some instances it may be sufficient for the affected actors to act collectively (and differently from how they might act individually), in other instances the collective action challenges are too great. Classically we might think of the necessary response as being governmental. But a major reason for emergence of TPR regimes is that NGOs seek to address the costs of economic activity which cannot be effectively addressed by the actors involved alone, collectively or individually. The problem of the commons is not restricted to such local issues as fisheries, but extends also to global issues, notably climate change.<sup>22</sup> Extending beyond the problem of the commons we should consider the ways in which private interests are pursued and served through private regulation and the extent to which the relationships to government, to market and to communities support and incentivise effective regulation serving some version of the public interest. Such contestation in the field of intellectual property rights is a key case study in the contribution by Sol Picciotto to this volume.

These issues of purposes and effects of private regulation are closely linked to questions of the emergence of regimes. We conceive of regulatory regimes, following Eberlein and Grande, as ‘the full set of actors, institutions, norms and rules that are of importance for the process and the outcome of [...] regulation in a given sector’.<sup>23</sup> Many regimes are driven by market concerns, but market incentives to private regulation are not of one type. Standardisation processes, for example, are chiefly linked to problems of coordination in markets.<sup>24</sup> Producers want to be able to use each others’ components in production and to assure consumers that products from different producers will work together. There is a market incentive to develop and follow standards, and the market punishes those who do not follow them.

Quite distinct from the coordination issue, firms may self-regulate to address reputational issues in the market. Thus individual and collective firm responses to concerns about poor working conditions in the garment manufacturing industry have involved seeking to establish credible regimes to develop and implement higher standards so as to protect market position in industrialised countries.<sup>25</sup> This latter motivation hints at the position of firms within communities and is reminiscent of the idea that firms in extractive industries such as logging and mining are dependent on a ‘social licence to operate’<sup>26</sup> which, though it may be implicit, has significant consequences for firms when it is deemed to be breached. This may result in

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<sup>21</sup> E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990).

<sup>22</sup> W.D. Nordhaus, *Managing the Global Commons: The Economics of Climate Change* (1994); F. Haines and N. Reichman, 'The Problem that is Global Warming' (2008) 30 *Law & Policy* 385-393.

<sup>23</sup> B. Eberlein and E. Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' (2005) 12 *Journal of European Public Policy* 89-112, at 91.

<sup>24</sup> K.T. Hallström, *Organizing International Standardization: ISO and IASC in Quest of Authority* (2004).

<sup>25</sup> D. O'Rourke, 'Outsourcing Regulation: Analyzing Non-Governmental Systems of Labor Standards and Monitoring' (2003) 49 *Policy Studies Journal* 1-29.

<sup>26</sup> N. Gunningham, R. Kagan and D. Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law and Social Inquiry* 307-342.

some institutionalisation of private regulatory capacity over the issues at the level of individual firms or trade associations.

In some sectors it has fallen to NGOs to find ways to address social problems created by firms, for example respecting human rights and the environment. Organisations such as Amnesty International and the Rainforest Alliance reflect and channel public concerns about human rights and the environment, respectively, and have become important sources of standards and monitoring over multinational enterprises in particular. Many more NGOs have transnational reach in regimes which they lead, increasingly with some engagement of governmental and or industry actors.<sup>27</sup> Such engaged leadership of NGOs is exemplified by the activities of the Forest Stewardship Council discussed in the article in this special issue by Errol Meidinger. Though TPR regimes sometimes emerge without government involvement, governments have capacity to stimulate and steer such regimes through a variety of actions, including giving statutory recognition to private regimes and threatening legislative intervention. In some instances it is the weaknesses of national governments, particularly in developing economies, which stimulate the emergence of TPRs to address matters which national governments cannot effectively address. The capacity to steer transnational actors is arguably greater for inter-governmental actors than for national governments. The EU institutions, for example, have made increasing reference to regimes which link public encouragement to private capacity, under the rubric of co-regulation, as a means to regulating more effectively with less use of public resources.<sup>28</sup> Such regimes are increasingly likely to be both hybrid, involving both governmental and non-state actors, and also multi-level, involving national, European and international levels.<sup>29</sup>

A central example is provided by self-regulation in the area of advertising. In operational terms advertising self-regulation occurs in many member states as a privately organised and national regime.<sup>30</sup> However, the European Commission has been heavily involved in encouraging a transnational private organisation, the European Advertising Standards Alliance, to promote more uniform and stringent models of self-regulation and regulatory standards through the national private regimes.<sup>31</sup> The common reference point for the standardization of national codes is the Consolidate Code of Advertising and Communications Marketing Practice promulgated by the International Chamber of Commerce.<sup>32</sup> In turn, legislative measures, such as the Unfair Commercial Practices Directive (Directive 2005/29/EC) both encourages the engagement of stakeholders in the

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<sup>27</sup> K. Abbott and D. Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in *The Politics of Global Regulation*, eds. W. Mattli and N. Wood (2009).

<sup>28</sup> L. Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law - Where do they Meet?' (2005) 9 *Electronic Journal of Comparative Law*.

<sup>29</sup> F. Cafaggi, 'Private Regulation in European Private Law in *Reframing Self-Regulation in European Private Law*, ed. F. Cafaggi (2006).

<sup>30</sup> European Advertising Standards Alliance, *Blue Book 6: Advertising Self-Regulation in Europe and Beyond* (2010).

<sup>31</sup> European Commission, *Self-Regulation in the EU Advertising Sector: A Report of Some Discussion Among Interested Parties* (2006) pp. 12-13.

<sup>32</sup> European Advertising Standards Alliance, op. cit., n. 29, pp. 22-27.

promulgation of self-regulatory codes (recital 20) and requires member states to penalise through legislation the abuse of self-regulatory codes by businesses (art 6(2)(b)).<sup>33</sup>

#### **4. Patterns of Transnational Private Regulation**

Whilst TPR regimes do, by definition, share important elements of transnational reach and leadership by non-governmental actors, their legal forms are diverse. Some TPRERs are based on organisational forms such as companies, and others on contractual forms, both associational and bilateral. Amongst the companies corporate social responsibility (CSR) regimes frequently involve self-regulation of the company itself, whereas the adoption of externally set standards and certification or assurance processes involves companies in specifying and enforcing regulatory standards for other companies. Whereas associations do, in many cases, comprise member companies of the regulated industry, with a strong self-regulatory element, in some instances associations bring together a wider range of stakeholders, as with the case of the Forest Stewardship Council which is led by environmental NGOs. GlobalGap, the private food standards organisation, is led by representatives of major retailers.<sup>34</sup> Producer companies comprise the primary target of regulation and, increasingly, are represented within the association.

With the practices of individual firms involving corporate governance, key issues concern the sources of the norms which they follow and the mechanisms through which compliance is overseen. Corporate governance norms have emerged in recent years through the activities of various private committees, but been given some official force through reference to some or all of their requirements in national corporate law regimes. Oversight and enforcement has been in part a matter for companies themselves, through their executive and non-executive directors. Often ethical committees have been created independent from the management to oversee the implementation of codes of conducts. But shareholders have taken on increasing prominence, frequently acting through associational groups, in steering firms towards compliance with key corporate governance norms.<sup>35</sup> The increasing importance of private regulation has promoted important changes in the corporate governance structure of multinational enterprises to promote responsiveness towards stakeholders affected by the activity of the corporation.

With multinational enterprises generally, both in their own corporate governance activities, and in their relationships to others, whether in bilateral or associational contracts, there are significant distinctions in the market position of different firms. Proximity to final consumers has the potential to create market pressure on businesses to adopt and implement private regulatory regimes. Private regulators such as NGOs may exert greater pressure because labelling and other marketing mechanisms affecting reputation can be used as a competitive

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<sup>33</sup> F. Cafaggi, *Private Regulation in European Private Law* (European University Institute, Florence 2009) forthcoming in Hartkamp et al (eds.) , *Towards a European civil code*, 4<sup>o</sup> ed. 2011.

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<sup>35</sup> B. J. Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (2008).

tool. In some instances where consumer pressure is absent, investors may exert a degree of oversight over company practices through investment decisions generally and negotiation with companies through investor associations, a growing trend in the environmental protection area.<sup>36</sup>

Governments also have increasingly sought to assert at least limited enforcement capacity over firms' compliance with privately promulgated corporate governance norms. Thus corporate governance is frequently a multi-level and hybrid affair. As Peer Zumbansen notes in his contribution to this special issue, corporate governance regimes exemplify contemporary challenges to legal centralism, and require a more pluralistic conception of both law making and law enforcement in the corporate sphere. Such regimes typically comprise both hard and soft law instruments, a theme central to other articles in this issue, notably that of Fabrizio Cafaggi. It is significant that corporate governance and even bilateral contracting practices of companies should, increasingly be regarded as not wholly private matters for companies themselves, but rather representative of hybrid governance arrangements in which a public dimension to corporate activities is recognised. Conventional private law devices have been transformed to perform regulatory functions at the global level. A new body of rules and practices has emerged. Associational regimes in which businesses (and sometimes others, including governmental actors) work together to create regulatory arrangements raise rather different issues, but which may be equally characterised in terms of asking to what extent such arrangements should be regarded as private or public matters. It is striking how little scrutiny associations with regulatory purposes and or effects have had from competition law institutions, a lacuna which the article in this issue by Imelda Maher seeks to remedy. From a constitutional perspective questions for such associational regimes include the extent to which they are representative and inclusive, and transparent in their policy making and respectful of rule of law norms in their enforcement activity.

A third form of transnational private governance is based neither on single entities nor associations of interested firms, but rather has a broader form bringing together NGOs and, with increasing frequency governmental and/or business actors, a phenomenon referred to as the 'governance triangle'.<sup>37</sup> Standards regimes are one form for such organisations, originating in industry-based, but non-associational activities which increasingly engage non-industry actors within their processes. Environmental and labour rights regimes operating transnationally are increasingly characterised by such multiple representation. Elaborating on this theme in his contribution to this special issue Cafaggi gives particular emphasis to the hybrid nature of much TPR, involving the mixing of public and private legal instruments and collaboration between governmental and non-governmental actors. While the use of the term of TPR has become a common one, it also becomes very clear from his contribution that there is no question of a strict public-private divide in transnational governance, but that the

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<sup>36</sup> B. Richardson, *Environmental Regulation Through Financial Organisation: Comparative Perspectives on the Industrialised Nations* (2002).

<sup>37</sup> Abbott and Snidal, *op. cit.*, n. 26.

relationship between the public and private spheres is intertwined and being transformed in a variety of ways.

Hybridity is an important theme not only in respect of standard setting, but also with respect to monitoring and enforcement, a relatively neglected topic in the literature on transnational governance generally<sup>38</sup>. Within research on regulation it has been widely noted that enforcement tends to emphasise advice and persuasion by enforcement agencies and that this may be effective where there is capacity to escalate enforcement strategies to include more stringent measures such as prosecution and licence revocation.<sup>39</sup> This pyramidal model of enforcement has been extended in ways which are promising for hybrid governance regimes, to recognise the potential for third party enforcement as where businesses, trade associations and NGOs become involved in enforcing using powers delegated by legislative bodies or rights assigned to them under contracts.<sup>40</sup> In many TPRERs enforcement in a conventional sense has limited application since businesses adopt standards voluntarily and they are, in a sense, judged by the market in terms of the acceptability of their compliance. However the importance of checking for compliance is recognised within many regimes and it is not unusual to find contractual requirements on businesses that they engage third parties to certify compliance.<sup>41</sup> Where participation in a TPRER is less than voluntary then more conventional bilateral monitoring and enforcement may apply, though, as with many international regulatory regimes, it is frequently the case that the standard setting and the enforcement are organisationally distinct functions with the enforcement being carried out at national or sub-national level. There is, for example, very little direct involvement of the International Chamber of Commerce or the European Advertising Standards Alliance, in the enforcement of advertising rules which they are involved in designing, nor is GlobalGap directly involved in enforcing its standards on food producers.<sup>42</sup> Rather the rules are adopted and enforced by others, national self-regulatory bodies in the case of advertising, and large retailers in the case of foods standards. Thus an evaluation of the effectiveness of enforcement is likely to depend substantially on an analysis of the activities of firms, associations and NGOs operating more locally.

## 5. Constitutionalism and TPR

Questions of legitimacy of regulatory governance are not restricted to private regulatory regimes, but are raised also by the tendency within public regimes to distance regulatory

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<sup>38</sup>B. Kingsbury, Cassese, F. Cafaggi (ed.) *The enforcement of transnational private regulation*, EE, 2011, forthcoming,

<sup>39</sup> I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>40</sup> P. Grabosky, 'Discussion Paper: Inside the Pyramid: Towards a Conceptual Framework for the Analysis of Regulatory Systems' (1997) 25 *International Journal of Sociology and Law* 195-201.

<sup>41</sup> M. Blair, C.A. Williams and L.W. Lin, 'The New Role for Assured Services in Global Commerce' (2007) 33 *Journal of Corporate Law* 325-360.

<sup>42</sup> Havinga, T. 2006 'Private Regulation of Food Safety By Supermarkets', (2006) 28 *Law & Policy* 515-533.

decision making from elected politicians. Within public international law the relationship between legitimacy and constitutionalism has been much discussed.<sup>43</sup> In the European Union, for example, extensive delegation of apparently technical decision making to expert committees ('comitology') exemplifies this problem.<sup>44</sup> To the extent that transnational and private regulatory regimes are assessed by reference to traditional constitutional criteria they are liable to magnify such issues. For this reason the emergence of transnational governance generally has stimulated greater attention to more pluralist conceptions of constitutionalism which emphasise the constitutional potential of private activities where there are plausible claims to authority and common identity within a social or economic group.<sup>45</sup> Within such a perspective interdependence through the creation of networks, competitive processes and the potential for judicial accountability may be as important sources of legitimacy as the ballot box.

Thinking about regulation generally we can distinguish processes for setting norms from monitoring and enforcement. The constitutional significance of the distinction is that the former function involves a role conventionally understood as reserved to legislative institutions, while the latter is conventionally associated with the executive (and sometimes also the judicial) branch of government. Accordingly the different elements of regulatory regimes throw up different sorts of problems. In private regimes separation of functions and powers is not the rule. The integration within a single body of different functions can decrease independence and increase conflicts of interests. In his contribution Cafaggi suggests that separation of regulatory functions can address some of these problems; depending on the various regulatory relationships different governance responses should be provided in order to increase accountability without decreasing effectiveness.

Concerning the setting of norms constitutionalism is associated with the idea not only that laws should be made by elected legislatures, and not by delegated bodies, but also that lawmakers should be subject to constraints on the content of the laws they pass (ensuring for example compliance with human rights norms, and other rule of law principles such as the rule against retrospective legislation). Many jurisdictions allow for a scrutiny of the lawfulness of legislative acts by a constitutional or supreme court. Accordingly private law making within TPR regimes raises the problem not only of delegation, but also and distinctly, that scrutiny of such private law making may not apply or involve the range of norms and judicial procedures which are applied to parliamentary legislation. In their contribution to this special issue Casey and Scott address this issue in an exploration of alternative mechanisms through which the legitimacy of norms is supported within TPR regimes. Research in a number of regimes is suggestive of deliberate attempts to construct legitimacy and to prioritise certain forms of legitimacy over others in particular instances. Normative

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<sup>43</sup> A. vonBogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities ' (2008) 9 *German Law Journal* 1375-1400.

<sup>44</sup> C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (1999 ); M Pollack, 'Control Mechanism Or Deliberative Democracy?: Two Images of Comitology ' (2003) 36 *Comparative Political Studies* 125-155.

<sup>45</sup> Walker, *op. cit.*, n. 2.

legitimacy is closely tied to the appropriateness of processes in terms of such matters as inclusion and transparency. Pragmatic legitimacy is more closely allied to output measures of legitimacy concerned with the acceptance of the effectiveness of a regime. Clearly there may be a trade off between process and output, for example because the prioritisation of normative legitimacy slows down or increases costs thereby adversely affecting outcomes. Casey and Scott consider also a third possible basis for legitimacy based in a sense that it is not possible to think how things could be done otherwise ('cognitive legitimacy').<sup>46</sup>

Whilst the bringing to bear of expertise within regulatory governance is relevant to underpinning pragmatic legitimacy, and an evaluation of the effects or outcomes of a regime, expertise is perhaps more powerfully enlisted in supporting cognitive legitimacy such that other ways of doing things cannot be envisaged. Moves to institutionalise TPR regimes are significant for the way in which they support such taken-for-granted approaches to regulatory regimes. Sol Picciotto's contribution to this special issue contrasts the institutionalised forms of TPR which have emerged in the regulation of financial markets, notably in the International Accounting Standards Committee (IASC), with the more weakly institutionalised use of intellectual property rights (IPR) as instruments of regulation. The IASC has sufficient legitimacy for a majority of governments to have, in effect, delegated key aspects of regulatory standard-setting to it, no doubt a combination of process and expertise, with an increasing inability to imagine other ways in which such standards might be set. The IPR regime is the subject of a good deal more contestation, based in part on weaker claims to legitimacy of key actors. Picciotto suggests that giving recognition to the public character of some governance in this field, an extending of the public domain, might offer a way to support and reconstitute the legitimacy of private actors, mainly firms, within the field.

The legitimacy of regulatory governance generally is frequently understood in terms of a dichotomy between democratic and expert governance. The non-majoritarian character of much regulatory governance is, for some, a virtue and a source of legitimacy based on technical expertise and relative insulation from political interference.<sup>47</sup> The sometimes fragile legitimacy based on such expertise, with evaluation at least to some extent geared towards outputs and effects of a regime, rather than the processes, has, nevertheless involved also a degree of dependence on the democratic origins and accountability of public regimes, and frequently also the fact that senior officials are appointed by elected politicians. The absence of such national democratic elements within most TPRERs is likely to make the technocratic basis of legitimacy more fragile and is suggestive of the need for alternative modes of constitutional evaluation.<sup>48</sup>

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<sup>46</sup> J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) *Regulation & Governance* 137-164; M. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 *Academy of Management Review* 571-610.

<sup>47</sup> M. Everson and G. Majone, 'Institutional Reform: Independent Agencies, Oversight, Coordination and Procedural Control' in *Governance in the European Union*, eds. O.D. Schutter, N. Lebessis and J. Paterson (2001); M. Thatcher and A.S. Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1-22.

<sup>48</sup> Cutler, *op. cit.*, n. 19.

As regards the power to make legislation the constitutional attachment to the legislature is derived from the link of the legislature to the *demos* through elections. However, it is arguable that the focus on electoral politics constitutes a privileging of *one form* of governance which complies with a meta-principle of the right to self-governance and that other mechanisms of self-governance should be given equal prominence. A theory of constitutional private legislation might, then, look to other forms of self-governance including more direct ways to identify and engage those affected by governance decisions. This is frequently more challenging for TPR regimes than it would be in national contexts, since stakeholders are likely to be widely diffused and may be difficult to identify.<sup>49</sup> However, there is emerging a theory of legitimate global civil society premised on the donations by, and volunteering of, participants. Many TPRERs exemplify tendencies towards the creation of networks of action by global civil society actors, in areas such as environmental protection and labour.<sup>50</sup> Others have referred to self-governance as a constitutional principle to ground the foundations of TPR.<sup>51</sup> A central challenge for contemporary constitutional theory is to adapt its thinking to accommodate claims that such phenomena may constitute a new form of global democratic governance. This is of importance not only because of the spontaneous emergence of global civil society actors, but, more critically because delegation by governments to such actors represents a central alternative to inter-governmental responses to global governance problems.<sup>52</sup> The legitimacy of monitoring and enforcement functions is amenable to being addressed not only through participation, but also through institutionalisation both of processes and norms for scrutiny.

One very important difference between the public and the private at transnational level is that the former operate within a regime of attributed competences while the latter more frequently exercise original rule making power based on freedom of contract and association<sup>53</sup> In some instances powers may be delegated by international organisations directly by Treaties. In this vein one set of responses to the challenges of TPRERs asserts the potential of applying public law models of transparency and accountability to non-state and mixed actors within a model of Global Administrative Law.<sup>54</sup> One line of development in this literature is to argue that a wide range of activities which might once have been thought of as private should be regarded as public in character and therefore amenable to public law controls, whether at domestic<sup>55</sup>

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<sup>49</sup> Ibid., pp. 174-5.

<sup>50</sup> M. Castells and D Vogel, 'The Private Regulation of Global Conduct' in *The Politics of Global Regulation*, eds. W. Mattli and N. Woods (2009).

<sup>51</sup> F. Cafaggi, 'Private Regulation in European Private Law in *Reframing Self-Regulation in European Private Law*, ed. F. Cafaggi (2006).

<sup>52</sup> Castells, op. cit., n, 46, p. 8.

<sup>53</sup> F. Cafaggi, 'Private Regulation and European Legal Integration' in *The Regulatory State*, eds. D. Oliver, T. Prosser and R. Rawlings OUP, (2010).

<sup>54</sup> B. Kingsbury, N. Krisch and R.B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15-61C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187-214; .

<sup>55</sup> J. Freeman, 'Extending Public Law Norms Through Privatization' (2003) 116 *Harvard Law Review* 1285-1352; C. Harlow, 'The 'Hidden Paw' of the State and the Publicisation of Private Law' in *A Simple Common Lawyer: Essays in Honour of Michael Taggart*, eds. D. Dyzenhaus, M. Hunt and G. Huscroft (2009).

or global level.<sup>56</sup> Such an approach not only reduces the normative appeal of such ‘global administrative law’ models, but also calls into question the plausibility of effectively transposing norms and institutional structures developed for the control of public power to private organisations and networks. We contend that this strategy is but one among many instruments provided by the toolbox of public and private law to increase legitimacy. Private organizations engage a large number of tools to empower members and stakeholders with control over the activity in order to increase organizational accountability. When regimes are composed of several organizations control emerges from both cooperation and competition. The formation of private regulatory networks produces mutual control, the competition for members or more broadly regulatees can increase the standards to the extent that information is adequate to support the making of choices. The use of public oversight and procedural rules is one among the many potential strategies that TPR can use to increase accountability without reducing effectiveness.

A particular issue which is being addressed within the research project on TPR from which this article is drawn is the prominent role of private law instruments generally, and contracts in particular. Should contractual governance increasingly be regarded as public in character? It may be that the exclusive focus of public law processes on the state is simply a hangover from the Westphalian state model and to the extent that such a model is rendered obsolete by governance changes then public law oversight should be reconceived. Such an approach requires a re-thinking of the public-private divide and also some caution against the risks of excessive legalization. These themes are addressed in the contribution of Anne Meuwese and Jacco Bomhoff to this special issue. They find a good deal of common ground in two alternative approaches or ‘lenses’ for viewing TPR, one based in the ideas of private international law and the other in the development and operation of policies of better regulation. Both approaches are, in a sense, meta-regulatory in that they offer both norms and procedures, somewhat distinct from the GAL approach, through which oversight of aspects of TPR regimes might be achieved.

The case for a meta-regulatory approach need not be tied exclusively to legal oversight,<sup>57</sup> as Meuwese and Bomhoff suggest in their search for meta-norms. Better regulation policies, in particular, give some priority to seeking alternatives to legal control. An alternative approach, canvassed in this special issue, emphasises both the modes of control and accountability which are emergent in regimes rooted in market and community activities, and the potential for reconceptualising the effects of networks in governing network participants in a manner which is quite distinct from traditional public law modes. This approach addresses the shift from hierarchical to heterarchic governance and recognises the need to reconceptualize the bases of legitimacy for such regimes at both national and supranational level.<sup>58</sup> The central question is whether TPRERs can or should be analogized to traditional

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<sup>56</sup> vonBogdandy et al., op. cit., n. 39.

<sup>57</sup> C. Scott, 'Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The Heineken Effect?' in *Perspectives on Corporate Social Responsibility*, eds. N. Boeger, R. Murray and C. Villiers (2008).

<sup>58</sup> G. Teubner, 'Breaking Frames: The Global Interplay of Legal and Social Systems' (1997) 45 *American Journal of Comparative Law* 149-169.

institutional actors domestically and supranationally. In their contribution to this special issue Deirdre Curtin and Linda Senden make a case for developing an accountability perspective on TPRERs. Their exploring their distinctiveness and in particular the extent to which accountability as a virtue of such regimes should sought what this may entail in terms of applying traditional accountability mechanisms to TPR regimes and developing alternatives. Besides social accountability devices, the search for such alternative modes offers at least two distinct alternatives to the top down approach to the control and accountability of TPRs. The first is rooted in choice and the second in networks of mutuality.

Choice, though not uncritically accepted,<sup>59</sup> is a central value within market-based governance regimes. The performance and accountability of actors is driven, at least in theory, by the observation that those who use their services have options to exit and take services from others.<sup>60</sup> Within private regulation regulatees may have choice about who regulates them,<sup>61</sup> whilst beneficiaries of regulation, such as consumers may similarly have choices as to which self-regulatory regime they are protected by, by virtue of their product choices. Systems of mutual recognition also offer choices as to which of a variety of level of standards should be adopted because of a commitment to recognise each of the diverse sets of valid standards across all the mutually recognising jurisdictions.<sup>62</sup> There may be a further element of choice offered *within* regimes. If choice is pursued as a value, a key question is how to make regimes choice enhancing and support this with the possibility of exit. The theme of choice is central to the article in this special issue by Errol Meidinger which considers the emergence and effects of competition among TPR regimes in the food safety and sustainable forestry domains. That there may be competitive effects does not, of course, preclude a role for governmental actors in stimulating or participating in such regimes. Competition between public and private regimes has received some analysis in respect of provision of public services such as rail and air transport,<sup>63</sup> but rather less attention in respect of regulation. Where neither form of control is feasible participation of governmental actors through competition may provide an alternative. Such competition may be direct or indirect, as where governments give recognition to some but not other private regulators.

Networks of mutuality are rooted in the interdependence of actors, as with standards regimes. In an extreme case of interdependence the US nuclear power operators faced the likely destruction of their industry should one of their number cause an accident through failure to follow self-regulatory rules.<sup>64</sup> Many regimes exhibit interdependence not only between regulatees but also between regulatees and those protected by the regime. Evaluation of such regimes involves consideration of the extent to which they promote a thicker form of

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<sup>59</sup> B. Barry, 'Chance, Choice and Justice' in *Contemporary Political Philosophy: An Anthology*, eds. R. Goodin and P. Pettit (2006).

<sup>60</sup> A. O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (1970).

<sup>61</sup> Cafaggi, *op. cit.*, n. 28; A. Ogus, 'Re-Thinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97-108.

<sup>62</sup> Cafaggi, *op. cit.*, n. 28; Meuwese and Bomhoff in this issue.

<sup>63</sup> M. Bishop, J. Kay and C. Mayer, *Privatization and Economic Performance* (1994).

<sup>64</sup> J. Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (1994).

proceduralization.<sup>65</sup> Giving voice in such context is not simply about expressing preferences, but also learning about the preferences of others, the varieties of perspectives on the problem the regimes addresses and the potential for re-thinking not only the rules and instruments of the regimes, but also its objectives.<sup>66</sup> Such an approach may be tied to the idea, discussed above, of developing novel forms of democratic governance, at transnational level, which are not tied to national electoral politics.

## 6. Conclusions

The emergence and increasing significance of transnational private regulatory regimes presents many challenges. Perhaps the central challenge identified in this article concerns the possibility of reconceptualising the global public sphere so as to better embrace TPR regimes in their myriad forms, such that they are recognised as having similar potential for legitimacy as national and international governmental bodies. Such recognition raises challenges for TPR regimes to strategically develop their own institutional structures and processes, and also their links to others, notably governments, as part of that underpinning.

A central issue emerging from processes of globalization generally concerns the role of the state. Whilst the ‘myth of the powerless state’<sup>67</sup> has been effectively challenged the nature of state activity is being transformed by international and transnational activity. Much of the emphasis of the discussion of these issues has focused on the effects of international governance on state capacity and the increasing interdependence of states in fields such as financial regulation. TPRERs raise different sorts of issues concerning the role of the state. We suggest that just as international organisations might increasingly use their capacity for steering or ‘orchestration’ to enrol the capacity of private actors in transnational governance<sup>68</sup> so also may national governments enhance the range of their activities, complementing participation in international governance with direct engagement with TPR. It has long been observed that national governments make extensive use of transnational corporate capacity, for example by enrolling airlines in immigration control and banks in monitoring and reporting of money laundering.<sup>69</sup> A wider recognition of both the effectiveness and legitimacy potential for such engagement with transnational private regulatory capacity might underpin stronger engagement with both NGO-led and business-led TPRERs.<sup>70</sup> Increasing emphasis on TPRERs is part of a wider set of changes within which national governments are seen less as representative of sovereign states and more as central actors in national, transnational and international governance.

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<sup>65</sup> J. Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597-614; J. Black, 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 33-58.

<sup>66</sup> C. Scott, 'Reflexive Governance, Regulation and Meta-Regulation: Control or Learning?' in *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*, eds. O. de Schutter and J. Lenoble (2010).

<sup>67</sup> L. Weiss, *The Myth of the Powerless State* (1998).

<sup>68</sup> K.W. Abbott and D. Snidal, 'International Regulation Without International Government: Improving IO Performance Through Orchestration' (2010) 5 *Review of International Organization* 315-344.

<sup>69</sup> J. Gilboy, 'Implications of "Third Party" Involvement in Enforcement: The INS, Illegal Travellers, and International Airlines' (1997) 31 *Law and Society Review* 505-530.

<sup>70</sup> D. Vogel, 'The Private Regulation of Global Corporate Conduct: Achievements and Limitations' (2010) 49 *Business & Society* 68-87.

If the constitutional standing and legitimacy of TPRERs can be effectively resolved the potential benefits for governance are significant. The remoteness of global regulation from electoral politics has inhibited intergovernmental regulatory governance from achieving similar legitimacy to national regulatory regimes and, to some extent, undermined claims to effectiveness also. The necessity of TPRERs to find alternative sources of legitimacy based in procedural and other mechanisms may enable them to achieve stronger legitimacy than intergovernmental regimes. It is not unreasonable to hypothesise that the combination of direct participation of market actors and the interdependence of such actors with both NGOs and governments within many TPRERs has the potential to combine advantages both for effectiveness and legitimacy as compared with intergovernmental regimes.