THE MANY FEATURES OF TRANSNATIONAL PRIVATE RULE-MAKING: UNEXPLORED RELATIONSHIPS BETWEEN CUSTOM, JURA MERCATORUM AND GLOBAL PRIVATE REGULATION

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1. INTRODUCTION

Every-day life of businesses and consumers is pervaded by the references to global private standards: from the cars we drive to the computers we use, from the food we eat to the movies we watch. Private rule-making at the transnational level is increasingly gaining scope and traction, quickly expanding in both old and new territories, from e-commerce to data protection, from food safety to human rights protection, from financial markets to environment, from professional regulation to corruption and anti-money laundering, from civil aviation to private security. This is partly the result of weaknesses in conventional international public law and partly the result of the emergence of new modes of governance. Stimulated by the actions of states and private actors, these new modes of governance include public, private, and hybrid instruments.[1]

Private actors engage in transnational rulemaking in different forms depending on their objectives, the geographical and functional scope, and the effects of the regimes on the entities being regulated.[2] Some regimes have personal scope since they apply to supply chains wherever their participants are located. Other regimes have territorial scope and concern, for example, advertising in the UK, or lawyering in Europe.

Private regimes can both set standards for supply chains or design and regulate markets. On the one hand, there are standards concerning firms - in particular multinational corporations (MNCs) - regulating their own activities and even governance in order to ensure compliance in multiple jurisdictions.[3] On the other hand,

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[1] For example, agreements and memoranda of understanding between international organizations and private actors whose legal status is neither that of exchange contract nor that of an international treaty.

[2] *See* Fabrizio Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement*, 8 (Eur. U. Inst., Working Paper No. 15/2014, 2014), http://cadmus.eui.eu/bitstream/handle/1814/33591), [hereinafter *A Comparative Analysis*]; TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 18 (2011); Tim Büthe, *Private Regulation in the Global Economy: A (P)Review*, 12 BUS. & POL. 1 (2010); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI., 261, 263 (2008); JOHN BRAITHWAITHE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000).

[3] *See* OECD, INTERCONNECTED ECONOMIES: BENEFITING FROM GLOBAL VALUE CHAINS, (2013), *available at* http://www.oecd.org/sti/ind/interconnected-economies-GVCs-synthesis.pdf (last visited Mar. 26, 2015).

there is a proliferation of new markets privately designed and regulated via international electronic platforms. The more conventional stock and commodities exchanges are now complemented by electronic trading platforms regulated by private firms, associations, by cooperatives where multiple buyers and sellers exchange goods and services.

The emergence of many regulatory regimes is frequently driven by the changes in global value chains (GVCs) and in international trade.[4] GVCs have become the locus of policy implementation concerning regulatory issues, since they increasingly trade services and transfer technical and managerial capabilities from buyers to suppliers.[5] Donors, like international institutions, often endow GVC leaders with resources to promote policies aimed at facilitating smallholders' access to international markets, reducing poverty, and improving environmental conditions on the basis of private standards.[6] International regulatory policies incorporated in private standards are implemented through different forms of cooperation between international organizations, MNCs, and civil society organizations (CSOs).[7]

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[4] *See* Gary Gereffi, *Global Value Chains in a Post-Washington Consensus World*, 21 REV. INT'L POL. ECON., (2014); Stefano Ponte & Timothy Sturgeon, *Explaining Governance in Global Value Chains: A Modular Building Theory Effort*, 21 REV. INT'L POL. ECON., 79, 86 (2014); Gary Gereffi et al., *The Governance of Global Value Chains*, 12 REV. INT'L POL. ECON., (2005) [hereinafter *Governance of GVC*].

[5] *See* OECD, WTO, & WORLD BANK GROUP, GLOBAL VALUE CHAINS: CHALLENGES, OPPORTUNITIES AND IMPLICATIONS FOR POLICIES (2014), http://www.oecd.org/tad/gvc_report_g20_july_2014.pdf; WTO, TEMASEK FOUNDATION & FUNG GLOBAL INSTITUTE, GLOBAL VALUE CHAINS IN A CHANGING WORLD (Deborah Elms & Patrick Low eds., 2013), https://www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_e.pdf. (last visited Mar. 26, 2015).

[6] *See, e.g.*, FAO, FAO STRATEGY FOR PARTNERSHIP WITH THE PRIVATE SECTOR (2013), http://www.fao.org/docrep/018/i3444e/i3444e.pdf (last visited Mar. 26, 2015); FAO, FAO Strategy *for Partnership with Civil Society Organizations* (2013), http://www.fao.org/docrep/018/i3443e/i3443e.pdf; *see also* IFAD, DEEPENING IFAD'S ENGAGEMENT WITH THE PRIVATE SECTOR (2011), http://www.ifad.org/gbdocs/eb/104/e/EB-2011-104-R-4-Rev-1.pdf. (last visited Mar. 26, 2015).

[7] *See* Gary Gereffi, *A Global Value Chain Perspective on Industrial Policy and Development in Emerging Markets*, 24 DUKE J. COMP. & INT'L L., 433, 454 (2014) (stating that "[p]ublic governance will likely be called upon to play a stronger role in supplementing and reinforcing corporate codes of conduct, product certifications, process standards, and other voluntary, non-governmental types of private governance that have proliferated in the last two decades, and multi-stakeholder initiatives involving both public and private actors will arise to deal with collective action problems."). For a broader conceptual framework, *see generally*, the famous

Transnational private standards are voluntary; most of them become binding when regulated entities subscribe to them or join the organization managing the regime (e.g. become members). The adoption of standards is voluntary but compliance is mandatory.[8] Whether these regimes effectively monitor compliance and enforce standards once violations arise varies across sectors.[9] The focus of these standards is regulatory.[10] They regulate externalities like environmental harms, product safety, human rights violations in global supply chains;[11] they contribute to stability and transparency in financial markets.[12] The same industry (the diamond industry for

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piece by Kenneth Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, *in* THE POLITICS OF GLOBAL REGULATION, 44 (2009).

8 *See, e.g.*, THE EQUATOR PRINCIPLES, *available at* http://www.equator-principles.com/resources/equator_principles_III.pdf (last accessed Mar. 26, 2015) (stating "(5) b): Adoption of the principles by a financial institution is voluntary but once such adoption has been made, the adopting entity must take all appropriate steps to implement and comply with the principles," and drawing the distinction between transnational private regulation and international soft law).

9 *See* Fabrizio Cafaggi & Andrea Renda, *Measuring Effectiveness of Transnational Private Regulation*, 1, 74-76 (2014), *available at* http://ssrn.com/abstract=2508684 (last accessed Mar. 26, 2015).

10 *See A Comparative Analysis*, *supra* note 2 at 18.

11 *See, e.g.*, THE WORLD DIAMOND COUNCIL, *Standard Guidance: (COP 27) Kimberley Certification Process and World Diamond Council System of Warranties* at 2, *available at* http://www.responsiblejewellery.com/files/Kimberley-Process-Certification-Scheme-and-WDC-SoW-RJC-Guidance-draftv1.pdf (last visited Mar. 26, 2015) ("In addition to KP and SoW adherence, all diamond and jewelry industry organizations and their members have adopted the following principles of self-regulation, obliging them to: trade 'only with companies that include warranty declarations on their invoices;' not buy diamonds from suspect sources or unknown suppliers, or which originate in countries that have not implemented the Kimberley Process Certification Scheme; not buy diamonds from any sources that, after a legally binding due process system, have been found to have violated government regulations restricting the trade in conflict diamonds; not buy diamonds in or from any region that is subject to an advisory by a governmental authority indicating that conflict diamonds are coming from or available for sale in such region, unless diamonds have been exported from such region in compliance with the Kimberley Process Certification Scheme; not knowingly buy, sell or assist others to buy or sell conflict diamonds; ensure that all company personnel that buy or sell diamonds are well informed regarding trade resolutions and government regulations restricting the trade in conflict diamonds.").

12 *See* IFRS FOUNDATION, DUE PROCESS HANDBOOK (2013), http://www.ifrs.org/DPOC/Documents/2013/Due_Process_Handbook_Resupply_28_Feb_2013_WEBSITE.pdf (describing the function of financial reporting standards); *see also* ISDA, IMPROVING REGULATORY TRANSPARENCY OF GLOBAL DERIVATIVES MARKETS: KEY PRINCIPLES (2015), http://www2.isda.org/attachment/NzI4NQ==/Improving%20Regulatory%20Transparency%20FINAL.pdf.

example) can at the same time be the subject of different transnational private regimes, some focused on market design, others on regulatory objectives.[13] When they relate to the market making, the standards define general rules for traders in order to increase efficiency, reduce transaction costs and information asymmetries, decrease risks of opportunistic behavior, and enhance mutual trust both among traders and between traders and consumers.[14] When they concern regulation, they address externalities, collective action problems and govern production or access to global public goods.[15]

The fields of application go well beyond those traditionally occupied by '*jura mercatorum,*' including agriculture, human rights, social and labor regulation, environment, and the more conventional areas, such as finance, banking, professions, and trade, including e-commerce.[16] These private regimes are sector specific but not self-contained. They presuppose the existence of international and domestic institutions that can support their

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[13] Interestingly, within the same industry we can find examples of TPR and examples of custom in very close business communities. The World Diamond Council with the System of Warranties represents one of the most well-known forms of transnational private regulation along global supply chains. On the other hand, communities of merchants like the Orthodox Jewish community in New York constitutes one of the most studied phenomena of contemporary law merchants. *See* Haufler, *infra* note 64; The Kimberly process certification scheme: An innovation in Global governance and conflict prevention. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992).

[14] Daniel Spulber, *Solving the Circular Conundrum: Communication and Coordination in Internet Markets*, 104 NW. U. L. REV. 537, 542 (2010) ("[F]irms acting as intermediaries enhance transaction efficiency by pooling and diversifying risks, lowering the costs of matching and searching, alleviating adverse selection, mitigating moral hazard and opportunism, and supporting commitment through delegation of authority.").

[15] *See, e.g.*, Responsible Jewelry Council's activities contribute to "supply chain due diligence, legal compliance, anti-corruption, better environmental management and reduction of impacts, safe and healthy workplace, rights and benefits for workers and impacted stakeholders, community engagement and development, Improved market access, consumer confidence." *RJC Theory of Change, available at* http://www.responsiblejewellery.com/files/4-RJC-Theory-of-Change.pdf. (Apr. 4, 2015).

[16] I use the term *jura mercatorum* to capture the idea that they are multiple and may differ depending on the type of commodity or services. Hence, I do not subscribe to the idea that a single and common lex mercatoria is in place. I use the term *jus* rather than *lex* to express the plurality of sources including private and scholarly sources.

functioning.[17] They interact by both giving rise to conflicts or by mutually reinforcing one another.[18] The premise of the analysis that follows is that of institutional complementarity rather than that of separate and autonomous private orderings. The conceptual puzzle concerns the definition of different types of complementarity between private and public actors.[19]

Is the expansion of transnational private rule-making simply an evolution of more conventional forms of custom and *jus mercatorum* or does it depart from these forms of private rule-making? In the latter case is there a common denominator of current forms of transnational private rule-making? How does private rule-making correlate with international and domestic public legal orders? Do they constitute separate private orderings? Do they complement, supplement or replace public legal orders? What is the combination between legal and non-legal norms? Not only these questions have theoretical relevance but they also shape important regulatory policy choices at the international level concerning legitimacy, compliance and enforcement of global private standards?[20]

Private regulatory regimes are often the outcome of an interactive process with international and domestic public organizations.[21] Examples range from the collaboration between IOSCO and ISDA on the regulation of over the counter (OTC) derivative markets to collaboration between International Civil

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[17] *See* Ralf Michaels, *The True Lex Mercatoria. Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 458 (2007); *see also*, Kenneth Abbott, *International Organisations and International Regulatory Cooperation: Exploring the Links*, *in* INTERNATIONAL REGULATORY CO-OPERATION AND INTERNATIONAL ORGANISATIONS: THE CASES OF THE OECD AND THE IMO, 17 (2014). For a different perspective claiming the independence and autonomy of lex mercatoria, *see* CLIVE SCHMITOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE (1977); Roy Goode, *Rule, Practice and Pragmatism in Transnational Commercial Law*, 54 INT'L & COMP. L. Q. 539, 546 (2005); ROY GOODE, THE HAMLYN LECTURES: COMMERCIAL LAW IN THE NEXT MILLENNIUM 545 (1998).

[18] *See* Robert Wai, *The Interlegality of Transnational Private Law*, 71 LAW & CONTEMP. PROBS. 107, 127 (2008); Burkard Eberlein et al., *Transnational business interaction: Conceptualization and framework for analysis*, 8 REG. & GOV. 1 (2014).

[19] As Avinash Dixit puts it, "the issue in the study of different governance institutions is not the old-style contrast 'market versus government.' Rather it is the interaction of the whole system of governance and transactions—what combinations work well, under which conditions." Avinash Dixit, *Governance Institutions and Economic Activity*, 99 AM. ECON. REV. 5, 8 (2009).

[20] *See A Comparative Analysis*, *supra* note 2 at 1.

[21] S*ee* Jurgen Basedow, *The State's Private Law and the Economy- Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 709 (2008).

aviation organization (ICAO) and International Air Transport Association (IATA) on civil aviation standards and compliance.[22] The effectiveness of transnational private regulation, TPR, often depends on the existence of good collaborative platforms among domestic public regulators.[23] If differences across jurisdictions are significant, transnational private standards might not be able to work even if they comply with the strictest domestic regulation. In these situations, active cooperation with transnational regulatory networks or international organizations is needed.

Many of the new private regimes complement those developed by traders are conventionally labeled as *lex mercatoria*.[24] For example, rules concerning quality and prices are now complemented by rules related to safety and environmental protection.[25] In areas such as banking and professional regulations, there is some overlap, a significant transformation of conventional private rule-making with an increasing regulatory component.[26] In other areas such as agriculture, good practices are incorporated into codes of conduct that suppliers are required to comply with in order to be certified.[27] Other regimes, instead, cover new areas, pursuing primarily a regulatory function, as in the case of environmental protection and sustainability or internet governance and electronic commerce. In some instances they address directly the regulated entities, in other instances they constitute meta-rules directed at private standard setters.[28]

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[22] See the comments and suggestions given by ISDA to IOSCO on cross-border regulatory cooperation in derivatives, International Organization of Securities Commissions [IOSCO], *IOSCO Task Force on Cross-Border Regulation Consultation Report,* IOSCO Doc. CR09/2014 (2014). [hereinafter *ISDA Comments*].

[23] *Id.* (suggesting principles IOSCO should adopt in order to promote cross border regulatory cooperation. ISDA examines the toolkit of regulatory cooperation proposed by IOSCO including national treatment, pass-porting, and benchmarking, expressing a preference for the last).

[24] *See* FRANCESCO GALGANO, LA GLOBALIZZAZIONE NELLO SPECCHIO DEL DIRITTO, 43 (2005).

[25] An example of these developments is the evolution of IATA in its standard setting function.

[26] GEOFFREY P. MILLER & FABRIZIO CAFAGGI, THE GOVERNANCE AND REGULATION OF INTERNATIONAL FINANCE (2013).

[27] *See, e.g.*, GLOBALG.A.P., GENERAL REGULATIONS (4th ed. 2012), http://www1.globalgap.org/north-america/upload/Standards/IFA/v4_0-1/120206_gg_gr_part_i_eng_v4_0-1.pdf (providing a mandatory set of regulations for members).

[28] *See, e.g.*, ISEAL Alliance, ISEAL CREDIBILITY PRINCIPLES: PRINCIPLES FOR CREDIBLE AND EFFECTIVE SUSTAINABILITY STANDARDS SYSTEMS 4 (2013), http://www.isealalliance.org/sites/default/files/Credibility%20Principles%20v1.0%20l

Transnational private regulatory regimes –it is contended- do not represent an alternative to *jus mercatorum* since their functional focus is regulation driven by market failures rather than a set of prescriptions related to individual transactions between market participants. They integrate current public market regulation or contribute to the creation of new markets through market design.[29]

The multifarious forms of transnational private rule-making pose daunting questions concerning their origins, functions and scope. This article addresses the different forms of transnational private rule-making; it tries to examine their differences and the consequences for their normative foundations and policy objectives. After a brief historical overview, section I analyses transnational private regulation (TPR), and section II examines usages, customs and *jura mercatorum*. Section III presents a comparative assessment between TPR and custom. Section IV defines an agenda for future research and it is followed by the conclusion.

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ow%20res.pdf (directing standard setters focusing on sustainability: "The ISEAL Credibility Principles apply to all standards systems that focus on sustainability performance and that incorporate a standard and a mechanism for assuring compliance with that standard. . . . While these Principles offer a high level overview, additional guidance and information about the interpretation and application of these Principles is necessary and is captured in current and future ISEAL Codes of Good Practice. The Credibility Principles are not intended to be used in isolation as a normative evaluation tool. In applying these Principles, stakeholders should consider how the Credibility Principles are embraced and incorporated by a standards system, rather than attempting to determine whether a standards system meets – or complies with – the Credibility Principles. Standards systems may choose to combine these Principles in different ways, recognizing that there are tensions and trade-offs between the various Principles, e.g. between the rigor of a system and how accessible it is.").

[29] The distinction between market design and market regulation is not as clear-cut as neoclassical economics claims it to be. Within the regulatory function of private regimes I include rules concerning access and use of resources, both material and immaterial, like environment and knowledge. Examples of private standards related to market regulation include sustainability standards concerning safety, labor and environmental regulation that go beyond international and domestic law and ensure a higher degree of harmonization for MNCs operating across multiple national jurisdictions.

2. COMPLEMENTARITY IN TRANSNATIONAL PRIVATE RULE-MAKING: THE HISTORICAL PERSPECTIVE

The existence of global private law making forms is not new. It dates back to the middle ages, when merchants, artisans, and farmers were collectively conferred regulatory and often normative power by the public authorities to regulate business relationships and commerce between domestic and foreign traders. Towns conferred 'çorporationes' (guilds) power to regulate fairs and commerce but also prices, qualities and the labor market.[30] Crowns conferred private entities power to regulate fairs and later to govern colonies through 'statuta' and charters.[31] At the same time, merchants, artisans, and farmers created their own customary rules, independently from any institutional support within guilds but also independently from guilds.[32] New contracts, like *commenda* and *compagnia*, were created and standardized by merchants with the crucial contribution of Italian notaries. Clearly, the absence of a single authority, like the modern regulatory state, presents difficulties for such historical comparison, as the concept of public and private has transitioned and changed over time.[33]

The conceptual framework for inter-temporal comparison of global private law making ought to take into account the changing relationship between local and global legal systems. The role of custom in medieval times must be framed within the relationship

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30 Avner Greif et. al, *Coordination Commitment, and Enforcement: the Case of the Merchant Guild*, 102 J. POL. ECON. 745, 749 (suggesting that merchant guilds permitted foreign merchants to trade with the merchants of the town's guild. "If the purpose of the guilds was to create monopoly power for the merchants and to increase their bargaining power with the rulers, why did *powerful* rulers during the late medieval period cooperate with alien merchants to establish guilds in the first place?").

31 *See, e.g.*, Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant,'* 21 AM. U. INT'L L. REV. 685, 708 (comparing the English crown in relation to St. Yves or the French in relation to the fair of Champagne). [hereinafter St. Ives].

32 Michaels, *supra* 17 at, 447-68; Ralf Michaels, *The Mirage of Non-State Governance*, 1 UTAH L. REV. 31 (2010).

33 *See* John F. Padgett, *Early Capitalism and State Formation*, *in* THE EMERGENCE OF ORGANIZATIONS AND MARKETS, 115, 119 (2012) (suggesting a process of co-evolution of markets and states. Even more dramatic changes have occurred in the private sphere with the creation of corporate entities and the development of global supply chains.); Henry Hansmann et. al, *Law and Rise of the Firm*, 119 HARV. L. REV. 1335 (2006).

between *jus commune* and *jura propria*.[34] The role of transnational custom nowadays must instead be framed between public international law and transnational private law.

The coexistence and interaction between *jus commune* and *jura propria* characterized many legal orders in continental Europe.[35] Private actors played a role in the development of both. The guild system as it developed in medieval Italy and spread across Europe in the twelfth, thirteen, and fourteen century represents a clear illustration of private actors entrusted with regulatory, tax and sanctioning power.[36] In some instances there was even coincidence between town governments and guilds; for example, the members of the guilds were running town governments. In other instances there was separation between the guilds and town governments, albeit close collaboration between the two.[37] Guilds regulated trade,

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[34] *Jus commune* is the medieval set of common rules applied in continental Europe coming from Roman law (the Justinian Digest) and canon law; *jura propria* are the local legal orders designed and administered by towns and cities. The two were continuously interacting. *See* DAVID IBBETSON, COMMON LAW AND JUS COMMUNE (2001); R.C. VAN CANAEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW (1992).

[35] *See* PAOLO GROSSI, L'ORDINE GIURIDICO MEDIEVALE 223, 235 (2006) ("Jus commune has a deeper penetration also in the most hostile and closed areas of jus proprium: think to Venice that claims to be founded on the sea and for this reason able to avoid any influence from mainland, and yet compelled to face the common legal heritage.") (translation by author).

[36] *See* Sylvia L. Thrupp, *The Gilds*, *in* 3 ECONOMIC ORGANISATION AND POLICIES IN THE MIDDLE AGES 230, 232 ("Town governments were then making increasingly systematic use of gilds in general administrative work, treating the officers as quasi-public officials."). The double identity of the guilds as both private and semi-public is well captured by the description of the officers. *Id*. at 238 ("They were an organ of the commune and they were a private group concerned with technical and trade interests."); *see also* Avner Greif, *Institutional and Impersonal Exchange from Communal to Individual Responsibility*, 158 J. INST'L & THEORETICAL ECON. 168, 283 n.20 (2002) ("[I]n many towns the mercantile and municipal organizations were identical, since the merchant guild was the governing body of the borough.")

[37] The conventional examples are Florence, Bologna, and Milan. The first was characterized by a high degree of coincidence between guilds and town government, the latter by the separation. "According to Valsecchi, who dedicated one of his early book to this subject, the process by which corporations would come to conquer fully or partially the control over the City start swith the establishment among them of a union or a confederation, but then would then progress along three different stages. An example of of the first stage is the one of Milan, where the confederation, founded in the area of St. Ambrose, failed in the process without reaching the control of the City, nor exercising a strong political influence over it, rather it aimed mainly at preventing the municipality to interfere in the fields that corporations want strictly reserved to themselves. In the second group, the proposed prototype is Bologna, where the corporations organized as a political and military force are able to achieve control over the City. But they [. . .] can not

prices, quality and, to a limited extent, even product safety.[38] Guilds enacted *statuta* that could be the expression of autonomous normative power or the result of a ''delegation" based on the conferral of privileges.[39] Their normative power was only limited by *jus commune*.[40] Guilds' regulatory activities differ from customary law, which developed without any formal 'delegation' by town governments or other 'public' authorities.[41] *Corporationes* (guilds) had both a 'delegated' and an autonomous power to regulate trade and production.[42]

Medieval fairs and their regulation represent another example of trade regulation by private actors entrusted with regulatory

achieve the result of having the City their own property, and can not prevent foreign elements to be part of it, and therefore, in order to protect their position, opposed to the old Comune maius their own vision, namely the City of the people (comune del popolo). In the third group, finally, where Florence is the best known example, the political ascension of the art guilds reaches its climax: after a path fairly similar to Bologna's one, the art guilds could, with the well-known law of 1282, to ensure the full control of the City, excluding any other constitutency." (translation by author) Gino Luzzatto, *Corporazione*, *in* ENCICLOPEDIA DEL DIRITTO, 669 (1962).

[38] *See* Thrupp, *supra* note 38, at 230-32.

[39] Statuta were legal acts that had binding effects over members of guilds and beyond. In particular, statute enacted by merchants regulated both internal relationships among merchants and external relationships between merchants and third parties.

[40] "Mercatores et alii artificaes possunt facere inter se statuta et ista statute sunt confirmata a jure communi et ideo non est necesse quod confirmetur per legem municipalem . . . ." (Merchants and other artisans may adopt *statuta* and these act are confirmed by *jus commune*, thus authorization by municipal law is not required . . . .) But then he specified, "non possunt statuere quod sit natura iter et evidentem iniustum . . . . Item non possunt statuere contra jus publicum totius civitatis." (They cannot regulate what should be the natural path nor what is unfair . . . . Similarly they cannot regulate against the public law of the law of the city.) (translation by author) n. 4, Lugduni, MDXLIV, c. 32 v. *quoted in* Vito Piergiovanni, *Statuti Diritto Comune e Processo Mercantile*, *in* NORME, SCIENZA E PRATICA GIURIDICA TRA GENOVA E L'OCCIDENTE MEDIEVALE E MODERNO 1105, 1108-09 nn.17 & 20 (2012).

[41] They were both part of *jus mercatorum*. *See* FRANCESCO GALGANO, STORIA DEL DIRITTO COMMERCIAL 38 (1976) ("Fonti del jus mercatorum erano gli statuti delle corporazioni mercantili, le consuetudini mercantili, la giurisprudenza della curia dei mercanti.") (Sources of the law merchants are the acts of merchants guilds, merchants customs, and jurisprudence of merchants courts) (translated by author).

[42] *See* Piergiovanni, *supra* note 40, at 1108 n.15 (stating "Sul tema della potestà condendi statuta Baldo, seguendo una tradizione dottrinale ormai consolidata, non dubita che essa spetti alla corporazione senza necessita' di una superiore conferma.") (on the subject of the regulatory power, Baldo following a well established academic approach, does not doubt that it belongs to the guilds without any confirmation by higher authorities) (translation by author).

power.[43] Unlike guilds, which enacted mainly local regulation, fairs had a number of transnational regulatory aspects in relation to the regulated entities.[44] Their regulatory power was conferred by the local public authority to the church or to other communities of private actors.[45] They not only regulated the transactions in the trade, but also the liability and the sanctions for participants committing violations.[46] In some instances, the role of collective responsibility in the trade became highly important, giving rise to a system where the entire community was made responsible for the default of an individual member.[47] As for example, when a trader delivered defective goods or did not pay the price and the community was liable.[48]

The delegation of normative power to private actors has been used repeatedly after the middle ages. The colonial expansion, for example, was characterized by the use of corporate entities with

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43 *See* O. Verlinden, *Markets and Fairs*, *in* THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE FROM THE DECLINE OF THE ROMAN EMPIRE VOLUME 3: ECONOMIC ORGANIZATION AND POLICIES IN THE MIDDLE AGES 119–54, 133 (M.M. Postan, E.E. Rich and E. Miller eds., 1963) (discussing the regulatory framework for Medieval fairs).

44 *See Id.* at 132 (" . . . at the end of the twelfth century and during the first half of the thirteenth, the Champagne fairs were indeed the centre of the commercial activity of the western world.").

45 *See* Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 AM. U. INT'L L. REV. 685, 693–694 ("The king and abbot had significant authority over the establishment of legal principles, the resolution of disputes, and the enforcement of the fair court's judgments.").

46 *See* Verlinden, *supra* note 43 at 132 (noting that trade at fairs "must have been subjected to a fairly strict control on the part of the royal agents who superintended the customs store-rooms, which were "a kind of bonded warehouse").

47 This is the so-called reprisal: " . . . the reprisal consisted of a sanction that differed from the standard penalty, taking the form of an exclusion and interdiction of all the defaulting debtor's co-citizens from the fair." Maura Fortunati, *The Fairs Between Lex Mercatoria and Ius Mercatorum*, *in* FROM *LEX MERCATORIA* TO COMMERCIAL LAW 143 (Vito Piergiovanni ed., 2005).

48 *See* Avner Greif, *Institutions and Impersonal Exchange: From Communal to Individual Responsibility*, 158 J. INST'L & THEORETICAL ECON., 168, 169–170 (2002) (discussing the collective responsibility system and noting that an entire community would be held liable for the default of an individual community member); Lars Boerner & Albrecht Ritschl, *Individual Enforcement of Collective Liability in Premodern Europe: Comment*, 158 J. INST'L & THEORETICAL ECON. 205, 205 (2002) (examining the institution of communal responsibility for the debts of individual merchants across merchants' associations and towns).

governmental responsibilities, as the case of East and West Indian companies show.[49]

Both historical and contemporary analysis demonstrates that private legal regimes have never been fully independent from the public sphere. Well before the formation of the nation states, public authorities interacted with private actors in regulating markets, trades, and what today is called welfare (health care, education, public housing, and care for elderly the and disabled).[50] Even after the formation of the nation states, collaborative rule-making between public and private actors has taken place. States have promoted, steered, and orchestrated the activities of private actors.[51] What constitutes the public sphere has undoubtedly changed radically over time. The private sphere has also transformed over the centuries. When examining the different forms of regulatory power-sharing between the public and private spheres, one has to be aware of the changing meanings of those terms, and in particular the entry of new players in the last quarter of the 20th century. Yet it is possible to identify some common threads for interpreting the present with the awareness of the past.

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[49] *See, ex plurimis,* PHILIP STERN, THE COMPANY STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA 93 (2011). In relation to the Dutch East India Company, *see* John Padgett, *Country as Global Market: Netherlands, Calvinism and the Joint Stock Company*, *in* THE EMERGENCE OF ORGANIZATIONS AND MARKETS 208, 226 (John F. Padgett & Walter W. Powell eds., 2012).

[50] *See* John R. Commons, *American Shoemakers, 1648–1695: A Sketch of Industrial Evolution*, 24 Q. J. ECON., 39, 39 (1909) (demonstrating how the boot and shoe makers responded to commercial and industrial changes by seeking refuge provided by protective organizations).

[51] *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 501 (2009) (suggesting that the "Transnational New Governance" is well suited to international regulation because it places fewer demands on intergovernmental organizations and states); Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions in the Shadow of the State*, *in* THE POLITICS OF GLOBAL REGULATION 44, 44–45 (Walter Mattli & Ngaire Woods eds., 2009) (discussing examples of the non-state and public-private governance arrangements that began in the 1980s to implement standards for global production in the areas of labor rights, human rights, and the environment). For an historical perspective, *see generally* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION (Edward Ballesein & David Moss eds., 2009).

3. TRANSNATIONAL PRIVATE REGULATION

3.1. The Composition of the Private Sphere

Transnational private regulatory regimes are created by private actors, in collaboration, rather than in competition with public entities. Not only do they define standards to regulate firms' behavior, but they also both define organizational fields and partition the transnational regulatory space.[52] Private standards state more or less clearly their regulatory objectives and define, often with some approximations, a metric to evaluate the effectiveness of regulatory performances.[53] They aim at changing the status quo and improving the conditions of regulatory beneficiaries, including: increasing consumer safety, decreasing environmental pollution, enhancing human rights protection, granting smallholders access to international markets and global supply chains, banning the extraction of minerals in conflict zones, reducing corruption and money laundering, promoting financial stability and mitigating systemic financial risks, and ensuring access and use of internet.[54]

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[52] *See* Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 147 (1983) (discussing the isomorphic processes that lead sets of organizations to become increasingly similar through rationalization and bureaucratization once they have emerged as a field).

[53] *See* Fabrizio Cafaggi & Andrea Renda, Strijbis Foundation Report, *Measuring the effectiveness of private regulatory organizations*, (Oct. 3, 2014) *available at* http://ssrn.com/abstract=2508684 (stating the ways in which private standards evaluate the effectiveness of regulatory performances).

[54] In relation to the Internet, *see, e.g.*, *Section 2. Core Values*, *in* BYLAWS FOR INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS: A CALIFORNIA NONPROFIT PUBLIC-BENEFIT CORPORATION, (as amended July 30, 2014), *available at* https://www.icann.org/resources/pages/governance/bylaws-en.

> "In performing its mission, the following core values should guide the decisions and actions of ICANN:
>
> 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
>
> 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
>
> 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that

Who are the global private regulators? Enterprises and trade associations, professionals, and civil society organizations (CSOs). Industries are often complemented by civil society organizations and non-governmental bodies. The single stakeholder model, with a single constituency, typically an industry or a profession, has been more recently complemented by the multi-stakeholder model where industries, CSOs, and often governments convene, trying to accommodate diverging objectives and conflicting interests.[55] The most common legal form is nonprofit.[56]

Who are the regulated? Ever more frequently, regulated entities are the global chains rather than individual firms.[57] There is a shift

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reflect the interests of affected parties.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.

5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations."

55 *See* Lucy Koechlin & Richard Calland, *Standard setting at the cutting edge: an evidence-based typology for multi-stakeholder initiatives*, *in* NON-STATE ACTORS AS STANDARD SETTERS 84, 84-85 (Anne Peters et al. eds., 2009) (describing multi-stakeholder initiatives).

56 *See* Kevin E. Davis, *Privatizing the adjudication of international commercial disputes: the relevance of organizational form*, *in* ENFORCEMENT OF TRANSNATIONAL REGULATION: ENSURING COMPLIANCE IN A GLOBAL WORLD 211, 218 (Fabrizio Cafaggi ed., 2011) (listing well-known international commercial arbitration institutions that are organized as not-for-profit entities).

57 For example, the World Diamond Council System of Warranties requires " . . . that all consignment of diamonds, whether rough, polished or set in jewellery

from individual firms to groups of enterprises or to the entire supply chain.[58] This change is driven by the need for effective regulation across national jurisdictional boundaries when chain leaders outsource activities to suppliers located in different jurisdictions. Private standards are addressed to the MNC and its whole supply chain linked via contracts. Even when the regulated is only the individual firm, the implementation of the standards often requires taking into account interdependencies between firms along the entire chain, and, as a result, regulatory networks are deployed. The chain leader is made responsible to ensure compliance with the standards by the suppliers in many due diligence regimes.[59] Hence, for example, if corruption takes place at the level of subcontracting the main contractor can be held liable for failure to monitor and ensure appropriate oversight or to set up the appropriate internal management system. In the agri-food sector processors and/or retailers may be held liable when pandemics arise because of process standards violations by farmers, located upstream in the supply chain not in privity of contract.

Compared to the conventional view that connects the private production of rules to merchants and the industry, the contemporary regimes are characterized by a much stronger presence of CSOs.[60] On one hand, transnational CSOs actively

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be accompanied by a written warranty on all invoices through the supply chain." This approach is underlined in the OECD Guidelines: "In spite of the fragmented production process in the supply chain, and independent from their position or leverage over suppliers, companies are not insulated from the risk of contributing or being associated with adverse impacts occurring at various points in the mineral supply chain". OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE SUPPLY CHAINS OF MINERALS FROM CONFLICT-AFFECTED AND HIGH RISK AREAS 16 (2d. ed. 2012) [hereinafter *OECD Due Diligence Guidance*], *available at* http://www.oecd.org/corporate/mne/mining.htm.

[58] The trend is quite clear in certification regimes where chain of custody and group certification are becoming the rule. See, for example, the Responsible Jewelry Council Chain of Custody, the Fair Trade Chain of Custody, the PEFC Chain of Custody Forest Based Products-Requirements, The Global Gap Chain of Custody Standard, and the Marine Stewardship Council Chain of Custody Standard Default Version.

[59] *See, e.g.*, *OECD Due Diligence Guidance*, *supra* note 57, at 20 (providing guidance for a model supply chain policy for carrying out a responsible global supply chain of minerals from conflict-affected and high-risk areas).

[60] *See* Anne Peters, Till Forster & Lucy Koechlin, *Towards Non-State Actors as Effective, Legitimate, and Accountable Standard-Setters*, *in* NON-STATE ACTORS AS STANDARD SETTERS 544, 552 (Peters et al. eds., 2009) (discussing "the shift towards more synergetic relationships between public and private actors").

participate in regulatory processes led by public entities.[61] On the other hand, CSOs devise their own regimes, which sometimes compete with but most of the time complement the public regimes.[62] CSOs stimulate the birth of regimes, as in the case of conflict minerals, forestry, and sustainability.[63] Furthermore, they monitor existing regimes and denounce violations and breaches, as do, for example happens in the field of human rights with Amnesty International, Global Witness, and Human Rights Watch.[64] The strategies may differ, but often CSOs campaign first, promoting boycotts in market sensitive areas that induce multinationals to take initiatives and define regulatory regimes to protect their reputation and to preserve market values.[65] They then seek to build coalitions with industry and governments to establish new regulatory regimes, in order to reduce and mitigate the consequences of the human rights violations, environmental harms, and food safety crises that sparked the boycotts.

The growing role of CSOs contributes to extend the representation of interests affected by transnational private regimes, thus increasing inclusiveness and participation in transnational

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61 *See* Sabino Cassese, The Global polity: Global Dimensions of Polity and the Rule of Law, (2012) [hereinafter *Cassese, Global Polity*].

62 *See* David Vogel, *Taming Globalization? Civil Regulation and Corporate Capitalism*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT, 472, 472 (David Coen et al. eds., 2010) (defining civil regulation and describing the actors involved); *A Comparative Analysis*, *supra* note 2, at 31.

63 In relation to certification, *see* Tim Bartley & Shawna Smith, *Communities of practice as cause and consequence of transnational governance: the evolution of social and environmental certification*, *in* TRANSNATIONAL COMMUNITIES: SHAPING GLOBAL ECONOMIC GOVERNANCE, 347, 350 (Marie-Laure Djelic & Sigrid Quack eds., 2015) (discussing social and environmental certification associations and other organizations that are involved in the activity but are not dedicated certification associations); Graeme Auld, CONSTRUCTING PRIVATE GOVERNANCE: THE RISE AND EVOLUTION OF FOREST, COFFEE, AND FISHERIES CERTIFICATION (2014).

64 In relation to conflict minerals and the role of CSOs, *see* Virginia Haufler, *Transnational Business Governance and the Management of Natural Resources*, *in* COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY SERIES 16 (2012), *available at* http://digitalcommons.osgoode.yorku.ca/clpe/24 (explaining the differences between supply chain regimes in diamonds and other metals, specifically tin, tantalum, and gold).

65 *See* Steven Bernstein & Benjamin Cashore, *Can non-state global governance be legitimate? An analytical framework*, *in* REGULATION & GOVERNANCE 1.4 355 (2007); T. Bartley, *Certification as a mode of regulation*, HANDBOOK ON THE POLITICS OF REGULATION 441 (D. Levi Faure ed., 2011); Axel Marx, *Global Governance and the Certification Revolution: Types, Trends, and Challenges*, HANDBOOK ON THE POLITICS OF REGULATION 604 (D. Levi Faure ed., 2011); Auld, supra note 63.

regulation.[66] Consumers, investors, workers, human rights stakeholders, and organizations have created transnational communities.[67] They started developing their own standards and managed to "persuade" multinationals to adopt these standards. CSOs also participate in different capacities to set standards, led by industries. Such expansion increases the heterogeneity of interests in transnational regulatory processes, changing the identity and features of private regulation.

3.2. Conflicts of Interests and Organizational Responses

The transnational private sphere is heterogeneous, replete of conflicts about both objectives and instruments.[68] This diversity is reflected in the nature of transnational communities that have emerged and are involved in regulatory processes.[69] Within private regulation, different views may exist about trade-offs between regulatory objectives and instruments' choices.[70] First, the content of conflicts will be examined followed by an analysis of institutional responses.

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[66] *See* Cassese, GLOBAL POLITY, *supra* note 61; Richard Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness*, 108 AM. J. INT'L L. 211, 214 (2014) (highlighting the wide array of organizations that participate in transnational regulation).

[67] *See* Marie-Laure Djelic & Sigrid Quack, *Transnational communities and their impact on the governance of business and economic activity*, *in* TRANSNATIONAL COMMUNITIES SHAPING GLOBAL ECONOMIC GOVERNANCE, 377, 382–83 (Marie-Laure Djelic & Sigrid Quack eds., 2015) (describing the creation of transnational communities).

[68] For information related to conflicts within the private sphere, see Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation?* (European University Institute Robert Schuman Centre for Advanced Studies, Working Paper No. 53, 2010) at 31.

[69] *See* Tim Bartley & Shawna N. Smith, *Communities of practice as cause and consequence of transnational governance: the evolution of social and environmental certification*, *in* TRANSNATIONAL COMMUNITIES SHAPING GLOBAL ECONOMIC GOVERNANCE 347, 350 (Marie-Laure Djelic & Sigrid Quack eds., 2010) (establishing that, unlike national communities, transnational communities represent a much wider variety of interests and objectives).

[70] *See* Julia Black, *Legitimacy, accountability and polycentric regulation: dilemmas, trilemmas and organizational response*, *in* NON-STATE ACTORS AS STANDARD SETTERS 241, 255 (Anne Peters, Lucy Koechlin, Till Forster & Gretta Fenner Zinkernagel eds., 2009) (discussing the different views that exist as to the trade-offs between regulatory objectives and the choice of instrument).

Private regimes address conflicts within industry, both within CSOs and between industry and CSOs. Conflicts are both allocative and distributive.[71] Allocative conflicts concern the definition of the level of the optimal standard, in particular its degree of strictness or laxness. Distributive conflicts concern the allocation of compliance costs and the benefits related to the implementation of private standards. More broadly, they concern the distribution of regulatory power within the private sphere and between private and public actors.[72]

Interests' heterogeneity is reflected into both the composition of the communities of the regulated and that of the beneficiaries. Communities of regulated entities are formally defined by legal instruments that regulate access and exit to the regime. The primary tools are membership or individual contracts between regulator and the regulated. The community of the regulated in membership based organizations has legal power to participate in the regulatory process and to define the agenda of the organization and its regulatory objectives.

Private standards are always stricter than public ones but how much stricter should they be? Who has to pay the additional costs of stricter standards along global value chains? Is the distribution of costs explicitly regulated by the standard itself?

Very rarely the standards explicitly determine costs' allocation among regulated entities. Private regimes differ in their emphasis on fairness regarding costs' distribution. Some regimes specifically

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71 In particular, there are conflicting views between north and south, emerging and mature economies, and even between newly-emerged economies, require balancing and the creation of multilevel structures able to accommodate such heterogeneity. Private standards may increase compliance costs in order to reduce externalities. The distribution of compliance costs among regulated entities located along global supply chains represents a major source of conflicts in transnational private regimes.

72 *See* Tim Büthe & Walter Mattli, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 441–43 (2011) (discussing the internationalization and privatization of rulemaking); Fabrizio Cafaggi & Katharina Pistor, *Regulatory Capabilities: A Normative Framework for Assessing the Distributional Effects of Regulation* 1 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 13-354, 2013) (developing the normative concept of "regulatory capabilities," asserting that no entity should be subjected to a regulatory scheme without some freedom to choose). *See also* Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation and Responsiveness*, 108 AM. J. INT'L L. 211, 213 (2014) [*hereinafter* Stewart Accountability] (discussing how to hold authorities in international regulatory schemes accountable).

determine the amount of premiums that retailers are required to pay suppliers when they comply.[73] Others leave parties the task of negotiating cost distribution on the basis of general principles, and some regimes do not even regulate the matter. If the private regulator does not explicitly regulate cost distribution among regulated entities, private parties handle the issue contractually. The buyer defines the premium to be paid if the supplier complies with the standard. Generally, there is not a premium and no cost reimbursement without compliance.

Distributional conflicts are not only about pecuniary costs, as they also concern objectives and trade-offs. Take the relationship between global private standards and innovation transfers. Many private regimes regulate the transfer of innovation related to safety and environmental protection from MNCs to Small and Medium Sized Enterprises ("SMEs"). Should innovation be transferred on the basis of private regulation? Should the transfer be simply instrumental in order to pursue the regulatory objectives, or should it also stimulate the growth of SMEs in the Global South? Should, for example, patents be freely accessible within supply chains? Should suppliers pay fees to the patent's owner? Should fees be correlated to compliance with private standards so that monitoring costs will decrease and overall efficiency increase?

Different views about ranking objectives and distributing costs and benefits exist not only within industry, but also in the world of non-governmental organizations. Conflicts among CSOs concern the definition of objectives and how to prioritize them. In the past, private regimes would conflict since some would target environmental protection while others would prioritize safety even at the expense of environment. Protection of consumer safety at the expenses of the environment would generally benefit Northern consumers at the expense of Southern producers. But even with environmental organizations, food safety organizations, and certifications regimes in particular, differences concerning regulatory objectives and priorities are and today were in the past

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[73] Premiums incorporate the additional costs of compliance and part of the benefits derived therefrom. See, for example, the structure of premiums designed by Fair Trade labeling organization ("FLO"), where the premium associated with the compliance with requirements is defined in FLO STANDARDS UNIT, *Standard Operating Procedure: Development of Fair Trade Minimum Prices and Premiums* 9 (2014), *available at* http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/2014-03-13_SOP_Development_of_Fairtrade_Minimum_Prices_and_Premiums.pdf.

even more significant.[74] Things are partly changing. There is a growing trend towards the integration of standards within sustainability, attempting to reach a compromise between conflicting objectives, especially in multi-stakeholder organizations. However, some divergences still persist.

A variety of institutional responses to conflicting views and objectives has been provided. The first response to conflicts is provided by governance models.[75] There is an increasing use of

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[74] *See* Christine Overdevest, *Comparing forest certification schemes: the case of ratcheting standards in the forest sector*, 8 SOCIO- ECONOMIC REVIEW 47, 2010; Graeme Auld, CONSTRUCTING PRIVATE GOVERNANCE, 5 (2014).

[75] In many instances, CSO-driven regimes take multi-stakeholder forms in order to accommodate diverging views and objectives, as for example in food safety, where they include farmers, processors, retailers, and environmental and consumer protection organizations. See, for example, the Roundtable of Sustainable Biofuels, where there are seven chambers representing different interests. According to Article 4 of the Charter the Roundtable on Sustainable Biomaterials Association, there are seven chambers:

> 1. Biomass producers (e.g. farmers, plantation managers and other feedstock growers);
>
> 2. Industrial biomaterial/bioenergy producers;
>
> 3. Retailers/blenders, transportation industry, users of biomaterials and banks/investors;
>
> 4. Rights-based NGOs (including land, water, human, and labor rights) and trade unions;
>
> 5. Rural development, food security, smallholder farmers, indigenous people, and community-based civil society organizations;
>
> 6. Environment, or conservation organizations and climate change, or policy organizations;
>
> 7. Intergovernmental organizations (IGOs), governments, research/academic institutions, standard-setters, specialist advisory agencies, certification agencies, and consultancy organizations, as well as any other applicants for membership who do not fulfil the characteristics of any other Chamber.

Roundtable on Sustainable Biomaterials Association, *Articles of Association*, Version 23 September 2014, Art. 4 (last accessed Jan. 2, 2015), *available at* www.rsb.org.

See Round Table on Responsible Soy Association, *Statutes*, *Art. 4* (accessed June 28, 2015), *available at* http://www.responsiblesoy.org/documentos/ statutes-bylaws/?lang=en, where there are three constituencies:

> "1. Producers,
>
> 2. Industry, Trade and Finance (excluding producers, including supply chain actors such as crushers, traders, food and feed manufacturers and financial institutions),
>
> 3. Civil society organizations."

multi-stakeholder regulatory models, which includes both a simple and a complex version. In the simple version, the organization opens the membership to different constituencies.[76] In some cases, the regulatory model prioritizes constituencies by using different membership statuses. The main constituency is granted full membership, while other constituencies are given the status of associate members—or that of observers. The complex model is composed of different chambers, or pillars, within the general assembly. Each constituency is represented in a chamber, and the chambers appoint members of the board.[77] The multi-chamber models represent a more sophisticated approach used when there is

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See Round Table on Sustainable Palm Oil, Background, (last accessed Jan. 15, 2015), *available at* http://www.sustainablepalmoil.org/standards-certfication/certification-schemes/the-roundtable-on-sustainable-palm-oil-rspo/,where there are seven sectors:

> "1. Banks and investors
>
> 2. Consumer goods manufacturers
>
> 3. Environmental or nature conservation organizations (NGOs)
>
> 4. Oil Palm growers
>
> 5. Palm Oil processors and Traders
>
> 6. Retailers
>
> 7. Social or Development Organizations (NGOs)."

[76] In membership-based regimes, as is the case for associations, both access and exit are regulated by the law of the association. Membership is the tool that permits a potentially regulated entity to participate to the regulatory process and implies the undertaking of obligations related to the regime. Members of IATA have to be airlines and commit to comply with IATA standards related to safety and the circulation of dangerous goods. . . Members of FSC . . . members of ISDA, members of GFSI.

[77] This model is used by Forest Stewardship Council ("FSC"), where the General Assembly is composed of three membership Chambers, and is the highest decision-making body in FSC. The Chambers are divided on the basis of three different constituencies, Environmental, Social, and Economic, and are further split into sub-chambers countries from the Global North and Global South. Each sub-chamber then elects two members of the Board of Directors, which has a total of twelve members. FOREST STEWARDSHIP COUNCIL, *Governance*, https://ic.fsc.org/governance.14.htm (last visited Jan. 21, 2015). An alternative model is that deployed by the International Code of Conduct for Private Service Providers Association, where article 3, which concerns membership, states: "Membership in the Association shall be divided into three membership categories reflecting stakeholder pillars: the Private Security Companies and Private security Service Providers pillar (hereinafter PSC pillar), the civil society organization (CSO) pillar and the government pillar." International Code of Conduct for Private Security Service Providers, http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf (last visited Jan. 15, 2015).

double heterogeneity: within and between constituencies. For example, in the Forest Stewardship Council ("FSC") model, there are three chambers: economic, social and environmental.[78] Each chamber includes multiple organizations whose interests might not be perfectly aligned. The individual chamber attempts to achieve a solution, which can then be negotiated with the other chambers in the general assembly.

The second institutional response to the heterogeneity of interests is related to the changes of the regulatory process concerning participation and consultation.[79] Many transnational private regulators have codified their standard setting procedures, which require consultations at different stages of the drafting process.[80] In some instances, standard setting procedures have been adopted by private meta-regulators and then implemented by individual regulators in their own procedures.[81] In other instances, they are designed by individual regulators. Participation in the regulatory process by regulated entities can be accomplished in different ways, either individually or collectively.[82] Many transnational private regulators create technical committees whose components are appointed on the basis of expertise and

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78 Forest Stewardship Counsel, *Governance*, https://us.fsc.org/governance.181.htm (last visited June 28, 2015).

79 *See* Olga Malets & Sigrid Quack, *Projecting the local into the global: trajectories of participation in transnational standard setting*, *in* ORGANIZATIONS AND MANAGERIAL IDEAS: GLOBAL THEMES AND LOCAL VARIATIONS, 325, 325–338 (Drori, Hollerer , Walgenbach, et al. eds., 2013).

80 ISEAL ALLIANCE, ISEAL CODE OF GOOD PRACTICE: SETTING SOCIAL AND ENVIRONMENTAL STANDARDS (2014) 6; *see also* IASB AND IFRS INTERPRETATIONS COMMITTEE, DUE PROCESS HANDBOOK (2013), http://www.ifrs.org/DPOC/Documents/2013/Due_Process_Handbook_Resupply_28_Feb_2013_WEBSITE.pdf; ISO/IEC GUIDE 59, CODE OF GOOD PRACTICE FOR STANDARDIZATION (1994), https://www.iso.org/obp/ui/#iso:std:iso-iec:guide:59:ed-1:v1:en; UTZ CERTIFIED, CODE DEVELOPMENT PROCEDURE FOR A UTZ CERTIFIED PRODUCT CODE (2011), https://utzcertified.org/attachments/article/1987/Code%20Development%20Procedure%20UTZ%20CERTIFIED.pdf; EUROPEAN ADVERTISING STANDARDS ALLIANCE, DRAFT EASA BEST PRACTICE RECOMMENDATION (2010), http://ec.europa.eu/justice/news/consulting_public/0006/contributions/organisations/epc_annex2b_en.pdf; FAIRTRADE INTERNATIONAL, Standard Operating Procedure Development of Fairtrade Standards (2012), http://www.fairtrade.net/fileadmin/user_upload/content/2009/standards/documents/2012-02-07_SOP_Development_Fairtrade_ Standards.pdf.

81 On meta private regulation, *see* Fabrizio Cafaggi, *Regulating Private Regulators, in* RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW (S. Cassese ed.), forthcoming, 2015 (on file with the author).

82 *See Cassese, GLOBAL POLITY*, *supra* note 61.

representation of interests.[83] They often represent interests and constituencies outside those who have been granted membership. In technical committees, consensus is the general rule; therefore participation influences the final outcome of the decision making process.[84] The alternative or complementary method to ensure inclusiveness is granting consultations at every relevant drafting stage. The outcomes of consultations have to be taken into account and reasons have to be given when recommendations are rejected. Governance models and the integration of standards constitute complementary responses to the heterogeneity of various interests in transnational private regulation.

4. THE PROCEDURAL FEATURES OF TRANSNATIONAL PRIVATE REGULATION

4.1. Standard Setting.

TPRs are rather formalized; the regimes adopt written standards according to predefined procedures subject to periodical revision. This is a significant difference compared to customary law.[85] They act as private legislatures and increasingly define rules on how the regime should be governed, including standard setting, monitoring, and implementing enforcement procedures.[86] At times these procedures are defined by the charters and bylaws of the organization, but most times they are separate standards whose development is characterized by rules open to consultation with external stakeholders. **Such a divide marks the separation between the governance of the organization and governance of the**

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83 *See* for example GFSI, ISEAL, IFRS.

84 *See* Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness*, 108:2 AM. J. INT'L L. 211, 214, 235 (2014) (distinguishing between decisional and non-decisional participation depending on how the right to participate can influence the final decision and in particular the content of the standard).

85 *See infra.*

86 *See* Colin Scott, *Standard-setting in Regulatory Regimes*, *in* THE OXFORD HANDBOOK ON REGULATION, 104, 104 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010) (elaborating on the standards within regulatory regimes and "the challenges of a accountability associated with the emergence of a highly diffuse 'industry' for regulatory standard setting").

regulatory process. The two are connected, albeit not overlapping.[87] The development of a separate body of rules concerning the participation in the process underlines the distinction from pure self-regulatory regimes where openness and inclusiveness have not been the primary concerns.

Private standards are voluntary, and regulatory regimes frequently use market mechanisms to promote their diffusion and to ensure effective implementation.[88] They are generally legally binding, although their effectiveness is additionally ensured through non-legal mechanisms.[89] Codes of conduct, regulatory contracts, rule-books and agreements represent the primary instruments to design and to implement standards. Auditing and reporting constitute the most significant techniques to assess compliance;[90] they ensure the flow of information from the organization towards the community of the regulated, the potential beneficiaries, and the regulator.[91] The paradigmatic example is certification where different schemes have emerged, driven by CSOs or by industry, and more recently by multiple stakeholders, including national governments.[92]

It is worth examining some of the procedural features of transnational regulation in more detail, beginning from the process

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87 *See generally* Fabrizio Cafaggi, *A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement* (Hague Inst. for the Internationalisation of Law) (Preliminary Draft June, 2014) (on file with author) (discussing the relationship between organizational governance and regulatory processes).

88 *See* Bernstein & Cashore, *supra* note 65 at 354.

89 *See* Tim Buthe & Walter Mattli, *International Standards and Standard-setting Bodies*, *in* THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 440, 441 – 43 (David Coen, et. al. eds., 2010) [hereinafter Buthe & Mattli] (identifying five reasons for compliance with "voluntary" standards: superior solutions to technical problems, network externalities, information asymmetries, social pressure or political legal incentives, legal sanctions).

90 *See generally* Neil Gunningham, *Enforcement and Compliance Strategies*, *in* THE OXFORD HANDBOOK OF REGULATION 120 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010) (examining how to create an enforcement strategy that achieves effective and efficient policy outcomes while also maintaining community confidence).

91 *See* ISEAL Code of Practice 6.4.2, 6.4.3, 6.4.4 ICOC articles of association article 12, *available at* www.isealalliance.org (assuring compliance with social and environmental standards).

92 Certification is highly relevant in some sectors, such as environment, product safety, while it plays only a minor role in other areas like finance. T. Bartley, Certification as a Mode of Regulation, Handbook on the Politics of Regulation 441 (D. Levi Faure ed. 2011).

of codification concerning standard setting.[93] In the past, many private regulators did not have rules defining standard setting procedures. Charters and bylaws regulated their activity without any reference to the interests of stakeholders lacking membership. Private regulators would operate with ad hoc procedures to enact codes of conduct or guidelines related to the activities of their regulated entities. Such systems have been subject to serious criticisms by external stakeholders and even by those members not involved in the process.[94] States and international organizations recommended the definition of clear rules concerning the regulatory process for the purpose of integrating them into their legal orders.[95] More recently, private regulators have come to adopt standard setting procedures to which different bodies involved in the regulatory activity must comply with, including dispute settlement.[96] The objective is to make the drafting process transparent, subject to review and contestation in order to increase its legitimacy (both input and output). The effects of increasing proceduralization of the regulatory process are manifold. Clearly they enhance legitimacy and transparency, but at the same time increase both costs and time. Standard setting rules include periodic revision and integration. The obligation to revise codes and standards after a relatively short period of time ensures the pace of regulatory innovation without crystallizing the standards.

In some instances, the standard setting procedures deployed by individual regulators follow templates produced by meta private regulators.[97] A case in point is that of the members of International social and environmental accreditation and labeling (ISEAL) alliance. ISEAL is a non-profit company incorporated in the UK and encompasses a number of organizations in the field of

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93 *See* Buthe & Mattli, *supra* note 89, at 441.

94 *See* Stewart Accountability, *supra* note 72, at 234 (contending that the accountability deficit of global regimes can be corrected by reforming some of the current accountability mechanisms).

95 This has often been the case for the European Union that has stimulated a more accountable definition of the regulatory process.

96 *See, e.g.*, ISO-IEC Directives part 2, 2014 *available at* www.iso.org. Due process handbook of IASB, *available at* www.ifrs.org., EASA Recommendation on code drafting and consultation *available at* www.EASA.org., ISEAL standard setting code *available at* www.isealalliance.org.

97 *See, e.g.*, ISO Guides for Standardization Drafted in Compliance with the WTO Code of Practice ISO/IEC Guide 2:2004 and ISO/IEC Guide 59:1994.

sustainability.[98] It produces meta-rules to be applied to the members.[99] ISEAL has published three codes, one related to standard setting, one on impact (monitoring) and one on assurance (compliance and enforcement).[100] Compliance with the codes is mandatory for full members. The standard setting codes defines procedures that members have to follow when enacting their own codes.[101] These rules concern (1) the criteria for participation in the process (mapping stakeholders, selecting the relevant actors according to a balance of different interests),[102] (2) the drafting criteria, (3) the process of consultation that has to be repeated after each stage, and (4) the process of revision that has to take place periodically.[103]

Both in the case of meta-regulation and that of individual regulators, one challenge is to accommodate heterogeneity in the community of regulated entities. Private regulators aim at regulating thousands or even millions of firms across the globe. Differences related to size, managerial and financial capabilities, and business cultures may be dramatic. A regulatory strategy that fits for every possible regulated entity does not exist. There is need to differentiate according to departure points and developmental

98 ISEAL Alliance, www.isealalliance.org (last visited Jan. 15, 2015).

99 Meta-rules are framing principles that individual regulators implement in their own regulatory instruments. *See* Fabrizio Cafaggi, Transnational Private Regulation: Regulating Private Regulators, cit. fn. 81, p. 18-19.

100 ISEAL Alliance, www.isealalliance.org (last visited Jan. 15, 2015).

101 *See* ISEAL Alliance, Standard Development Point 5.1 Terms of Reference, www.isealalliance.org (last visited Jan. 15, 2015) (stating that standard developments have to follow the terms of reference which must include: a justification for the new standard, a clear definition of the objectives the standard intends achieving, "an assessment of risks in implementing the standard and how to mitigate for these, including identification of factors that could have a negative impact on the ability of the standard to achieve its objectives, the identification of unintended consequences, and possible corrective actions to address these consequences.")

102 *See* ISEAL Alliance, Standard Development Point 5.5.1 Terms of Reference, www.isealalliance.org (last visited Jan. 15, 2015) (requiring that "standard setting organizations shall ensure that participation in standard consultation is open to all interested parties and that participation and decision making reflects a balance of interests among interested parties in the subject matter and in the geographic scope in which the standard applies.")

103 *See, e.g.*, UTZ Certified Code Development Procedure 2.0 September 2014, www.utzcertified.org (last visited Jan. 15, 2015) (enacting compliance with ISEAL code of good practice for setting social and environmental standards).

capabilities of each (cluster of) regulated entities.[104] The regulatory approach is changing: many organizations now define timelines that permit firms with different sizes and capabilities to reach the stage of full compliance over time through a process of "continuous improvement."[105]

4.2. Review and Enforcement Mechanisms

Enforcement is a key pillar of every regulatory system. In TPR enforcement mechanisms operate to ensure compliance with the standards and solve disputes between regulator and regulated, between regulated, and between regulated and third parties.[106] Sometimes enforcement is partly decentered and the regulator imposes the adoption of grievance mechanisms on each regulated entity to solve disputes with third parties.[107]

Some regimes are still limited to standard setting and do not provide any dispute resolution mechanisms, relying on domestic courts or on generic enforcement private systems such as arbitration.[108] Dispute resolution bodies in transnational private

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[104] *See, e.g.*, UTZ Core Code of Conduct 1.0, 2014, www.utzcertified.org (last accessed Jan. 15, 2015) (highlighting the 4 year used by UTZ certified in their Core Code of Conduct distinguishing between mandatory and additional control points. The total amount is always 120 but the first year the ratio is 60/60, the second is 87/33, the third is 103/17, the fourth is 113/7).

[105] Typically this is true for SMEs, compared to large enterprises when the same standard applies, but the time to achieve full compliance differs. In other contexts, regulators have designed different standards introducing distinctions among regulated entities.

[106] *See* Fabrizio Cafaggi, Enforcing Transnational Private Regulation: Models and Patterns, in Fabrizzio Cafaggi (ed.) Enforcement of Transnational Regulation, Ensuring Compliance in a Global World, 2012, 75 ff. 99 [hereinafter Enforcing Transnational Private Regulation].

[107] In the field of private securities, see art. 13 *International Code of Conduct for Private Security Providers,* ICOC, and in the field of data protection, binding corporate rules usually include legal enforceability of rules by the so-called controller. *See* Art. 29 Data Protection WP, *Explanatory Document on the Processor Binding Corporate Rules*, 10 (2013), *available at* http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp204_en.pdf.

[108] 2013 ISDA Arbitration Guide, *available at* www.isda.org (explaining the paradigmatic case of ISDA where the master agreement (section 13 b) indicated as default clause the jurisdiction of English Courts. In 2013 a policy change occurred and ISDA suggested the introduction of arbitration agreements).

regimes are more common in membership-based organizations, including trading platforms.[109]

Recently, dispute settlement bodies have been created separately from the standard setters to preserve their independence, impartiality, and autonomy and to reduce conflicts of interest.[110] Their degree of independence and compliance with due process varies across fields.[111] The private enforcer might be a unit of the regulatory body or have independent legal personality but its activity should not be subject to the control of the standard setter. Parallel to the creation of independent enforcers has been the codification of rules. Individual regulators have expressly codified principles about regulatory enforcement; accordingly enforcement procedures have to be accessible and fair, the enforcer has to be independent and impartial, and must provide injured parties with effective remedies.[112] Compared to the contemporary 'merchant courts,' a much higher degree of proceduralization and a lower degree of discretion is warranted in this type of private adjudication.[113]

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[109] The creation of an enforcement body should not be interpreted as it has been the case for *lex mercatoria* as an attempt to insulate these regimes from the control of domestic courts that continue to play a significant role.

[110] The most well-known example is the TAS (Sport Arbitral Tribunal) reformed to comply with a judgment of the Swiss Federal Supreme Court that required separation and independence from the standard setting body (Swiss Federal Tribunal, Gundel v. Fédération Equestre International, 15 March 1993, BGE 119 II271). *See* L. Casini, The Making of a Lex Sportive by the Court of Arbitration for Sport, Ger. L. J. 1317 ff. at 1322 (2011). In the field of advertising see EASA Best practice recommendation on jury composition *available at* www.easa.org., applied to national SROs regulating advertising. *See* P. Verbruggen, Enforcing Transnational Private Regulation, EE, 2014.

[111] *See generally* Fabrizio Cafaggi, Enforcing Transnational Private Regulation, s*upra* note 106 at 77.

[112] *See, e.g.*, art. 13.1 *International Code of Conduct for Private Security Service Providers*, ICOC. The importance of a fair and impartial grievance mechanisms is also emphasized by the 'Ruggie' principles concerning CSR. *See* United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights*, Principle 31 (2011) *available at* www.un.org (casting the criteria for effective non-judicial grievance mechanisms).

[113] Even if the enforcement body is composed by experts with specific knowledge of the sector, impartiality and due process have become necessary conditions for legitimacy.

The third party enforcer just described has not entirely replaced other models, in particular that of first party enforcement.[114] In many instances the scheme owner maintains the right to directly administer sanctions when regulated entities violate the rules. This is the case in electronic trade platforms, in certification schemes, in several roundtables to name a few.[115] In the latter examples the standard setter and the enforcer coincide, and there is no independence.

Proceduralization of enforcement includes the definition of a sanctioning system. Enforcement by private regulators is based on a tripartite set of sanctions: those stemming from contract law, those based on organizational law, and those grounded on reputation. Legal sanctions, often defined by the codes of conduct, are generally combined with extra-legal sanctions.[116] Legal sanctions are often based on membership and strongly related to reputational effects in the market place.[117] Clearly conventional sanctions for breach of contract are rarely used. Purely reputational mechanisms on the other hand would not suffice to protect the interests of those who suffer harms from regulated entities' violations. Much more common is the combined use of corrective measures and the power of exclusion on the basis of an escalating mechanism.[118]

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[114] *See* Dixit, *supra* note 21, at 10 (using Avinash Dixit taxonomy, one should conclude that first, second and third party enforcement institutions co-exist in transnational private regulation).

[115] *See* GLOBALG.A.P., GENERAL REGULATIONS: PART I; GENERAL RULES, art. 6.6 (Part I 4.0-1, 2012) (art. 8 and 15) (concerning the power of GLOBALG.A.P. to sanction certification bodies), Roundtable for responsible soy where the executive board has the power to admit and exclude members (art. 8 and 15).

[116] The creation of blacklists that forbids engaging in trading relationships or expulsion from the regime may have severe economic repercussions, being often much more effective than damages.

[117] Enforcement mechanisms vary depending on whether the regulator is membership based. In this instance, the regulator has a right to exclude or suspend membership depending on the seriousness of the violation. Often loosing membership can have blaming and shaming effects much stronger than common contractual sanctions.

[118] On the use of right of exclusion as a governance mechanism, *see* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 No. S2 J. LEGAL STUD. 453 (2002). On the use of complementary enforcement mechanisms, *see* Gillian K. Hadfield, *Contract Law is Not Enough: The Many Legal Institutions That Support Contractual Commitments*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS (Claude Menard and Mary Shirley, eds., Kluwer 2004); Avinash K. Dixit, LAWLESNESS AND ECONOMICS (Princeton University Press, 2004). ALTERNATIVE MODES OF GOVERNANCE, 97 ff.

A clear illustration of an institutionalized community, using both reputational and legal sanctions, is provided by some contemporary e-commerce platforms where the reputational sanctions are determined by peers on the basis of the platform regulation.[119] In addition, the platform owner can use legal sanctions primarily directed at preventing wrongful conduct by traders that may result in the suspension or termination of an individual account.[120]

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[119] For instance, in the case of eBay, after each transaction on the auction platform, parties are asked to leave an evaluation of the negotiation partner, namely a Feedback: buyers can leave a positive, negative, or a neutral rating, plus a short comment, whereas sellers can leave a positive rating and a short comment. The ratings provided by each user build up the so-called Feedback scores, where members receive one additional point for each positive rating, no points for each neutral rating, and reduce one point for each negative rating. This allows the other users to verify the trustworthiness of the buyer or seller within the platform. Since 20th August 2014, the eBay system added a new measure for sellers' evaluation: the transaction defect rate. This provides information regarding the seller's successful transactions that have one or more transaction-related defects. Ebay sets a minimum standard for this rate: sellers can have up to a maximum 5% of transactions with one or more transaction defects over the most recent evaluation period. A maximum 2% will allow a seller to qualify as an eBay 'Top Rated Seller.' It is not clear what exactly happens when this requirement is not met. The website only affirms that "eBay regularly offers coaching and training to sellers in order to help them be more successful. Sellers who fall below standard can expect to receive clear notification of next steps and actions. Consequences of falling below the minimum performance standards can include lowered search standing, limits to further selling, and in some cases a permanent loss of selling privileges." *2014 Spring Seller Update: Updates to Seller Standards Designed to Reward Great Service with More Sales,* EBAY.COM, http://pages.ebay.com/sellerinformation/news/springupdate2014/sellerstandards.html#highlights (last visited Jan. 21, 2015). In cases of negotiation problems, eBay's internal negotiation platform can resolve problems: "If the buyer and seller can't come to an agreement, eBay may decide the case. eBay may issue a refund, reverse a sale, or require the buyer to pay for an item." *Contacting Customer Service*, eBay.com, http://pages.ebay.com.sg/eBP/ (last visited Jan. 21, 2015). Finally, if suspicious activity is reported, the eBay Trust and Safety team investigates the situation. If a member violates a policy, the process is warning, limitation and then suspension of the account privileges. *Knowing the Rules for Sellers*, eBay, http://pages.ebay.com/help/sell/policies.html (last visited Jan. 21, 2015).

[120] *See, e.g.*, *eBay User Agreement*, eBay.com, http://pages.ebay.com/help/policies/user-agreement.html, http://pages.ebay.com/help/buy/role-of-eBay.html (last visited Jan. 21, 2015) ("If we believe you are abusing eBay in any way, we may, in our sole discretion and without limiting other remedies, limit, suspend, or terminate your user account(s) and access to our Services, delay or remove hosted content, remove any special status associated with your account(s), remove and demote listings, reduce or eliminate any discounts, and take technical and/or legal steps to prevent you from using our Services..").

The boundaries between compliance monitoring and enforcement are not always clear-cut in transnational private regulation.[121] On the one hand, the notion of enforcement is broader than that adopted in the public sphere, including different sanctioning systems that deploy legal and non-legal sanctions. On the other hand, the distinction between ex ante oversight and ex post punishment has blurred. In some instances a complex multi-tool strategy has been designed. For example, in the Articles of the Association of Private Services Companies International Code of Conduct (ICOC), three systems must simultaneously be in place: certification (art. 10), reporting, monitoring, and assessing the company's performance (art. 11), and the complaints process (art. 12).[122] In other instances, auditing and reporting are the primary mechanisms to ensure compliance.[123]

Auditing and reporting constitute only part of the wide array of instruments deployed by private regulators.[124] Self-assessment tools are now provided to individual firms in order to allow them to assess and report on their regulatory performance.[125] The outcomes of self-assessment can be subject to evaluation by committees and be discussed by the community of regulated and affected stakeholders. Different forms of peer reviews are deployed to promote mutual learning between regulated entities participating in the same regime. They often take the network form in order to ensure adequate interactions among participants.[126]

Conflicts concern not only the application but also the validity of rules. Many regimes define internal review procedures where

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121 Especially in certification regimes, the power to monitor compliance with certification schemes and the power to issue sanctions for noncompliance are not well differentiated. The certification body has to monitor compliance and can suspend or terminate certification as a punishment for noncompliance. *See, e.g.*, GLOBALG.A.P., *supra* note 115, at art. 6.

122 *See* Swiss Confederation, *International Code of Conduct for Private Security Providers,* ICOC (Nov. 9, 2010).

123 This is the approach taken by ISEAL in its assurance code. ISEAL Alliance, Assuring Compliance with Social and Environmental Standards: Code of Good Practice (2012), *available at* www.isealalliance.org.

124 *See, e.g.*, Stewart Accountability, *supra* note 94, at 252 (listing transparency, peer reputational influences and incentives, and competition as some of the more broadly defined methods of accountability).

125 *See* CAFAGGI & RENDA, *supra* note 9, at 99; Stewart Accountability, *supra* note 94, at 211.

126 *See* Timothy D. Lytton & Lesley K. McAllister, *Oversight in Private Food Safety Auditing: Addressing Auditors Conflict of Interest*, 2014 WIS. L. REV. 289, 330-331 (2014) (describing the network structure of institutional oversight).

affected stakeholders may seek standards' review before specialized committees or independent bodies.[127] These mechanisms are primarily directed toward parties who are not members and have not been able to actively participate in standard setting activities. Internal review is separated from complaints handling and often dealt with by a different committee. Review is also performed by domestic courts that contribute to regulatory innovation.[128] The use of domestic courts to adjudicate disputes related to the implementation of transnational regulation may come at a cost. Decentralized review procedures may cause inconsistencies when different laws are applicable to the same transnational regime.[129] The link between internal and external review process is still rather weak. Enforcement and review mechanisms have become more relevant in global private regulatory regimes. They provide a centralized mechanism deploying a wide menu of sanctions that complement decentralized enforcement by domestic courts and arbitrators.

4.3. Separation of Functions in the Regulatory Process

The evolution of the last twenty years suggests that transnational private governance has moved toward separation of functions. The private regulatory process is now structured similarly to the conventional public process, separating the various

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[127] *See*, *e.g.*, *Bylaws for Internet Corporation for Assigned Names and Numbers,* art. IV, ICANN (July 30, 2014), https://www.icann.org/resources/pages/bylaws-2012-02-25-en?routing_type=path (describing three alternative mechanisms [board reconsideration committee, independent review panel, ICANN ombudsman] in the field of internet domains); Swiss Confederation, I*nternational Code of Conduct for Private Security Service Provers' Association: Articles of Association,* art. 13.2.3, ICoC, http://www.icoc-psp.org/uploads/ICoC_Articles_of_Association.pdf (last visited Mar. 26, 2015) (describing procedures in the field of private security companies, where the Secretariat reviews complaints regarding grievance procedures).

[128] Two examples are provided by the English and New York Courts in the adaptation of the ISDA Master agreement and the role of the Federal Swiss Supreme Tribunal in relation to International Olympic committee. INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, 2002 ISDA MASTER AGREEMENT (2002), *available at* www.isda.orghttp://www.isda.org/publications/isdamasteragrmnt.aspx#ma.

[129] *See* Fabrizio Cafaggi, *Enforcing Transnational Private Regulation: Models and Patterns*, *in* ENFORCEMENT OF TRANSNATIONAL REGULATION: ENSURING COMPLIANCE IN A GLOBAL WORLD (Edward Elgar ed., 2012) at 92.

functions: standard setting, monitoring, and enforcement. In the simpler version, this separation has occurred within the same organization by creating differentiated committees to ensure that no conflicts of interest arise. In more complex architectures, separation of functions has spurred the creation of independent units, sometimes with their own legal personality. This development, driven by the need for higher accountability, has departed from the more conventional private model of the merchant courts where the same community, often the same individuals, set the rules and solve conflicts concerning their application. Multi-stakeholder organizations tend to have a higher degree of functional separation between standard setting, monitoring, and enforcement.

5. REGULATORY INSTRUMENTS

A third distinct feature of TPR is represented by the specificity of regulatory instruments. TPRs define voluntary standards to be applied by regulated entities, individually or collectively, for the benefit of third parties, e.g. the regulatory beneficiaries (consumers, investors, human rights holders, environmental groups). These standards are collected or codified in codes, rulebooks, guidelines, or principles.[130]

Standards can define how regulated entities should ensure a certain level of product safety or prohibit social practices that imply the use of child labor, slavery, and discrimination. They may either (1) proscribe the standards and let regulated entities choose the implementation instruments (output standards), or (2) suggest or impose not only the tool (the standard contract form) firms have to deploy, but also the governance requirements necessary for good implementation (input standards).[131] In this matter there is a wide variety of standards ranging from general principles to highly detailed and specific rules.

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[130] *See, e.g.*, Equator Principles, *supra* note 8; International Bar Association, Principles on Conduct for the Legal Profession (2011); ISEAL Credibility Principles, *supra* note 31; World Diamond Council, System of Warranties (2014), https://www.worlddiamondcouncil.org/download/resources/documents/System%20of%20Warranties%20WDC%202014.pdf; *International Code of Conduct for Private Security Providers, supra* at note 128; *Unaccompanied Standards*, IFRS (Jan. 1, 2014), http://www.ifrs.org/IFRSs/Pages/IFRS.aspx#1 (accounting standards).

[131] For example they can impose the adoption of HACCP for product safety and a specific safety management scheme to implement it.

Contracts are also an important element in the regulatory toolkit. Standard contracts and standard terms constitute conventional instruments to regulate cross-border exchanges whose scope and functions have recently been broadened to incorporate regulatory objectives.[132] They are deployed (1) to regulate the relationship between regulator and regulated, (2) to implement standards in the relationship between regulated and third parties (sale or distribution contracts), and (3) to monitor standards' compliance (certification contract).

Regulatory contracts are used to create and regulate new markets. In addition to the traditional activities related to the collection of standard forms and term of the International Chamber of commerce (ICC), new markets have been created by private regulators ranging from electronic trading platforms to financial over the counter (OTC) infrastructures. New technologies and financial innovation have spurred new trading platforms with participants coming from different jurisdictions.[133] While creating new markets or implementing regulatory policies, private regulators design master agreements, framework contracts, and standard contract forms that participants are recommended to use when engaging in trade.[134] For example, the International Swaps and Derivatives Association (ISDA) master agreement represents a powerful regulatory tool to regulate derivatives' transactions.[135] The ISDA master agreement is incorporated in the individual contracts, which cover a number of transactions. Other examples of contractual standardization directed at marked design concern data protection, e-commerce, and product certification.[136]

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132 *See* Fabrizio Cafaggi, *The Regulatory Functions of Transnational Contracts: New Architecture*, 36 FORDHAM INT'L L.J. 1557 (2013) [hereinafter *New Architecture*] (exploring the increasing interaction between transnational contracting, transnational regulation, and certification).

133 These markets are primarily regulated by private actors with some degree of public intervention by domestic legislation and by trans-governmental networks.

134 Competition and antitrust authorities have banned the practice of private regulators imposing contractual forms or terms on regimes' participants. In Europe this prohibition has been applied directly to banking contracts.

135 The ISDA Master Agreement (MA) specifies that the MA and the confirmation statements are part of the same agreement and reflects the interests of all ISDA members, ensuring the diffusion of the regulatory instrument and consequently the development of the market. INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, 2002 ISDA MASTER AGREEMENT (2002) *available at* http://www.isda.org/publications/isdamasteragrmnt.aspx#ma.

136 On the ISDA Master agreement, see DAVID A. SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD-FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES

Regulating markets often implies the definition of boilerplates.[137] Contracts' standardization performs important regulatory functions, particularly when there is strong interdependencies among the transactions taking place within a single market: *e.g.* prices and quantities of each transaction influence the prices and quantities of other transactions, contractual termination may affect prices of other contracts and induce other defaults. Contract standardization also plays a strategic function in generating network externalities.[138] New participants have an incentive to adopt the ISDA master agreement if that is already used by the majority of traders in that market.

The regulatory function of contracts has in turn had an impact on the sanctioning system. Compliance with private standards, incorporated in the commercial contract, is ensured by a double system of sanctions.[139] Contractual sanctions are sought by the buyer against the seller, while regulatory sanctions are administered by the private regulator to the party responsible for compliance. The latter may refer to whichever contractual party subscribes to the regulatory regime.

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163 (Wiley, 2010); Joanne Braithwaite, *Standard Form Contracts as Transnational Law: Evidence From the Derivatives Markets*, 75(5) M.L.R. 779 (2012); J. Biggins and C. Scott, *Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform* (2012) 13 European Business Organization Law Review 307, p. 324; P. Saguato, *in* THE GOVERNANCE AND REGULATION OF INTERNATIONAL FINANCE 32 (2013). In the field of certification licensing, standard contract forms regulating the relationship between the accrediting body and the certifier and the certifier and the certified are a constant feature of each regime. *See* GLOBALG.A.P., *supra* note 121; IFOAM. In the field of ecommerce, all the electronic platforms define general principles in codes or principles and then issue standard contracts forms that trader have to use.

137 *See* S. CHOI AND MITU GULATI, *Contract as Statute* in O. BEN- SHAHAR, BOILERPLATE 145, 149 (2006). *See* Stephen J. Choi & Mitu Gulati, *Contract as Statute, in* BOILERPLATE: THE FOUNDATIONS OF MARKET CONTRACTS 145, 149 (Omri Ben-Shahar, ed., 2007).

138 *See* Stephen J. Choi & G. Mitu Gulati, *Contract As Statute*, 104 MICH. L. REV. 1129 (2005-2006); Marcel Kahan & Michael Klausner, *Standardization and Innovation of Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) (analyzing how externalities influence standardization, customization, and innovation in corporate contracts). *See* Mitu Gulati & Stephen J. Choi, *Contract As Statute*, 104 MICH. L. REV. 1129 (2006); Marcel Kahan & Michael Klausner, *Standardization and Innovation of Corporate Contracting (Or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997) (analyzing how externalities influence standardization, customization, and innovation in corporate contracts).

139 *See New Architecture*, *supra* note 1372, at 1600.

Implementation of private standards can involve groups of regulated entities. In these instances, the regulated entities are recommended to use multiparty and regulatory contracts to establish a network that has to implement regulatory requirements. Such networks can be (1) vertical, including parties along the global supply chain aimed at implementing safety, environmental, or social policies, or (2) horizontal among firms in different supply chains located in the same geographic location.[140] The use of contracts imposes monitoring costs on the parties along the chain to evaluate compliance and react in case of non-compliance through innovative sanctioning regimes.

To ensure compliance, many regulatory instruments use market driven tools, including both prices and sanctions. They reward compliance via market prices and punish violations by using reputational and community sanctions, in addition to the more conventional contractual and associational sanctions.[141] Possibly the most interesting developments concern compliance instruments; for example, how regulated entities' compliance is ensured using both hierarchical and peer monitoring.[142]

Regulatory instruments do not focus only on standard setting and implementation. Compliance monitoring has stimulated the development of many innovative regulatory instruments. Furthermore, it refers to the regulator and to those that have to comply. Private standards concern also reporting and monitoring

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140 Horizontal networks can be created to access capital (multiparty loans), technologies (patent pools), and knowledge (multiparty contracts to transfer know-how).

141 Dixit, *supra* note 118, at 97.

142 *See* NEIL GUNNINGHAM, ENFORCEMENT AND COMPLIANCE STRATEGIES 120 (Oxford Handbook of Regulation, 2010). *See generally* CHRISTINE PARKER & VIBEKE LEHMANN NIELSEN, EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION (London School of Economics and Political Science, 2011); FABRIZIO CAFAGGI, THE ENFORCEMENT OF TRANSNATIONAL REGULATION 108 (Edward Elgar ed., 2012); PAUL VERBRUGGEN, ENFORCING TRANSNATIONAL PRIVATE REGULATION: A COMPARATIVE ANALYSIS OF ADVERTISING AND FOOD SAFETY (Edward Elgar ed., 2014); GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT AND COMPLIANCE (Wolters Kluwer 1st ed., 2014). *See* NEIL GUNNINGHAM, *Enforcement and Compliance Strategies*, *in* OXFORD HANDBOOK OF REGULATION 120 (Robert Baldwin et al. eds., 2010). *See generally* CHRISTINE PARKER & VIBEKE LEHMANN NIELSEN, EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION (Edward Elgar ed., 2012); FABRIZIO CAFAGGI, ENFORCEMENT OF TRANSNATIONAL REGULATION 108 (Edward Elgar ed., 2012); PAUL VERBRUGGEN, ENFORCING TRANSNATIONAL PRIVATE REGULATION (Edward Elgar ed., 2014); GEOFFREY P. MILLER, THE LAW OF GOVERNANCE, RISK MANAGEMENT AND COMPLIANCE (2014).

compliance by regulated entities.[143] Firms are required to issue financial and non-financial reporting where they document their degree of compliance with human rights, social, and environmental policies.[144] Due diligence requirements associated with compliance often translates into changes concerning both the internal governance of the corporation and that of the supply chain.[145] Self-assessment is the first - yet not the exclusive - instrument to monitor regulatory performance. Private regulators use ex officio power to inspect and monitor regulated entities compliance, in addition they may deploy third party monitoring by delegating this function to 'independent' private actors.[146] Monitoring instruments increase accountability both towards the regulated along with the beneficiaries of the regulatory process while also providing information about overall effectiveness.

6. USAGES, CUSTOM, AND JURA MERCATORUM

Conventionally, the new lex mercatoria has been described as a body of privately set rules produced by a community of traders whose legitimacy is provided by the community itself.[147] It is a

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143 *See, e.g.*, GLOBAL REPORTING INITIATIVE, G4 SUSTAINABILITY REPORTING GUIDELINES (2013), https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf. (last visited Apr. 3, 2015).

144 ICOC Articles of Association, *supra* note 91, at art. 12.

145 *See generally* The Kimberley Process, Kimberley Process Certification Scheme, *available at* http://www.kimberleyprocess.com/en/kpcs-core-document (last visited Apr. 3, 2015); FAO-OECD Guidance for Responsible Agricultural Supply Chains, Draft for Comment, 2015, *available at* http://mneguidelines.oecd.org/FAO-OECD-guidance-responsible-agricutural-supply-chains.pdf (last visited Apr. 3, 2015); International Fund for Agricultural Development, Procedures for Financing from the Grants Programme, *available at* http://www.ifad.org/gbdocs/eb/102/e/EB-2011-102-R-28.pdf (last visited Apr. 3, 2015).

146 *See generally* Fabrizio Cafaggi & Andrea Renda, *Measuring the Effectiveness of Private Regulatory Organizations*, 82 STRIJBIS FOUND. REP. (2014), http://ssrn.com/abstract=2508684.

147 ROY GOODE ET AL., TRANSNATIONAL COMMERCIAL LAW 38 (Oxford Univ. Press, 2007) ("[L]ex mercatoria . . . consists of the unwritten customs and practices of merchants so far as satisfying externally set criteria for validation. This definition excludes written codification of customs and practice . . . . [L]ex mercatoria is thus best seen as being true to its origins the product of spontaneous activity on the part of merchants.").

contested concept.[148] Among the most debated issues are the self-contained nature of lex mercatoria and its independence from state laws. Recently, both the assumption of statelessness and that of centralization of rulemaking and uniformity have been successfully challenged.[149] Both historians and lawyers have shown that *lex mercatoria* emerges out of an institutional framework where adjudication plays a paramount role.[150] Moreover, merchant rules have been for the most part local and often conflicting, rather than uniform and universal.[151]

The concept of custom (*consuetudo*) is at the same time broader and narrower than *jus mercatorum*.[152] Through custom, social

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148 *See* Nikitas E. Hatzimihail, *The Many Lives – and Faces – of Lex Mercatoria: History as Genealogy in International Business Law*, 71 L. & CONTEMP. PROBS. 169, 169 (2008) (detailing the analysis of lex mercatoria's rival accounts).

149 Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 447–68 (2007); Ralf Michaels, *The Mirage of Non-State Governance*, 1 UTAH L. REV. 31, 31–45 (2010); THE AMES FOUNDATION, LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (Mary Elizabeth Basil et al. eds., 1998) *available at* http://amesfoundation.law.harvard.edu/lm.html (last visited Apr. 3, 2015); J. Donahue, *'Benvenuto Stracca's De mercatura: Was There a lex mercatoria in Sixteenth Century Italy?', in* FROM LEX MERCATORIA TO COMMERCIAL LAW, COMPARATIVE STUDIES IN CONTINENTAL AND ANGLO-AMERICAN LEGAL HISTORY 24, 69–120 Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 447–68 (2007); Ralf Michaels, *The Mirage of Non-State Governance*, 1 UTAH L. REV. 31, 31–45 (2010); Mary E. Basile et. al., LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (1998); Charles Donahue, *'Benvenuto Stracca's De Mercatura: Was There a Lex mercatoria in Sixteenth Century Italy?', in* FROM LEX MERCATORIA TO COMMERCIAL LAW, COMPARATIVE STUDIES IN CONTINENTAL AND ANGLO-AMERICAN LEGAL HISTORY 24, 69–120 (Vito Piergiovanni ed., 2005) [hereinafter COMPARATIVE STUDIES].

150 The role of adjudication is very relevant to identifying the existence of a custom and determining its content and effects. While it is universally recognized that adjudication by courts and arbitrators is relevant, different views exist on the effects of judicial "recognition" of custom. Some believe that it is a precondition for making the custom binding; others hold the view that it has only a declaratory function. *See generally* Roy Goode, *Usage and its Reception in Transnational Commercial Law*, 46 INT'L & COMP. L. Q. 1, 7–18 (1997); ALBRECHT CORDES, *The Search for Medieval Lex Mercatoria*, 5 OXFORD U. COMP. L F., 64 (2003), http://ouclf.iuscomp.org/articles/cordes.shtml.

151 *See* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1153 (2012) [hereinafter *The Myth*] (providing an account of commonly conflicting rules).

152 *See* J. Gilissen, *Consuetudine*, *in* DIGESTO, DISC. PRIVATISTICHE 9 (UTET, 1988) 9 [hereinafter *Gilissen, Consuetudine*]; NORBERTO BOBBIO, LA CONSUETUDINE COME FATTO NORMATIVO (pincite) (1942) (parenthetical); Norberto Bobbio, *Consuetudine (teoria generale)*, *in* 9 ENCICLOPEDIA DEL DIRITTO 426 (Antonino Giuffre ed., 1961). For

practices in commercial and social relationships become legally binding.[153] Customary rules have contributed to the creation of new markets or to their globalization, as for example the financial instruments like bills of exchange and bills of lading introduced by Italian bankers and merchants in the fifteenth century.[154] Custom is broader because it is not limited to merchants and to contracts and exchanges; it applies to other fields of private law, from property and intellectual property to torts and restitution.[155] It concerns weights, measures, and other performance features (e.g. time and place) related to exchanges.[156] Custom tends to be associated with specific transactions and markets. It "regulates" the exploitation of resources - the limits posed in the interest of community - to the use of collective resources when related to ownership.[157]

Jus mercatorum is broader than custom since it encompasses both *statuta* (general regulations concerning merchants and the relationships between merchants and third parties), *consuetudo* (custom), and the decisions by merchant courts.[158]

Historically, custom was the primary source of legal regulation of commercial relationships in Europe until the French revolution and the Code de commerce of 1807, where primacy of legislation determined the decline of custom. However, custom never disappeared after the codification process started.[159] Even after the Ordonnance de commerce was in 1673 enacted by Colbert, the role of "*coutumes*" in French commercial law remained very significant.[160] A different path was followed in English common

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a historical perspective, see generally the essays in COMPARATIVE STUDIES, *supra* note 149.

153 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4 (4th ed. 1993 & Supp. 1999).

154 *See* Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 105 (1991) (explaining the evolution across institutions in early modern Europe).

155 *See* Geoffrey Hodgson, *On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering*, 43 J. of Econ. Issues, 143 (2009).

156 *Id*.

157 *See generally* ELINOR OSTROM, GOVERNING THE COMMONS (1990).

158 *See* FRANCESCO GALGANO, STORIA DEL DIRITTO COMMERCIALE 38 (1976).

159 David Ibbetson, *Custom in Medieval Law, in* THE NATURE OF CUSTOMARY LAW 153-155 (Amanda Perreau-Saussine & James B. Murphy eds., Cambridge U. Press 2007). *See also* R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW (1-15) (D.E.L. Johnson trans., 1988).

160 Vito Piergiovanni, *Diritto Commerciale nel Diritto Medievale e Moderno*, 4 DIGESTO 333, 343 (1989). Vito Piergiovanni, *Diritto Commerciale nel Diritto Medievale e Moderno*, *in* DIGESTO, 333, 343 (1989).

law, where the origins of common laws are often grounded on custom and integration rather than separation as the distinctive feature of the relationship between law and custom.[161] At common law, custom and laws are seen more as complements than competing sources.[162]

Custom develops out of usages that reflect patterns of behavior by members of a business community.[163] Unlike "*mos*" (habit) which represents factual pattern of behavior, *consuetudo* (custom) constitutes a normative practice.[164]

In medieval times, (business) communities were closed and access was regulated.[165] Nowadays for the purpose of custom, the community does not have to define strict membership requirements. The process through which usages and customs become binding on the relevant community may differ, depending on whether it is self-defined by the community or regulated by the public authority via legislation or adjudication.

When the community of traders defines the process through which rules become binding, they refer to internal rules of their community. These rules range from social norms to highly formalized instruments.[166] The public law perspective differs when it determines the criteria for custom to be legally binding. In contemporary legal systems, custom or '*consuetudo*' is part of legal sources of domestic and international regimes.[167] Parties can make specific references to custom in their contract; custom can prevail over default rules whereas it cannot conflict with mandatory rules.[168]

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161 S*ee* H. PATRICK GLENN, ON COMMON LAWS 16–20 (2006).

162 Ibbetson, *supra* note 159, at (153).

163 The distinction between usages and custom goes back to the school of Orleans and the contribution by Jacques de Revigny,

164 *See* Ibbetson, *supra* note 159, at 156 (stating that in relation to medieval times, "habit represented a factual regularity while custom was normative.").

165 *See* Piergiovanni, *supra* note 160, at 338 ("La cittadinanza è requisito normalmente richiesto per appartenere alla corporazione, oltre all'esercizio dell'attivita' mercantile ed alla buona fama: l'entrata viene poi sancita dal giuramento di accettazione delle norme sociali e dal pagamento di una tassa").

166 Paul R. Milgrom, et al., *The Role of Institutions in the Revival of Trade: the Law Merchant, Private Judges, and Champaign Fairs*, 2 ECON. & POL. 1 (1990).

167 *See*, *e.g.*, U.N. Commission on the International Trade Law, *Digest of Case Law on the United Nations Convention on the International Sale of Goods*, art. 9(2), U.N. DOC. A/CN.9/SER.C/DIGEST/CISG/9 (June 8, 2004) [hereinafter "CISG Art. 9"]; at the domestic level, art. 12 preleggi of the Italian Civil code.

168 Williston & Lord, *supra* note 153, § 34 ("At common law, the requisites for incorporating a custom or usage, [1] in order that it could be considered as entering into a contract and forming a part of it,[2] are that it must be ancient or long-

When parties are silent, the applicability of transnational customs is determined according to the law of the contract.

According to the conventional legal definition, custom constitutes a form of private production of rules that become binding when the community tacitly consents.[169] The common features of custom are generally associated with the repetition over time of behavior by the majority of the community.[170] Thus the two requirements are repetition over time of a specific behavior and *opinio juris sive necessitatis*.[171] The former concerns the conduct of the community's members, the latter represents the (tacit) consent of the relevant community to that behavior.[172] The significance of the belief that a practice exists (*opinio juris*) has been relaxed in some areas, where simple presumed knowledge of the custom's existence is considered the necessary and sufficient precondition to become legally binding.[173]

How is the scope of custom's application defined? What are the business or social community' boundaries to which it applies? In customary law the relevant community is composed by merchants or traders, in agricultural law by farmers, in the professional world by lawyers, doctors, engineers, accountants and so on. Unlike TPR, where the regulator often represents different and competing interests including those of stakeholders who are the primary beneficiaries of the standards (consumers, investors, and human rights holders), in custom, the community is composed by those who apply the rules. Interests of the affected stakeholders outside of the business community are not relevant to transform the social

established,[3] certain,[4] continuous,[5] uniform,[6] general,[7] notorious,[8] reasonable,[9] and not in contravention of law.[10] Furthermore, parties acting within the scope of the usage's operation must acquiesce in it.[11]").

169 For the different perspectives with a focus on law and economics, *see* CUSTOMARY LAW AND ECONOMICS (Lisa Bernstein & Francesco Parisi, eds. 2013).

170 *See* BARTOLUS OF SASSOFERRATO, IN PRIMUM DIGESTI VETERIS PARTIS COMMENTARIA, Fol. 191 (1425).

171 *See* Rodolfo Sacco, Consuetudine; *Gilissen*, *Consuetudine*, *supra* note 152, at para. 5 (distinguishing between an objective element [repetition over time] and a subjective element [belief that the rule is binding]).

172 The consensual dimension has always been relevant to make it legally binding. In relation to then medieval times it has been claimed, "Just as the basis of legislation was the will of the prince, so the basis of custom was the will of people." Ibbetson, *supra* note 159, at 175.

173 *See, e.g.*, International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (2010); CISG Art. 9, *supra* note 167.

practice into a legally binding set of rules. Custom can produce externalities that are not internalized through the prescriptions of procedural requirements like those described in relation to TPR.

The boundaries of what constitutes a relevant community, the amount of time and the frequency of repetition may vary from custom to custom. The boundaries of the relevant community and of the scope of majoritarian consent are often left undetermined.

Communities for whom custom is binding may be personal or territorial. Consequently, customs may be personal and independent of a specific territory or territorial when associated with an administrative jurisdiction.[174] Hence, there are customs developed by merchants, bankers, and farmers, and customs developed in London, Florence, Paris, Genoa, Antwerpen, Lubeck, and so on. Nowadays, the primacy of legislation has reinforced the distinction between personal and territorial scope: the personal dimension of customs versus the territorial dominance of legislation; hence communities producing transnational customs are primarily functional rather than territorial entities.[175] This a common feature of transnational private rule-making.

Each community may adopt a different metric to define the existence and the content of custom. In agriculture, for example, the distinction between production, transformation and distribution practices is based on how different communities define their own practices. The former community is composed by farmers, the second by the processors of agricultural commodities, the third by retailers. However, even when global institutions like commodity exchanges harmonize customary rules, local differences persist. The local and transnational dimensions affect the relevance of the community through which the *opinio juris ac necessitatis* is formed and has an impact on judicial recognition. Domestic courts may use different parameters to evaluate whether a custom exists depending on its local or international scope and the boundaries of the community.

What characterizes custom is its evolutionary pattern: **incremental rather than radical and instantaneous, retrospective rather than prospective**. It starts with usages that can be repeat conducts by a number of the community's members. Custom

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174 *See Gilissen, Consuetudine*, *supra* note 152, at 9 para. 6.

175 Clearly a different account concerns local customs whose territorial features still dominate.

becomes binding on the entire community only when the majority of its members, at least tacitly, consent.[176]

The binding nature of custom should not be confused with its (non-existing) mandatory character. Even when custom is legally binding, parties have the opportunity to opt out.[177]

To emerge custom presupposes some institutional (pre)conditions. Key determinants are certainly interests' homogeneity and the presence of repeat players.[178] (1) Legally binding customs are not likely to arise when the community is characterized by the presence of heterogeneous and conflicting interests. Rather, this is the domain of regulation, either public or private. In the middle ages when private actors (for example, merchants in *corporationes*) were conferred the power to regulate their activities, the decision between enacting 'statuta' or developing customs was related, among other factors, to the degree of conflict of interest among the members of the communities. When conflicts were significant and the emergence of a common and shared rule was not likely to happen, they would enact a 'statutum'. When conflicts were limited, private actors would instead let the rules develop on the basis of practices construed with the aid of professionals (*consilia*). Interests' homogeneity does not imply lack of conflict. Conflicts in developing a custom are admissible, but within a community whose interests are generally aligned.[179] This feature represents a major difference from transnational private regulation and especially from the more recent multistakeholder forms that include representatives of industries, governments and CSOs.[180] (2) Consistent with interests' homogeneity of custom is the repeat player nature of the community's members.[181] Given that

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176 *See Gilissen, Consuetudine*, *supra* note 152, at 9.

177 The opt out of custom strategy is much harder in fields of property and torts, where parties should explicitly regulate the matter in order to make custom inapplicable. This is in contrast with the contracts field, where parties can state the inapplicability of custom to their agreement. It is commonly accepted that parties can opt out of custom by making an explicit reference to the inapplicability of custom to their contractual relationship.

178 *See* Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG*, 5 CHI. J. INT'L L. 157, 162 (2004).

179 Examples of these conflicts range from those concerning time of delivery and time of payment to those related to the definition of merchandise.

180 *See* Cafaggi, *supra* note 2.

181 *See* Gillette, Institutional Design, *supra* note 178, at 163.

custom arises out of usages that materialize in repeat conducts, such repetition is likely to occur when players are the same.

(3) A third institutional precondition is custom's observability.[182] For a custom to emerge, the pattern of behavior and the tacit consent have to be observable by the members of the community. Observability is translated into the legal requirement that the custom is known or should have been known to the parties in order to become binding. Modern technologies make behavior among distant players observable. Hence physical proximity and size of the community are not any longer institutional preconditions of the emergence of customary rules. Custom may develop in communities where players are numerous and far away. Observability marks another significant difference from private regulation: since parties have to opt in to private regulation for it to be binding, in TPR knowledge is actual and observability is unnecessary.

How are customs enforced? When customs become binding, they can be enforced before a court, but the most powerful instrument is conventionally considered extralegal enforcement by the community.[183] The community, once the custom has been recognized as binding, deploys extralegal sanctions to punish violations.[184] A custom's modes of enforcement depend on the (1) degree of the community's institutionalization, (2) existence of a third party's enforcer, and (3) relationship between individual and collective responsibility.[185]

There are different degrees of community's institutionalization within which custom develops; sanctioning regimes change accordingly. When the community is not institutionalized, the sanctioning system is primarily, if not exclusively, reputational.[186] The members who do not comply with customary rules can be excluded from the trade via refusal to deal. However, the

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182 *Id.* at 164.

183 *See* Vito Piergiovanni, *Courts and Commercial Law at the Beginning of the Modern Age*, in THE COURTS AND THE DEVELOPMENT OF COMMERCIAL LAW (Vito Piergiovanni, ed., 1987); Piergiovanni, *Diritto Commerciale*, *supra* note 165. *But see* Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders Coalition*, 83 AM. ECON. REV. 525, 531 (1993).

184 *See* Avinish K. Dixit, *Lawlessness and Economics: Alternative Modes of Governance*, 99 AM. ECON. REV. 5, 7 (2009).

185 *See* Avner Greif, *Impersonal Exchange Without Impartial Law: The Community Responsibility System*, 5 CHI. J. INT'L L. 109, 110 (2004).

186 *See* Milgrom, North & Weingast, *supra* note 166.

effectiveness of the administered sanction depends on the size and cohesiveness of the community. Reputational sanctions work where there is cohesion of the objectives of the rules and where the violation by the individual participant produces negative effects on the entire group. Mutual trust supports the use of reputational sanctions. When the community is institutionalized, enforcing a mechanism with a predefined procedural structure can be set up. A system of adjudication is generally composed of laypeople (not professional judges) experts in the field. In relation to the enforcement of custom, the sanctioning menu is much richer than legal ones, and the sanctions tend to correlate to the gravity of the violations and its recurrence (e.g., whether it has occurred in the past, between the same parties). The higher the degree of the community's institutionalization, the closer the enforcement mechanisms to those adopted in TPR where increasingly independent 'dispute resolution bodies' administer sanctions and monitor their execution.

The above description assumes a highly decentralized form of rule-making where the usage becomes binding on the basis of its spreading across the community that provides tacit consent. However, in many instances private institutions have codified customs.[187] Codifying institutions contribute to reduce uncertainty by collecting usages and making them publicly available. The paradigmatic contemporary example is offered by the International Chamber of Commerce (ICC), but many specialized institutions collect usages in relation to particular areas of finance, commerce and trading or in agriculture and in professions. Clearly the very definition of custom may change if instead of a spontaneous process of incremental consolidation, specific institutions perform the task of identifying and collecting the usages to 'transform' them into a legally binding custom. Codification of customs is performed by different institutions: the individual global supply chain, the industry, and the market. In many instances, these codifications are not themselves binding. They are purely informative. They become binding when trading platforms make compliance an entry

[187] *See, e.g.*, Chicago Mercantile Exchange; Chicago Climate Exchange *available at* http://www.cftc.gov/ucm/groups/public/@iodcms/documents/file/rercmecbot072613.pdf.

requirement or when chain leaders require compliance with best practices as a prerequisite for accessing the chain.[188]

Does the process of customs' codification change the nature of custom as a form of incremental and spontaneous transnational private rule-making?[189] It depends! The nature of custom does not change if codification is simply an instrument to collect and organize conceptually practices developed incrementally by the business community. If, instead, codification superimposes the codifiers' view, be them academics or practitioners, to what happens in practice, it changes the nature of custom. A business association that defines strict rules and strong barriers to entry for those subject to the rules does not fit with this definition of custom and is much closer to an industry self-regulatory regime. For the purpose of the comparison, the article considers forms of custom's codification that reflect the evolution of practices rather than the conceptual framework of the codifiers. The legitimacy and authority of custom is based on the community's practice and consent. However, the functional difference between custom and private regulation remains even when including codifications that transform the incremental process and crystallize it into private legislation. Customary rules are 'exchange facilitators'. Customary rules are not meant primarily to regulate market failures. At most, they reduce transaction costs by creating common trading rules that harmonize or standardize practices.[190] They do not have stated regulatory objectives like those defined in TPR: complying with rule of law and human rights, increasing product safety and environmental protection, enhancing transparency in financial markets, or more industrial policy oriented objectives such as increasing the volume of trade, internationalizing markets, and granting SMEs access to global supply chains.

In addition, as it is clearly showed by Choi and Gulati, the presence of a transnational private regulator like ISDA permits immediate and coherent reactions to courts' (mis)interpretation of

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188 This has been demonstrated, in relation to agriculture, through the regulations enacted by different exchanges such as those in New York and Chicago.

189 It clearly does for those who believe that custom is oral and not written since by definition codification implies shifting from verbal to written. However the process of custom's codification is old and goes back to Roman and medieval law. Medieval jurists believed that 'consuetudo' could be codified. *See Gilissen Consuetudine*, *supra* note 152, ¶ 3, 18.

190 *See* FRANCESCO PARISI & VINCY FON, THE ECONOMICS OF LAWMAKING (2009); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

the regulatory regime that cannot be triggered when 'impersonal' markets without a visible hand are at work.[191] This is the case in custom, where dispersed and uncoordinated market players cannot define an effective regulatory strategy to counteract 'unexpected' judicial interpretations.

7. COMPARING PRIVATE TRANSNATIONAL FORMS OF RULE-MAKING: DIFFERENCES AND COMMON FEATURES

The foregoing analysis shows that the role of private actors in global rule-making differs quite significantly across sectors and it is not easily reconcilable within a single set of distinct features. The differences can be analyzed along four dimensions: actors, procedures, instruments and effects.

7.1. Actors

The differences between custom and TPR in relation to actors are remarkable. Custom is characterized, even in its broadest spectrum, by the involvement of merchants. Civil society organizations do not play a significant role in the development of customary commercial rules. Interests of private actors in custom are generally aligned and homogenous or, better, become aligned and homogenous at the end of the process.[192] TPR, on the contrary, is characterized by a much broader variety of private actors participating in the rule-making process with different objectives. Within the industry, different and often conflicting interests exist.[193] Conflicts may reflect size (which

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191 *See* Choi & Gulati, *supra* note 138 at 149 (comparing the pari passu clause in sovereign debt contracts and derivatives swap contracts based on ISDA master agreement. "The existence of ISDA allows the swaps market to respond to unexpected court interpretations of contractual ambiguities much differently than the sovereign debt market").

192 Custom becomes legally binding only when interests are aligned and there is consensus.

193 Recently, the conflicts over transnational standard setting and implementation have also involved SMEs. A typical conflict is between multinationals and SMEs operating within the same regimes like in the agricultural-food industry. They have different capacities to comply and are often involved in distributional conflicts concerning the allocation of compliance's costs with the standards.

in turn reflects different technological and financial capabilities) as those between multinationals and smallholders or may arise between producers and retailers within global chains.[194] The existence of conflicting objectives is reflected both on governance and standard setting procedures.

The changes towards wider interests' representation in TPR are mainly stimulated or even led by CSOs. CSOs often represent interests conflicting with those of firms, i.e. the regulated entities. CSOs can play either a leading role running governing the scheme themselves or an ancillary role, taking part in governance organizations that run the regulatory process. Increasingly TPR regimes include tripartite (multistakeholder) organizations encompassing states or governments, in addition to industries and CSOs.[195] The involvement of public actors and CSOs is often the sign of the public interest goal playing a more relevant role in TPR than in custom.

Hence, TPR is increasingly moving towards wider participation and inclusion as a response to the accountability deficit criticisms. The inclusiveness of the regulatory process, which might not always be reflected in the organizational governance, answers the need to involve constituencies without membership that nevertheless may be (negatively) affected by the implementation of the standards. Similar trends are not observable in contemporary law merchants' making. When drafting standard contracts forms the International chamber of commerce (ICC) does not involve the potentially affected stakeholders who may either gain or lose from the adoption of specific contractual clauses. At ICC drafting contracts is conceived rather as a technical process that involves practitioners in the field. No impact analysis is carried to evaluate losers and

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194 *See* S. Henson and J. Humphrey, *The Impact of Private Food Safety Standards on the Food Chain and on Public Standard-setting Processes* (May 2009) *available at* http://ec.europa.eu/food/international/organisations/sps/docs/private_standards_codex_en.pdf (prepared for FAO/WHO); Joint FAO/Who Food Standards Program, 'Codex Alimentarius Commission, 33rd Session, Consideration of the Impact of Private Standards' (Geneva, Switzerland, 5-9 July 2010) *available at* ftp://ftp.fao.org/codex../Meetings/CAC/cac33/cac33_13e.pdf.

195 See the membership of ICOC *available at* http://www.icoc-psp.org/uploads/Signatory_Companies_-_September_2013_-_Composite_List2.pdf, the one of the Round table on sustainable biofuel *available at* http://www.rspo.org/members?keywords=&member_type=&member_category=&member_country=All), and similarly the one of the Round table on sustainable palm oil (*available at* http://rsb.org/about/organization/member-list/).

winners and the distributional effects of model contract drafting. The compromise among conflicting interests is limited to the dialogue between enterprises represented within ICC without the active involvement of other stakeholders!

Custom, to become legally binding, presupposes some degree of interest homogeneity and a relative cohesive business community. TPR on the contrary is often based on the co-existence of conflicting interests and objectives. Its binding nature is compatible with conflicts. This distinction results in different organizational and governance responses and enforcement mechanisms.

7.2. Procedures

The formation of legally binding custom is incremental and decentralized.[196] **It is retrospective and backward looking**. The process of customary rule-making is based on consolidation of practices among traders belonging to the (broadly speaking) same community.[197] Such consolidation can occur in different ways, ranging from hard codification to collection of references, to practices identified by experts.[198] The personal scope of custom is often undetermined. There is not a legal definition of the relevant community to which custom is applied and the determination of communities' boundaries often occurs through ex post litigation.

Transnational regulatory regimes operate as private legislatures with procedures that determine ex ante the different stages of the rule-making process.[199] **They are prospective and forward-looking**.

TPR is neither incremental nor decentralized. It is generally designed by a regulator on the basis of standard setting procedures;

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196 The term decentralized has kin this context a Hayekian connotation. *See* Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchan*t, 144 U. PA. L. REV. 1643, 1700 (1996); Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1752 (1996).

197 In medieval times, these rules applied to the members of guilds and the relationships between them. Only exceptionally they were applied to foreign merchants and almost never to non-merchants.

198 The legal value of these codifications changes accordingly. The recognition of the binding force may differ depending on the internal or external perspective: whether it is seen from the community of traders or from the legislation.

199 *Id.*

it is not the product of a spontaneous aggregation of regulated entities' conducts.[200] It has increasingly become formalized. Procedural requirements have been introduced to protect the interests of affected stakeholders who, lacking membership, cannot use the organizational toolkit that provides participatory and voting rights. Different issues concern those negatively affected by the standard and those that can suffer harm from non-compliance. The latter are stakeholders that would benefit from the standard when it is complied with.[201] The former bear the costs of the standard's implementation. Both potentially conflicting interests have to be taken into account according to many TPR procedures.[202]

Many regimes are binding at time of birth: an incremental process is not required to achieve the status of a binding set of rules.[203] What may be incremental is the degree of compliance according to the logic of continuous improvement. Full compliance is frequently subject to a timeline, depending on the capabilities of each regulated entity to meet the requirements.[204] Hence the rules are immediately binding but compliance may be subject to different time horizons depending on the size, in particular the financial and administrative skills, of regulated entities.

Depending on the personal or territorial scope TPR may adopt different institutional designs. Where the scope is territorial both standard setting and compliance may encompass multiple 'administrative' levels. In order to accommodate local differences the regime may be composed of two, and increasingly three layers, including one global, one regional and one national level.[205] Such a

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200 For this distinction see *New Foundations*, *supra* note 68, at 31.

201 *See id*. at 32.

202 For a broader analysis *see* R. Stewart, Disregard, *supra* at note 66.

203 As we have seen, there are a small number of regimes where the rules are not binding and compliance is recommended. This is the case of EASA the private regulator operating in the field of advertising where the main tool is represented by best practices recommended to the national SROs.

204 *See, e.g.*, the UTZ Certified, Core Code of Conduct Version 1.0 (2014), *available at* http://www.utzcertified-trainingcenter.com/ewExternalFiles/EN%20UTZ%20Core%20Code%20for%20Individual%20Certification%202014.pdf. Under the UTZ Core Code of Conduct, compliance with the requirements can be achieved over 4 years. The Code defines mandatory voluntary (additional) requirements and their ration changes over time. The first year is 60/60, the second year is 87/33, the third is 103/17 and the fourth is 113/7. Over the 4 years 53 requirements shift from voluntary to mandatory.

205 See, for example, in the field of certification the model adopted by GLOBALGAP or in the field of advertising the model adopted by EASA.

multilevel structure is missing when the scope is designed functionally rather than territorially. The relevant community of regulated entities is identified by formal rules that define both the membership and the effects of the rules. As we have seen, the predominant is membership-based while the alternative model is that of free or for sale standards to which regulated entities can individually commit.[206] In the latter case, the community is shaped by individual choices of regulated entities that subscribe to the regime. Absent membership and organizational forms, regulated entities do not form a cohesive group and lack decision-making power. The collective dimension is very limited and the relationship between regulators and regulated rather loose. It is the use of the standard and its market share that determines the success or the failure of the regime.

7.3. Instruments

The rule-making and enforcement instruments also differ. Usages and customs arise out of contractual practices by individual traders that consolidate over time and may be collected in private or intergovernmental codifications. There is not a single regulator, rather the regulatory process is based on incremental consolidation of decentralized practices. Once usages and customs become binding, members of the trading community may be bound by the rules unless they opt out. Up to that moment, parties have to opt in the usages or custom, making a specific and express commitment. Within usages, the collection of contract terms and clauses is rather common. The creation of a market might be the outcome of the process of developing customary rules. As we have seen, transnational contract forms and terms are also used in private regulation. In the latter case, however, they primarily serve the purpose of implementing international public and private standards; broadening their scope by pursuing regulatory objectives. The existence of conflicting interests typical of TPR does not prevent the standardization of contracts by the transnational regulator. On the contrary! Once the compromise is reached on the

206 This commitment can occur on the basis of an agreement between the standard setter and the regulated entities (for example in the case of GFSI or that of Equator principles with the adoption agreement) or on the basis of a unilateral declaration or a code of conduct enacted by the regulated entity.

standard or on the framework contract, deviations from standards by individually regulated entities are much rarer in TPR than in customary law.

In TPR, the standards are defined ex ante through detailed standard setting procedures that are followed by regulators. Regulatory instruments to design and implement standards vary depending on the functions they perform: codes of conduct, rulebooks, guidelines and best-practice recommendations. The use of regulatory contracts suggests that the process of norm making is consensual, but consent by regulated entities is expressed ex ante.

Contracts are commonly used to implement transnational regulatory standards. In order to reduce transaction costs and harmonize rules among market or supply chain participants, private regulators design standard contract forms or suggest incorporation of standard terms and conditions in commercial contracts by regulated entities between them or with third parties. The standard is articulated in a code of conduct or in guidelines and rulebooks and then applied by parties in a commercial contract.

If standards address externalities, they state principles that regulated entities have to "transpose" into contractual clauses when engaging third parties. In product safety, if the code of conduct imposes compliance with a hazard analysis control point (HACCP), the parties have to define contractual terms, rights, and obligations that can implement a safety management scheme. In advertising, the advertiser and the media include contract clauses concerning compliance with codes related to deceptiveness, fairness, and decency.[207] TPR deploys contracts to implement standards. Safety standards produced by IATA in relation to civil aviation are incorporated in bilateral or multiparty production contracts between airlines and their suppliers.[208] Data protection standards are incorporated into contracts between search engines and consumers.[209] Privacy policies are incorporated into sales contracts

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[207] *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, ADVERTISING AND MARKETING COMMUNICATION PRACTICE, Consolidated International Chamber of Commerce Code, art. 26 (explaining advertising and marketing communication marketing practices).

[208] *See* Brian F. Havel and Gabriel S. Sanchez, *The Emerging Lex Aviatica*, 42 GEO. J. INT'L L. 639, 639 (2011) (detailing industry standards in international commercial air travel).

[209] *See Google Terms of Service*, GOOGLE.COM, https://www.google.it/intl/en/policies/terms/regional.html (last visited Mar. 27, 2015) ("Google's privacy policies explain how we treat your personal data and protect your privacy when you use our Services. By using our Services, you agree that Google can use such

between electronic platforms and customers.[210] Human rights regimes are incorporated in contracts between diamond producers and retailers[211] or in contracts between private military companies and their customers.[212] Human rights regimes are incorporated in lending contracts between banks and other financial institutions and borrowers, as with the Equator principles.[213]

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data in accordance with our privacy policies. We respond to notices of alleged copyright infringement and terminate accounts of repeat infringers according to the process set out in the U.S. Digital Millennium Copyright Act. We provide information to help copyright holders manage their intellectual property online. If you think somebody is violating your copyrights and want to notify us, you can find information about submitting notices and Google's policy about responding to notices in our Help Center."); *See also*, *Yahoo Terms of Service*, YAHOO.COM, https://info.yahoo.com/legal/us/yahoo/utos/terms/ (last visited Mar. 27, 2015) ("By accessing and using the Yahoo Services, you accept and agree to be bound by the terms and provision of the TOS. In addition, when using particular Yahoo owned or operated services, you and Yahoo shall be subject to any posted guidelines or rules applicable to such services, which may be posted and modified from time to time. All such guidelines or rules (including but not limited to our Spam Policy) are hereby incorporated by reference into the TOS. Yahoo may also offer other services that are governed by different Terms of Service. In such cases the other terms of service will be posted on the relevant service to which they apply.").

210 *See eBay User Agreement*, eBay.com, http://pages.ebay.com/help/policies/user-agreement.html (last visited Mar. 27, 2015) ("This User Agreement, the User Privacy Notice, the Mobile Devices Terms and all policies posted on our sites set out the terms on which eBay offers you access to and use of our sites, services, applications and tools (collectively "Services"). You can find an overview of our policies here. All policies, the Mobile Devices Terms, and the User Privacy Notice are incorporated into this User Agreement. You agree to comply with all the above when accessing or using our Services.").

211 *See System of Warranties*, WORLD DIAMOND COUNCIL, https://www.worlddiamondcouncil.org/download/resources/documents/System%20of%20Warranties%20WDC%202014.pdf (last visited Mar. 27, 2015) (requiring each buyer and seller of rough diamonds, polished diamonds and jewelry containing diamonds to make the following affirmative statement on all invoices: "The diamonds herein invoiced have been purchased from legitimate sources not involved in funding conflict and in compliance with United Nations resolutions. The seller hereby guarantees that these diamonds are conflict free, based on personal knowledge and/or written guarantees provided by the supplier of these diamonds.").

212 *See* Laura Dickinson, *Public/Private Contract, in* GOVERNMENT BY CONTRACT (Jody Freeman & Martha Mino eds., 2009) (detailing the pervasive outsourcing of U.S. government work to private actors and the clash with traditional American values); Carsten Hoppe & Ottavio Quirico, *Codes of Conduct for Private Military and Security Companies, in* WAR BY CONTRACT 362 (Francesco Francioni & Natalino Ronzitti eds., 2011) (explaining the state of self-regulation in the military and security industry).

213 *See*, *Guidance for EPFIS on Incorporating Environmental and Social Considerations into Loan Documentation*, EQUATOR PRINCIPLES FINANCIAL INSTITUTIONS

If the purpose of the regulatory regime designing a market, rather than implementing a standard, the regulatory instrument imposes or recommends to traders the use of executory contracts that partly reflect the framework or master agreement and partly regulate the specific relationship.[214] This can be done in different ways: (1) through standardized bilateral contracts designed by the regulator; (2) through a multiparty contract applicable to all trading partners; or (3) through a rulebook that defines contractual terms to be applied by individual traders in their contractual relationships.

Instruments of private regulation are not confined within contracts. In TPR, a wider variety of instruments is deployed, ranging from property rights to regulatory contracts; from the law of associations and foundations to corporate and trust law.[215]

Enforcement mechanisms differ between custom and TPR. While merchant courts are composed by members of the same business community using primarily non-legal sanctions, in TPR enforcement is increasingly performed by third parties - independent from standard setters - subject to formalized procedural rules implementing due process, fair trial, and effective remedies principles. At times, the vertical relationship between enforcer and disputants is supplemented by peer monitoring in order to implement reputational mechanisms. In TPR the sanctioning system is often the result of a combination of legal and extra-legal sanctions. These differences with law merchants can be explained by the degrees of heterogeneity and conflicts within the private sphere and by the relevance of regulatory beneficiaries and

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http://www.equator-principles.com/resources/ep_guidance_for_epfis_on_loan_documentation_march_2014.pdf (last visited Mar. 27, 2015)) ("It is not a requirement to include the Equator Principles Action Plan as an Annex in the loan agreement. If an Equator Principles Action Plan has been agreed, the loan agreement should, as a minimum, contain a reference to this plan, and/or conditions precedent/subsequent in order to have the clients' commitment to comply with the plan." However, it further affirms "Where a client is not in compliance with its environmental and social covenants, the EPFI will work with the client on remedial actions to bring it back into compliance to the extent feasible. If the client fails to re-establish compliance within an agreed grace period, the EPFI reserves the right to exercise remedies, as considered appropriate.").

214 *See* Choi & Gulati, *supra* note 138, at 149 (showing the distinction between economic and noneconomic terms).

215 Depending on the legal form of the regulatory body, the relationship between regulators and regulated is subject to the law of association or nonprofit corporations or to that of contract law. In the latter instance the regulated is bound by a regulatory contract signed with the organization.

third parties in private regulation.[216] Merchant courts work in a context of homogenous communities where interests are usually aligned.[217] When interests and objectives are divergent or conflicting, more formalized and impartial enforcement regimes become necessary. The other factor influencing different enforcement mechanisms is the role of affected stakeholders. As we have seen, different issues concern those negatively affected by the standard if implemented and those that can suffer harm from non-compliance.[218] The latter should be considered regulatory beneficiaries of the regime, but may suffer detriment for infringements of the standard. The communities of stakeholders that may be positively affected by compliance require access to dispute resolution mechanisms to limit the negative consequences of non-compliance. The effectiveness of regulatory regimes is primarily (albeit not exclusively) dependent upon their ability to participate in the rule-making process and have access to ex post internal review.[219]

7.4. Effects

The definition of "effects" concerns the personal scope of the private regime based on customary or regulatory law. To whom does it apply? How is the domain of application defined and by whom? What is the shape of the community of regulated entities? Custom applies primarily to the community of traders, but it can extend beyond the community.[220] How such a community is defined

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216 *Id.*

217 Medieval merchant courts applied *lex mercatoria* also to relationships with non-merchants, generally protecting merchants' interests at the expenses of other communities like artisans or agricultural producers. Current merchant courts apply almost exclusively to relationships among merchants, whereas transnational private law (the contemporary *jus commune*) applies to relationships between merchants and non-merchants.

218 *See Stewart Disregard*, *supra* note 84, at 213 (explaining the relative harms of bad implementation and non-compliance).

219 An important function is also played by domestic courts exercising judicial review. However, legal systems distinguish the judicial power to review regulation depending on their public or private nature or on the pursuit of public interest and public function.

220 Baldo degli Ubaldi, and then Benvenuto Stracca (tractatus de mercatura seu mercatore), distinguished between the power to regulate and the personal scope of the regulation. *See* Baldo In Decretalium Volumen Commentaria, Venetiis,

is not clearly determined. Within the codification process of custom, there is often an effort to define the boundaries of the community, but many times its extent is variable and flexible.

In TPR the instruments to define the regime's personal scope are much clearer: as to the regulated entities it is (1) membership when the regime is regulated by an organization-like association, or it is (2) contract between the regulator and the regulated when the foundational model is deployed.[221] However, the regulatory function of the private regime implies that the standard's implementation produces effects on third parties; the consumers, the investors, the human rights holders would benefit from compliance and be harmed by infringements. When a standard defines the safety of a product, compliance reduces consumer risks, whereas the lack of compliance increases them. These forms of regulation differ from conventional self-regulation because there is no coincidence between regulators and regulated.

A second important difference of effects concerns the distinction between territorial and functional scope. Custom, according to the more recent findings, tends to be local and geographically circumscribed. TPR is often defined functionally. The relevant community of regulated is identified by the regulatory objectives - safety, financial stability, and consumer protection, and by the geographical location of the regulated entities. In fact, the different geographical operations of global supply chain make the territorial scope hard to define.

MDXCV, c. 104 v.n. 48, ("Quaero ecce mercatores habent judicem mercantiae, nunquid non merctarores possunt eius jurisditionem prorogare seu adire? Resp. non: quia municipalis non potest prorogari seu ampliari. . ." quoted by V. Piergiovanni, Statuti diritto comune e processo mercantile, in Norme, scienza e pratica giuridica tra Genova e l'occidente medievale e moderno, Genova, 2012, p. 1105 ff at . 1108 fn. 15 stating: "Piu' complesso il problema della validita' degli statuti presso altri tribunali: Baldo non ne accetta la limitazione per i soli iscritti alla corporazione, ma esclude che i giudici ordinari possano applicare disposizioni statutarie che non riguardano i mercatores ma siano relative ai giudici mercantili stessi e all'ordo juris.").

221 *See* Cafaggi, *supra* note 2, at 14, 17 (comparing different modes of transnational private regulation).

	Actors	**Procedures**	**Instruments**	**Effects**
Transnational Custom	Merchants	Undefined, both oral and written	Collection of customs, with contract terms and clauses	Binding on the community with opt out possibilities
Transnational Private Regulation	Manufacturers, retailers, SMEs. Civil society organizations, States, International organizations	Written. Standards setting codes, auditing and reporting, independent evaluation mechanisms	Regulatory contracts, Reports	Binding on the members even in disputes with third parties

In light of the foregoing differences, what are the implications concerning the foundations of private norm-making power? Is there a common foundation of private rule-making or does it differ?

The different features suggest that **foundations of transnational private rule-making are not the same in Custom and TPR**. While, in the case of custom, private autonomy and freedom of contract can be the source of legitimacy, this is certainly not enough in TPR. The legitimacy of a transnational regulatory regime cannot depend only on the consent of the parties that join the regime since the effects go beyond their respective spheres. Many stakeholders affected by the standard are unable to express consent or dissent. What provides legitimacy to the regulatory regime is not only the expression of consent by regulated entities, but also the inclusiveness, the transparency of the process, and proportionality of the regulatory product (the standard). Procedural requirements related to the process and the final regulatory products are a necessary component of the legitimacy towards affected stakeholders that do not belong to the community of regulated entities. The validity of these rules depends on their legitimacy. Consent by the regulated is not enough; affected stakeholders have to participate and confer

(input and throughput) legitimacy.[222] When judicially reviewed, transnational private regimes can be stricken down by judges even if they have been expressly consented upon. Private autonomy and consent are necessary, but are not sufficient conditions to ensure normative character to the rules. They have to be combined with procedural rules that grant third parties access and control, enabling contestation, e.g., access to dispute resolution.

8. AN AGENDA FOR FUTURE RESEARCH

To map and to understand transnational private law making, it is essential to make comparisons among the different modes of the standards' production and the various domains over which they develop, stabilize, and decline. "What are the combinations between legal and social norms in standard setting and enforcement" is a key question to differentiate the various forms. Comparative analysis of transnational private regulation, customs, and *jura mercatorum* is at its very early stage. Issues concerning (1) why different private regimes emerge, (2) how they spread, and (3) why they decline over time are still largely unexplored. As to TPR, such questions have been raised in relation to specific sectors. But comprehensive inter-sectoral analyses are still lacking. These forms, it has been contended here, have existed for a long time and developed in connection with the transformations of the public sphere and, in the last centuries, of the State as the dominant unit of analysis.[223]

Four themes should be subject to further comparative investigation: (1) the different functional partition between local and global private regimes (more specifically, a comparison

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[222] *Id.* at 11 (outlining the common interests of the regulated and the stakeholders); Cafaggi, *supra* note 68, at 4 (explaining the role stakeholders can play in regulation).

[223] *See* Edward Ballesein, *Rights of Way, Red Flags, and Safety Valves: Business Self-Regulation and State-Building in the United States* 1 (Kenan Institute for Ethics, Working Paper No. 1, 2012) (telling the history behind self-regulation in the U.S. business community). *See also* Edward Ballesein & Marc Eisner, *The Promise and Pitfalls of Co-Regulation: How Governments Can Draw on Private Governance for Public Purpose, in* NEW PERSPECTIVES ON REGULATION 127 (David Moss & John Cisternino eds., 2009) (examining the role nongovernmental actors can play in regulatory development); William Novak, *Public-Private Governance: A Historical Introduction, in* GOVERNMENT BY CONTRACT 23 (Jody Freeman & Martha Mino eds., 2009).

between domestic and transnational forms of private regulation); (2) the techniques (i.e., indicators) to measure the success and failure of transnational private regulation and custom; (3) the different modes of integrating transnational private rules into domestic and international public legal orders; and (4) the different distributional impacts and effects of private regulation and customary rules. Other relevant aspects of a research agenda include: the use of private regulation and custom to regulate, increase or decrease competition, the different nature of legal and non-legal instruments, and the various criteria to draw the boundaries between social and legal norms.

Both TPR and customs include local and global components. The local or global nature of rulemaking is not a static feature. Local customs and regimes have become global, gaining dominance over competitors. Global customs and regulatory regimes have declined and, in some instances, have become local, whereas in other instances they have altogether disappeared. Studying TPR and customs from an evolutionary perspective demonstrates that the boundaries between local and global are diachronically mobile and sector or market specific.

The debate on transnational private law making is often characterized by lack of data concerning their effectiveness. Effectiveness should be measured within the private sphere both between alternative modes and between private and public regimes. We still lack appropriate indicators that can be used to engage in a comparative analysis instrumental to policy decision-making.[224]

Both transnational regulation and customary rules have huge distributional impacts. They transfer power, wealth, and capabilities between communities of private actors, between communities and states and between states. The dominance of a regulatory regime or that of a custom marks the temporary victory of one standard over competing ones and has large socioeconomic impacts on communities, transferring wealth and power within and between them. The nature and features of distributional effects are largely unexplored both by the transnational regulators and by the institutions engaged in collecting customs. It is strongly

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224 *See* Cafaggi & Renda, *supra* note 9, at 115 (explaining the use of indicators in measuring regulations). For a general overview of indicators as instruments of governance see Davis & Kingsbury, INDICATORS AS GOVERNANCE, OUP, 2013.

recommended that shared indicators to measure distributional impacts be used in policy design by international organizations.[225]

A fourth area is that of integration of transnational private standards into both domestic and international legal orders. How are customs and regulatory regimes integrated? There are important contributions concerning the technique of incorporation, but many other techniques have developed to provide private regimes a legal status and ensure general application. Open issues concern the applicability of domestic techniques of legal integration to transnational private standards. Recent research on the EU shows that a piecemeal approach, rather than a coordinated and consistent approach, is used to integrate transnational standards into the EU legal order.[226] Similarly the UN system does not have general principles to define forms of private standards' integration. The WTO code of practice represents a point of reference but it does not say much about integration into domestic legal orders and its effects.

9. CONCLUSION

Transnational regulatory regimes generated by private actors have witnessed a rapid and unexpected increase. This process has been caused by significant transformations in global value chains, global trade and international markets, combined with a stronger role played by CSOs. This article has delved into whether the newly created regimes resemble and can be easily associated to conventional *jura mercatorum* and customs. This question has both theoretical and practical implications. From the theoretical and historical viewpoint, it asks whether TPR simply constitutes a development of *jus mercatorum* and customary law or reflects different needs connected to the changing instruments and objectives of international public policies related to market design and regulation. From the policy perspectives, it forces one to rethink different approaches to transnational private rulemaking by states and international organizations.

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225 For example, the OECD Guidelines for multinational enterprises and their impact on global supply chains should be supported by a much deeper distributional analysis of the standards.

226 *See* Fabrizio Cafaggi, *Integrating Global Standards into the European Union*, on file with the author.

The new forms differ from both custom and *jura mercatorum*. Differences concern both processes and objectives. The new private regulatory regimes are generated by different private actors - often with conflicting interests - through processes similar to those deployed in public legislation or international treaty making. The new regimes are trying to address these conflicts by internalizing trade-offs within the same standard avoiding or mitigating the conflicts. TPR is neither incremental nor decentralized.[227] However, it is multilevel and composed of two (and increasingly, three) layers including a global, a regional, and a national level when the scope is geographic.[228] In TPR, standard setting and enforcement procedures are defined and approved ex ante. For rulemaking, monitoring, and enforcement private regulators are bound to abide by the rules designed by themselves or by meta private regulators.

Customs, on the contrary, are generally created by homogenous communities that produce legal rules through repeat behavior. They become binding on the communities retrospectively, after sufficient consent becomes clear. It is gradual, incremental, and unstable. The legal requirements that transform a business practice into a legally binding rule do not address the issue of external negative effects.

Functionally, TPRs are characterized by regulatory functions that not only address different types of market failures but also solve collective action problems in contexts where states' regulatory capacities are limited at best. Customs, on the other hand, regulate exchanges and trading, but rarely address externalities and the production of public goods.

Unlike *jus mercatorum* and custom, where private collective autonomy constitutes the foundations of rule-making power and provides the legitimacy of their normativity, these new regimes involve third parties' interests to a much greater extent. The public interest function - which differentiates them from conventional self-regulation - calls for procedural and substantive requirements that ensure legitimacy and effectiveness. Collective private autonomy is integrated and limited by the pursuit of public interest and the necessity to comply with the rule of law.

These differences suggest that the relationship with public orders - both at the transnational and domestic level - should be

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227 This is not to say that it is not evolutionary and multilevel.

228 Such a multilevel structure is lacking when the scope is functional and not territorial.

regulated differently from custom and other forms of privately produced rules. The techniques of incorporation, usually applied to usages and customs, cannot be mechanically transplanted to TPRs. The legal status of these regimes and their binding nature can be certainly evaluated through the lenses of contract and organizational law. However, the applicability of these regimes to parties that have not participated in the regulatory process in any meaningful way should be subject to complementary forms of inclusion. Clearly, tacit consent of the community, the milestone of custom's normativity, cannot play a role to transform regulatory regimes into binding rules. It is the combination of private autonomy and procedural requirements that ultimately provides the necessary legitimacy to ensure compliance with global private standards.