

Introduction: The transformation of transnational private regulation: enforcement gaps and governance design¹

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Transnational private regulation (TPR) is growing, giving rise to numerous regimes at the global level which interplay with public, international and domestic regimes. TPR encompasses regimes that primarily, but not exclusively, regulate firms operating in markets that extend beyond States' boundaries. The scope ranges from trade (electronic platforms to trade goods, services and shares) to human rights, from food safety to financial and banking, from professional (accounting, legal, medical) to technical (telecom, aviation, electricity) standards, from environmental to employment standards, and from advertising to data protection. Within each sector, global supply chains have become relevant global regulators, developing contractual regulatory tools which are applied to some or all participants.² TPRs are frequently embedded within independent private orders, often pursuing conflicting policies; their normative foundations are primarily based on private autonomy, freedom of contract and association limited by constitutional and international laws. Thence, they are primarily regulated by their relevant constitutional contracts and/or organizational charters; gaps are filled by reference to domestic private law regimes, whereby

¹ This introduction has strongly benefited from deep and rich discussions with the EUI Casebook working group. My thanks go also to Rebecca Schmidt and Federica Casarosa for editorial and research assistance. Responsibility for the text is mine.

² See on the relationship between private regulation and supply chains, S. Henson and J. Humphrey, 'The impact of private food safety standards on the food chain and on public standard setting processes', paper prepared for FAO/WHO, May 2009, available at www.fao.org (last visited April 2011). (Hereafter, 'The impact of private food safety standards'.) For a taxonomy of global value chains in relation to different power relationships see G. Gereffi, J. Humphrey and T. Sturgeon, 'The governance of global value chain', *Review of International Political Economy*, 2005, 78–104.

the rules applicable are determined by conflict of law rules.³ Their scope is sector specific and they lack a general legal framework but for the one provided by applicable public international law and common constitutional principles.⁴ Growing recognition of the necessity to coordinate and avoid conflicts has begun to generate private meta-regulators, organizations whose goal is to produce general transnational rules that private organizations, across sectors, can freely adopt.⁵ However this trend is in its infancy.

TPR often consolidates as a result of combined governmental and market failures. However, it emerges not only as a consequence of the weaknesses and shortcomings of States and global public regulatory regimes, but also for technological reasons which require fast and effective decision-making processes, allowing rules to be adapted in line with both industry and human rights evolution.

The consolidation of TPR, complementary to international regulation enacted by States through treaties or other legally binding instruments, poses daunting challenges to market governance but also to the implementation of fundamental rights and rule of law principles.⁶ It shifts power and responsibility from public to private entities. It redistributes rule-making powers among actors, within the private sphere, and across markets between northern and southern players. Those challenges pertain to its legitimacy and effectiveness vis-à-vis other forms of public global regulation based on States' direct or delegated exercise of rule-making power at the international level.⁷ They stand at the core of the scope of global democracy and transnational legal pluralism.

Unlike many forms of *lex mercatoria*, which predominantly apply only to the members of the regulatory 'club', these regimes produce global collective goods or 'bads', having effects beyond the members of the

³ See F. Cafaggi, 'New foundations of transnational private regulation', in C. Scott, F. Cafaggi and L. Senden (eds), *The Challenges of Transnational Private Regulation: Conceptual and Constitutional Debates*, Blackwell, 2011, pp. 20ff. (hereafter, 'New foundations').

⁴ On the application of public international law to TPR see Chapters 5 and 6, this volume.

⁵ An example is that of ISEAL whose codes are meant to apply to its members but can also reach a much wider community of 'users'. See the Codes available at <http://www.isealalliance.org/> (last visited June 2011).

⁶ See 'Introduction', in C. Scott, F. Cafaggi and L. Senden (eds), *The Challenges of Transnational Private Regulation: Conceptual and Constitutional Debates*, Blackwell, 2011.

⁷ See B. Kingsbury, N. Krisch and R. Stewart, 'The emergence of global administrative law', 68 *Law and Contemporary Problems*, 15 (2005) and S. Cassese, 'Global standards for national administrative procedure', 68 *Law and Contemporary Problems*, 109 (2005).

regulatory bodies that govern the rule-making process. Unlike international commercial law, the standards have regulatory purposes in addressing both market and governmental failures. They deploy various standard setting instruments, ranging from principles and guidelines to codes of conduct, regulatory contracts, and master agreements. These are primarily voluntary tools to which regulated entities subscribe in different forms: from acquiring membership to becoming a signatory of the regulatory contracts or by choosing to become a regulated entity, making reference to the regulator's master agreement and incorporating its terms in their executory contracts.⁸

In fact, regulated entities, which voluntarily subscribe to a regime, undertake contractual or organizational commitments to abide by the rules and to comply with sanctions when infringements occur. Violations of these commitments are, in theory, subject to ordinary domestic laws of contract or association and company laws.

Enforcement represents a strategic juncture for the effectiveness and legitimacy of TPR. For the purpose of this book, legal enforcement encompasses administrative, judicial and non-judicial private enforcement. Within private non-judicial enforcement we include different types of legal mechanisms characterized by the existence of an enforcer (first, second or third party) using some type of adjudicating procedure, which may include also self-enforcing contracts subject to *ex post* scrutiny.⁹ Accordingly we oppose the idea that private non-judicial enforcement belongs only to the social rather than also to the legal sphere. Litigation is part of the enforcement mechanisms and the distinction between individual and aggregate litigation has been at the core of the recent debate in the domain of transnational litigation.¹⁰ Such a distinction is relevant for TPR but the

⁸ Global private standards become binding also by way of tort law when courts refer to them in defining rules of conduct like the duty of care or negligence. In the contributions both contractual and tort-based enforcement are considered.

⁹ Self-enforcement should be distinguished from spontaneous enforcement through market or community mechanisms. The former is part of the legal toolbox, the latter do not deploy legal mechanisms. Even in self-enforcement, parties are limited by legal constraints linked with due process and other general principles. See for a general overview applied to self-enforcing contracts: S.E. Masten and J. Prufer, 'On the evolution of collective enforcement institutions: communities and courts', TILEC Discussion Paper, DP 2011-017, pp. 1ff. (available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773486); A. Katz, 'Taking private ordering seriously', 144 *University of Pennsylvania Law Review* (1995-1996), 1745ff. See also generally: I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, OUP, 1995.

¹⁰ See S. Issacharoff, R.H. Klonoff, R.A. Nagareda and C. Silver, *Principles of the Law of Aggregate Litigation*, ALI, 2010.

aggregate dimension is significantly underdeveloped both in the judicial and non-judicial domain.

While the analysis concerning enforcement of international public regimes is quite advanced, enforcement of transnational private regimes has not yet been adequately investigated.¹¹ Enforcement, including judicial, administrative and non-judicial enforcement, performs manifold functions in ensuring the effectiveness and evolution of TPRs: (1) it defines the boundaries of private regimes, allocating regulatory power among transnational regulators; (2) it produces and/or corrects (un)desirable distributional effects; (3) it contributes to the architecture of transnational legal pluralism, transcending inter-governmentalism; and (4) it fills gaps when regimes are based on incomplete 'contracts' or private legislation.

Domestic courts, administrative agencies and private enforcers could play a significant role to ensure TPR's effectiveness by policing the regulatory agreements, by monitoring the commitments of regulated entities and by ensuring regulatory compliance. However, important differences exist among them and choice of forum may have strategic implications. Often conflict of laws rules designate developing countries with weak and inadequate judicial systems as competent jurisdictions, while nevertheless being alert to the extraterritorial effects of Western jurisdictions. An institutional design dilemma underlies the alternatives of empowering developing countries' courts or granting extraterritorial effects to developed countries' enforcers.¹² Currently the responses vary from sector to sector, and from country to country.

Courts, administrative agencies and private enforcers are not the only policing institutions of TPRs; markets and communities contribute a great deal to secure compliance through non-legal devices, giving rise to an apparent paradox. While, formally, private regulations are voluntary

¹¹ See in this volume F. Francioni, Chapter 5. For a general discussion from different perspectives see S. Cassese, *Il diritto globale, Giustizia e democrazia oltre lo Stato*, Einaudi, 2009, esp. pp. 133ff. See also B. Kingsbury, 'Weighing global regulatory rules and decisions in national court', *Acta Juridica*, 90, 2009; E. Benvenisti and G. Downs, 'Will national court cooperation promote global accountability? The judicial review of international organizations' (hereinafter 'National court cooperation'), unpublished manuscript on file with the author; R. Teitel and R. Howse, 'Cross-judging tribunalization in a connected but fragmented global order', 41 *International Law and Politics* 2009; A. von Bogdandy and I. Venzke, 'In whose name? An investigation of international courts' public authority and its democratic justification', 2010, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593543

¹² Enforcers should be understood as both courts and private enforcers to the extent that they operate in territorial rather than functional jurisdictions.

instruments, to which parties are free to subscribe or alternatively, abstain, their adoption has often come to be understood as the precondition for access to global markets or other regulatory spaces. Frequently then, these transnational private regimes are legally voluntary but socially or economically binding.

Legal enforcement constitutes only one mechanism to achieve compliance, a fundamental goal to meet basic 'rule of law' requirements. It primarily operates *ex post* while traditionally compliance mechanisms tend to operate *ex ante*. Compliance, like enforcement mechanisms are context and sector-dependent.¹³ They vary across sectors, but, more importantly, they vary in relation to the specifically adopted regulatory strategy. In TPR, we can identify different approaches ranging from command and control, to responsive or market-based regulation, each one calling for specific instruments.¹⁴ In particular, the combination of *ex ante* and *ex post* devices constitutes a crucial turning point in the design of the mix of compliance and enforcement tools: when a regime opts for strong *ex ante* requirements, associated, for example, with certification or licensing, the role of *ex post* legal enforcement decreases. When access to the regulatory regime by the regulated is free or it is simply linked to membership requirements, the role of legal enforcement increases.

While rule-making is ever more transnational, enforcement is still predominantly decentralized at the local level. Decentralization in TPR is not only territorial but also functional, as it is the case in the field of corporate social responsibility (CSR) for enforcement in supply-chain based regulatory systems that cut across State boundaries.¹⁵ However, the institutional allocation between transnational and local does not follow for the classical partition within international law between primary and secondary rules.¹⁶

¹³ See for example the evaluation of compliance in relation to international soft law agreement; E. Brown Weiss, 'Rethinking compliance with international law', in E. Benvenisti and M. Hirsch, *The Impact of International Law in International Cooperation*, CUP, 2004, pp. 134ff.

¹⁴ The use of categories developed in domestic public regulation should be accompanied by a word of caution about mechanic transfers. Clearly the private dimension calls for a reconceptualization, which considers the different normative foundations of TPR.

¹⁵ As we shall see in supply-chain-based private regulation, compliance mechanisms are designed by the multinational corporations (MNCs) to be applied along the chain with some adaptations to the national legal system where the dispute arises.

¹⁶ On the actual role of this distinction and more broadly the actual direction of the debate between monism and pluralism see Francioni, Chapter 5 in this volume.

Often the private standard setter defines both the substantive and procedural rules, with the exception of judicial enforcement, where the definition of the latter is usually provided by national legal systems. Compared with public regimes, especially in non-judicial enforcement, TPR displays a wider variety of institutional arrangements existing among different levels, and giving rise to different types of architectures. Institutional complementarity between public and private standards has thence relevant effects on enforcement strategy.¹⁷

ENFORCEMENT GAPS AND INSTITUTIONAL DESIGN

Compliance and enforcement have become central issues for the credibility and legitimacy of TPR.¹⁸ The multiplication of legal regimes at the transnational level has so far not been accompanied by effective enforcement mechanisms, as a result of which enforcement gaps that undermine their legitimacy and credibility have arisen. These gaps have both an institutional and a substantive dimension.

Institutionally, specialized private enforcement bodies still tend to focus primarily on internal disputes within regimes, neglecting conflicts among them. This asymmetry partly depends on a lack of jurisdiction over inter-organizational disputes and partly on the willingness to reinforce separateness among different global legal orders.¹⁹ For example, the dispute settlement body (DSB) of a transnational private regulator has jurisdiction over disputes between its members or between them and the regulator, while it has limited ability to adjudicate over conflicts concerning the interpretation of a code of conduct enacted by another organization to which 'its' members have committed to comply. Suppose, for instance, that a CSR organization has a clause in its bylaws imposing compliance with a code of conduct concerning employment standards enacted by another private organization. If conflicting interpretations arise over the nature of those employment standards, it would not be possible for each DSB to give

¹⁷ See on these questions Cassese, D'Alterio and De Bellis, Chapter 12 in this volume.

¹⁸ The question of compliance has become central in public international law and international relations in the last 20 years. See D. Shelton (ed.), *Commitment and Compliance*, OUP, 2000, and E. Benvenisti and M. Hirsch, *The Impact of International Law in International Cooperation*, CUP, 2004.

¹⁹ See F. Cafaggi, 'The architecture of transnational private regulation' (May 1, 2011). EUI Law working paper, available at SSRN: <http://ssrn.com/abstract=1899555>

the final word because no DSB has conclusive or exclusive jurisdiction over the dispute among instruments enacted by different regulators. Their jurisdiction would probably be limited to the effects of the interpretation of the code over their members. The conflicting interpretations of multiple private enforcers will have to co-exist. Cooperative joint enforcement is highly underdeveloped among transnational private organizations; however, new forms of coordination have recently emerged through Memorandum of understanding (MoU) and functional equivalents.²⁰ Jurisdictional conflicts arise not only among private enforcers but also between them, administrative agencies and domestic courts. The coordination between international and domestic courts and between courts, administrative agencies and private enforcers is not sufficiently developed and there is limited room for voluntary measures aimed at coordinating contractually established dispute settlements.

Substantively, the enforcement power of these bodies is limited and compliance with sanctions by the infringers may be relatively low. Sanctions issued by private enforcers may be not respected, requiring, as a result, courts' intervention to enforce contractual obligations in order to execute sanctions. Domestic public regulators are also increasingly engaged with the enforcement of TPR to warrant its effectiveness.

Both institutional and substantive gaps require new solutions; accordingly, there is a need for devising better coordination among existing enforcement regimes, both in detecting infringements and in effectively sanctioning violations. The institutional challenges ahead point to the improvement of coordination mechanisms both within and among enforcement mechanisms, even when competition rather than cooperation is the distinctive feature.

This book tries to map enforcement mechanisms by considering four fundamental questions:

1. The identity and the power of the enforcers: *who are the enforcers?*
2. *The means of enforcement*: what are the boundaries between adjudication and administration?
3. *The effects of the enforcement and the scope of jurisdiction*, comparing judicial, private non-judicial and administrative enforcement: who can be involved in litigation and who is affected by private, judicial and administrative judgments?
4. *The specificity of remedies connected to the regulatory functions of the private regimes*: how does enforcement of private regulation differ

²⁰ See Chapter 12 in this volume and F. Cafaggi, 'The architecture of transnational private regulation', op. cit.

from enforcement of conventional contracts and organizational undertakings?

To frame these questions, a functional approach is useful. Enforcement of TPR has a double regulatory function. It affects the regulatory process because the solution arising from the controversy can highlight gaps in the regulation that need be filled; it thus engages rule makers in a 'regulatory dialogue' with the enforcers that may transform the (content of the) rules over time. A second related dialogue takes place between enforcers and infringers and feeds that with rule-makers. In this context, the reasons underlying the infringement perform a compelling function. Enforcement responses do and should vary according to violations' causes.²¹ Violations can occur either for reasons of regulatory incapacity or on the basis of rational calculations.²² Enforcement mechanisms should be tailored accordingly. In particular, the combination of cooperation and hierarchy in enforcement will vary depending on the reasons inducing the violation, i.e. its motivations. When the violation is caused by regulatees' incapacity, cooperative enforcement is likely to be more effective. When it is consciously directed at infringing the standards, despite there being an ability to meet the requirements, more hierarchy is needed. The orthodox distinction between hierarchical and adversarial enforcement versus cooperative compliance does not reflect the current approaches to TPR enforcement.²³ By way of enforcement rule-makers and the addressees of the regulatory regimes can engage in a learning relationship which can eventually improve regulatory effectiveness.

The second function of enforcement is the re-distribution of regulatory power. Enforcers of TPR, primarily domestic courts, may redistribute regulatory power within private actors or between private and public actors.²⁴ When enforcers decide how social standards apply to multinational corporations (MNCs) or the degree of privacy protection to which users are entitled when engaging in e-commerce, they reallocate regulatory

²¹ See R. Baldwin and J. Black, 'Really responsive regulation', 71 *The Modern Law Review*, 1 (2008), 59–94; Scott in this volume, Chapter 4.

²² See for a wider discussion in this volume Colin Scott's chapter in this volume, Chapter 4.

²³ For a thoughtful introduction to the relationship between enforcement and compliance see N. Gunningham, 'Enforcement and compliance strategies', in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation*, OUP, 2010, pp. 120ff, esp. 121ff.

²⁴ Private enforcers often lack jurisdiction over inter-regimes disputes. They can only indirectly redistribute regulatory power by defining the scope and boundaries of the regime whose rules they can enforce.

powers between industries or between industry and NGOs. The recognition of the regulatory function implies that adjudication can result in the reallocation of regulatory power from one regulator to another or from one regime (free trade, e-commerce) to another (fair trade, data-protection). When, for example, courts apply the principle of conforming interpretation, imposing an outcome which dictates that one regime has to conform to another one (free trade and human rights or CSR), they allocate regulatory power by creating a hierarchy between the two regimes. Another clear example of the regulatory function of enforcement is represented by the liability of private regulators and the scrutiny of the validity of disclaimers that private regulators often include in their charters and bylaws to immunize themselves from liability towards regulated and/or third parties. Disclaimers of private regulators and enforcers constitute a tool for the allocation of regulatory power between regulators and third parties and between regimes when, for example, the challenge concerning the regulator's liability comes from NGOs representing interests conflicting with those protected by the regulator.²⁵ What are the limits of this function? In particular, how are the limits based on private autonomy reconciled with those grounded on democratic principles?

This book addresses some of the enforcement challenges and gaps in transnational regulation, offering some proposals to improve its effectiveness, in a manner consistent with justice and global democracy.

HOW GOVERNANCE MODELS OF PRIVATE REGULATORS CAN AFFECT TPR ENFORCEMENT STRATEGIES

TPR differs from international regulation since it refers primarily to standards designed and/or implemented by private actors.²⁶ This said, it also includes hybrid forms like the delegation of rule-making power by public to private entities and various forms of co-regulation operating within the framework of institutional complementarity.²⁷ TPR often emerges as a response to the limitations of public international law. It complements

²⁵ See Cafaggi, Chapter 2 in this volume.

²⁶ F. Cafaggi, 'New foundations of transnational private regulation', *op. cit.*, pp. 1ff; T. Büthe, 'Private regulation in the global economy: a (p)review', 12 *Business and Politics*, 3, 2010, 1.

²⁷ For a map of different forms see K. Abbot and D. Snidal, 'Governance triangle', in W. Mattli and N. Woods (eds), *The Politics of Global Regulation*, Princeton University Press, 2009, p. 46. Taking a different perspective see T. Büthe,

transnational public regulation and frequently intertwines with it.²⁸ Even more, TPR and its enforcement mechanisms constitute an avenue to provide private parties with access to redress that they would not have had under public international law. This is, for instance, the case when private regulatory contracts incorporate, by reference, soft law provisions related to the respect of fundamental rights, making them binding and enforceable before national courts (NCs), and/or even before private enforcers. However contract law is not the only mechanism that can be employed to ‘harden’ soft law.²⁹ Extra-contractual liability also provides an enforcement avenue for soft law rules when they integrate the content of liability standards such as the duty of care. By rendering international public soft law rules enforceable via both transnational contracts and domestic private law, TPR not only increases the effectiveness of public international law but it also lends it legitimacy.³⁰ Furthermore, in specific cases public international law might also be integrated into private regimes. This can be particularly observed when the private regulator is vested with a high degree of regulatory power. In these scenarios general principles of international law such as good faith, etc. would be applicable to a private regulator’s enforcement processes.³¹ We therefore observe an evolving interaction between the public and the private regulatory instruments at the transnational level, where relationships may take competitive or cooperative forms, mutually reinforcing, especially in the latter case, their legitimacy.

‘Private regulation in the global economy: a (p)review’, op. cit. 2010, 1; G. Shaffer, ‘How business shapes law: a socio-legal framework’, 42 *Connecticut Law Review*, 147, 2009.

²⁸ See R. Stewart, Chapter 2 in this volume suggesting that transnational public regimes can be interpreted as responses to the failures of TPR.

²⁹ See for a general overview G. Shaffer and M. Pollack, ‘Hard vs. soft law: alternatives, complements, and antagonists in international governance’, 94 *University of Minnesota Law Review*, 706, 2010.

³⁰ See F. Cafaggi, ‘New foundations’, op. cit., pp. 20ff.

³¹ International Centre for Dispute Resolution, *ICM Registry, LLC v Internet Corporation for Assigned Names and Numbers*, Declaration of the Independent Review Panel, ICDR Case No. 50 117 T 00224 08, February 19, 2010, pp. 62ff. The Panel in this case interpreted Article 4 Bylaws which make reference to international law as including general principles as mentioned in Article 38 of the ICJ Statute. The rationale for this conclusion was based on ICANN’s ‘governance of an intrinsically international resource of immense importance to global communications and economies’.

TPR concerns the whole private sphere, encompassing firms and NGOs, with coinciding or conflicting interests.³² Conflicts of interest may occur within the same regime or across private regimes when they are aimed at regulating different market failures.³³ Conflicting interests are not only those between businesses and consumers but also concern business interests like those which emerge in conflicts between small suppliers of developing economies and big retailers of developed economies.³⁴ Thence within the private spheres, conflicts concern the regulated and the beneficiaries, both of whose interests are protected by the regulatory process.

The relationship between private non-judicial enforcers and infringers encompasses different features from that of (domestic) courts and litigants. The common feature across private non-judicial enforcement schemes is the repeat nature of the relationships between enforcers and potential infringers, permitting the enforcer to devise escalating systems which could hardly be used in judicial enforcement where repeat interaction between enforcer and infringers only rarely occurs.³⁵ The nature of the relationship however is not necessarily homogeneous across regulated entities. Private enforcers need to adapt their strategy to the (dis)homogeneity of regulated entities and their attitudes towards risks in order to engage in effective enforcement practices. The selection of strategies and their effectiveness therefore depends on the characteristics of the infringers and their respective responsiveness, which varies according to size, market power, and the relevant internal organizational model.

³² See D. Vogel, 'Private global business regulation', *Annual Review of Political Science* (2008), 261ff; D. Vogel, 'The private regulation of global corporate conduct', in W. Mattli and N. Woods (eds.), *The Politics of Global Regulation*, Princeton University Press, 2009, esp. p. 156; T. Büthe and W. Mattli, *New Global Rulers: The Privatization of Regulation in the World Economy*, Princeton University Press, 2011.

³³ See F. Cafaggi, 'The architecture of transnational private regulation', op. cit.

³⁴ See Edward Rubin, 'Images of organizations and consequences of regulation', *Theoretical Inquiries in Law*, 2005, Vol. 6, No. 2, Article 4. Available at: <http://www.bepress.com/til/default/vol6/iss2/art4>

³⁵ For repeat interaction to occur in judicial enforcement the 'constitutional' contract or bylaws have to introduce a choice of forum clause, identifying one single court as competent to resolve disputes concerning the private regime. For a critical assessment of the enforcement pyramid in relation to repeat interaction concerning public regulators, see C. Scott, 'Regulation in the age of governance: the rise of the post-regulatory state', in J. Jordana and D. Levi-Faur, *The Politics of Regulation: Institutions and Regulatory Reforms in the Age of Governance*, Edward Elgar, 2004, pp. 145ff.

Many contributions to this book emphasize the importance of governance for private enforcers and the correlation between legal forms of governance and enforcement strategies. This is certainly an important difference from judicial enforcement where courts' governance across legal systems is not conceived as a significant variable, perhaps mistakenly so. In particular, enforcement mechanisms vary between contractual and organizational forms of private enforcers.³⁶ Within organizational forms, particular significance rests on the distinction between for-profit and non-profit organizations, partially linked to that between first and third-party enforcers.³⁷

Contractual forms, especially those organized around supply chains, adopt primarily first-party enforcement approaches, sometimes developing staged procedures along the management ladder, depending on the complexity of the dispute. One party in the contractual chain operates as a direct (with its contractual partner) or indirect (with contractual partners along the chain) enforcer. Organizational models increasingly take the form of third-party enforcement under the growing pressure of separation among different regulatory functions. The choice of enforcement mechanisms is not entirely free, even within the private domain; meta-public regulation influences the regulatory approach, the selection of the governance model and that of procedural rules.³⁸ Availability of different enforcement forms is growing. Especially with regard to third-party enforcement, there is increasing competition between arbitral institutions and mechanisms existing beyond arbitration.³⁹

The link between governance and enforcement can be illustrated by analyzing some of the most diffused models, which certainly could not reflect the extraordinary variety of the present regimes:

(1) The simplest enforcement model is that of a multinational corporation (MNC), regulating the relationships with its employees, consumers and environmental organizations through the self-enforcement of its own

³⁶ See for a broader analysis concerning standard setting F. Cafaggi, 'New foundations of transnational private regulation', *op. cit.*, pp. 1ff.

³⁷ For the comparison between for-profit, non-profit and public institution see the contribution of Kevin Davis, Chapter 7, this volume.

³⁸ See C. Parker, *The Open Corporation: Effective Self-regulation and Democracy*, CUP, 2002; C. Coglianese and E. Mendelson, 'Meta-regulation and self-regulation', in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation*, OUP, pp. 146ff.

³⁹ See J. Dammann and H. Hansmann, 'Globalizing commercial litigation', 94 *Cornell Law Review* 1 (2008).

rules.⁴⁰ The MNC can enact one or more codes of conduct and/or guidelines, define unilaterally the nature of commitments, whether and how these are binding and over which actors they can produce effects.⁴¹ Increasingly, these codes are associated with compliance programs required by domestic statutes, concerning the conduct of employees and managers and relationships with third parties (for example, suppliers in procurement policies).⁴² In these schemes, the role of non-legal enforcement and that of compliance systems, based on hierarchy, are rather strong, whereas judicial enforcement is usually weak. Even if the MNC is involved in global supply chains it does not perform enforcement functions which are left to bilateral contracting. In this model enforcement is limited to the most immediate stakeholders of the MNC.

(2) A more sophisticated variant emerges when the regulatory body is the supply chain, where, together with the MNC, the up- and downstream participants of the chain are involved in regulating matters dealing with the production of goods and services. Commercial contracts here become regulatory instruments, regulating in combination with corporate and labor law.⁴³ MNCs exercise enforcement functions in this model as well, but their regulatory activity produces effects all along the chain, beyond the

⁴⁰ Somewhat specific features come with providers of financial services where the activity and its impact on the financial market modify the MNC's regulatory model and its enforcement features. For example the relevance of compliance programs is much stronger in the financial market entity than in other sectors. Geoffrey Miller's chapter in this volume (Chapter 9) is dedicated to this topic.

⁴¹ See for an overview of the theme: J. Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4-35, 19 February 2007.

⁴² Compliance with the codes thus performs different functions: due diligence, exempting from criminal/administrative liability, and performance of undertakings in contracts with different stakeholders. Codes' violations symmetrically bring about different simultaneous consequences: they can trigger at the same time criminal and civil liabilities often evaluated by multiple enforcers (public and private). The boundaries between compliance programs and enforcement are rather thin in this model. Enforcement of these rules is often exercised via internal bodies, for example the ethical committee, with a limited degree of independence from the board of directors and the standard setting body. The level of centralization and hierarchy in the enforcement model often reflects the specific business model adopted by the MNC. For example compliance programs against fraudulent behavior or anti-money laundering as in the USA Patriot Act, as discussed in Chapter 9, this volume, p. 269.

⁴³ There is an unexplored link between TPR, regulatory practices and enforcement strategies.

small group of stakeholders closely involved in the previous model. The relationship between enforcers and infringers, based on repeated interaction, is stable.⁴⁴ The use of commercial contracts as vehicles of transnational private regulation raises important questions from the enforcement perspective. On the one hand, they ensure rapid and fast monitoring of suppliers' compliance; on the other hand, they may often fail to protect the public interest or even the collective interest dimension. There is a risk of being instrumentalized in order to serve, exclusively, the market interests of the leading firm. Even if regulation is incorporated into bilateral commercial contracts, the enforcement of regulatory clauses has particular importance for the whole chain, going beyond the bilateral relationship in the context of which the breach has occurred. Privity of contract and the *de jure* inability of the lead enforcer to enforce third parties' obligations can increase the implementation costs of this model. The use of network contracts could mitigate these problems by enabling the lead firm to directly enforce obligations of all the participants and, at the same time, promote collaboration and peer monitoring among suppliers.⁴⁵ As many contributions show, this interdependence of relationships along the chain affects contractual enforcement of regulatory provisions.⁴⁶ NCs are divided over codes' enforceability when the codes stand alone, and even when their provisions are included in commercial contracts by reference.⁴⁷

The difference with the previous model is that the MNC here not only operates as a standard setter for the whole supply chain but also as a monitor and enforcer. It has (limited enforceable) duties to monitor and enforce suppliers' regulatory obligations for which it is made (at least partially) accountable to the final consumers via 'independent' audit and litigation. Limitations come from principles of contract law which reduce the possibility of enforcing third parties' obligations undertaken by second or third tier suppliers. Regulatory provisions in commercial contracts refer to MNCs' direct or third-party auditing to ensure compliance, and, in case

⁴⁴ Not every regulatory supply chain is identical and changes are taking place, shortening their length and promoting the creation of suppliers' groups and coalitions to pursue common regulatory objectives.

⁴⁵ See. F. Cafaggi (ed.), *Contractual Networks, Inter-firm Cooperation and Economic Growth*, Edward Elgar, p. 201.

⁴⁶ See in this volume, Estlund, Chapter 8, and Scott, Chapter 4, p. 147ff.

⁴⁷ In Estlund's contribution to this volume (Chapter 8) the US courts' position over enforceability of labor standard codes is examined. She analyzes the litigation over codes' enforceability in the US and underlines how courts have subscribed to the idea that codes' monitoring and enforcement is a right rather than a duty. Thence when suppliers violate codes' provisions MNCs cannot be made liable for failure to monitor and enforce codes' provisions. See Chapter 8, p. 237ff.

of violations, they provide potential leeway for unilateral termination of the contractual relationship. Often, however, contractual termination constitutes the last resort, deployed only after cooperative enforcement has been tried without success.⁴⁸

More broadly, the structure of the supply chain affects standard setting and enforcement. But the opposite is also true: private regulation and the enforcement model influence the length and form of the supply chain. Changes in the supply chain are driven by several concurring regulatory regimes, from product safety to environmental protection, and from labor to privacy standards, often integrated within one single model. These models have been adopted in the food safety sector and, to a limited extent, in the field of CSR and have subsequently been applied within other regulatory fields.⁴⁹ The supply chain, therefore, often constitutes a vehicle for regulatory transfers from one regulatory field to another, which may affect enforcement strategies. For example, one regulatory model is adopted in the field of product safety, and is later applied within other fields like labor or consumer protection. The MNC in the supply chain model often monitors compliance with regulatory clauses in similar ways regardless of whether they relate to safety, quality, labor or environmental protection. As a result, the supply chain regulatory model tends to integrate monitoring standards arising from within different private regimes, generating more harmonized enforcement strategies across sectors than other governance models.

What is the relationship between the two enforcement models just outlined? Do MNCs have a choice? The adoption of the supply chain model becomes necessary when private regulation concerns process or quality management, more than product standard, for in the former instance, suppliers' activities need to be monitored continuously to ensure regulatory compliance. Here, the regulatory chain is wider and includes several suppliers' tiers. The private regulatory toolbox adds to the company and labor law, commercial contracts between the MNC and suppliers and

⁴⁸ See the Walmart approach reported in Chapter 8: 'When violations are found our priority is to work with our suppliers to ensure that factories achieve compliance. We are confident that this collaborative approach is the best way to help our suppliers understand the business benefits of operating factories meeting labor, environmental, and health and safety standards' (Estlund, Chapter 8, p. 242).

⁴⁹ In food safety the subscription to the supply chain approach by public regulation has been applied also to private regulation shifting costs of monitoring, and, to some extent, enforcement onto MNCs which have then passed it on partly to the suppliers and partly to the final consumers. See Henson and Humphrey, 'The impact of private food safety standards', *op. cit.* pp. 1–14; T. Havinga, 'Private regulation of food safety by supermarkets', 28 *Law & Policy* (2006), 515 at pp. 522ff.

between the first, second and additional tiers. The effectiveness of the supply chain enforcement model, far more so than the simple MNC, is dependent upon the efficient interaction between the leader firm and independent auditors combining consensual and hierarchical components in enforcement policies.

(3) More complex governance models which reflect different enforcement mechanisms include: (a) single or multi-stakeholder agreements (firms and consumer organizations, or retailers and suppliers along the supply chain, for example); or (b) organizational models like associations, foundations, and 'for-profit' companies regulating the activities of their members, often by setting standards.⁵⁰

(i) Within the family of regulatory contracts relevant differences between enforcement mechanisms currently exist, depending on whether the regulatory provisions are designed as independent tools or are included in commercial contracts along the supply chain. In the former case, an agreement concerning transnational private standards can be made between a group of firms and consumer organizations, trade unions, environmental protection organizations or all of the above.⁵¹ This agreement can define the standards or design the architecture of the implementation of standards defined in codes of conduct or international soft law declarations. The contractual arrangement regulates the relationship among the signatories but it also produces effects on third parties; its validity and enforceability are subject to domestic or transnational contract law, depending on the choice of *lex loci* and *lex fori*. Regulatory contracts of this type are quite common in the field of CSR but have also developed in other sectors like Internet regulation (ICANN), financial private regulation (ISDA) and environmental protection (EMAS).⁵² In relation to financial regulation, they often take the form of master agreements to be applied

⁵⁰ In some instances the agreement is transformed into an organization. See the example of the Business Social Compliance Initiative, a network of retailers, industry and importing companies, which has formed a strategic alliance with SA8000 (the global social accountability standard) to create a Global Reporting Initiative (GRI) which develops 'sustainability reporting guidelines' for the global business community.

⁵¹ For a detailed examination of this model in the field of labor standards see C. Estlund, this volume, Chapter 8, p. 243.

⁵² See Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding principles on business and human

in individual transactions (SEPA or IPF in the payment system).⁵³ They are generally supported by private grievance mechanisms; however, judicial enforcement is also deployed to complement them.⁵⁴

A different model, already mentioned, is that of commercial contracts between firms along the supply chain, which may include clauses regulating safety, environmental protection, labor and occupational health and safety. Often these contracts have self-enforcing mechanisms and are rarely litigated before courts, given the significant power asymmetry between the parties and the strong use of reputational mechanisms. However, the relevance of regulatory provisions for the other participants to the supply chain may undermine the effectiveness of self-enforcement and might call for new responses.⁵⁵

(ii) In the latter case (b) an organization is created with a membership that may include different types of stakeholders, be they individual members or organizations.⁵⁶ Three different families exist within the organizational model. The first two are sector-specific; the third is a general model deployed across sectors.

The first family is sector-specific and is represented by the traditional professional and trade associations.⁵⁷ At a transnational level they are federations, composed of national professional or trade associations. Enforcers are generally part of the organization and their independence from standard setters is rather limited.

rights: implementing the United Nations “Protect, Respect and Remedy” framework’, A/HRC/17/31, 21 March 2011, available at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> (hereafter Ruggie ‘Guiding principles’). Examples concerning environmental protection are in Stewart’s contribution to this volume (Chapter 1), for financial markets, see the taxonomy in Miller’s contribution (Chapter 9), while for the Internet, see the analysis in Casarosa’s contribution (Chapter 10).

⁵³ This is the case for swaps regulated by ISDA master agreement and for payments in EURO regulated by SEPA. For a broader analysis see A. Riles, *Collateral Knowledge*, University of Chicago Press, 2011.

⁵⁴ See Ruggie ‘Guiding principles’, op. cit., art. 31.

⁵⁵ In commercial contracts the exercise of the power to terminate in the hands of the MNC is not made conditional upon examination of the interests of the full chain. When regulatory matters are considered, the interests of the participants may not be perfectly aligned when a violation is committed. Some could prefer injunctive relief, others termination and the current structure of international commercial contracts does not often include collective interests considerations.

⁵⁶ For example contrast IATA (single stakeholder) with the Forest Stewardship Council (multi-stakeholder with a multiple chamber structure).

⁵⁷ Some of these models are described in Cassese, D’Alterio and De Bellis, Chapter 12, this volume.

Another family is based on new industry alliances often cutting across sectors or encompassing multiple stakeholders. They regulate members' conduct (generally business enterprises) and often their relationship with third parties (i.e. consumers, suppliers, banks), in relation to the scope of the regime. Unlike the traditional trade/professional association self-regulatory model, these organizations design new enforcement mechanisms drawing on different sources, and, further, the degree of independence is higher even when enforcers are technically within the boundaries of the organization.⁵⁸

In all of these models, both the validity and enforceability of the rules are subject to domestic or transnational private laws, associated with the law of the place of incorporation of the private regulator, unless the enforcer is a fully independent entity incorporated elsewhere. Disputes over the rules' interpretation and application is governed primarily by the law of association, and when applicable by company law, which offers a much higher level of insulation from judicial intervention, applying the business judgment rule or its functional equivalents. The limits of the law of association, in legal systems that recognize it, regulating global standard setting, emerge quite clearly in many contributions although legal systems permit some degree of innovation. These drawbacks are often solved by recourse to administrative regulation. In areas like sports, environment, e-commerce and advertising, litigation and administrative enforcement by way of domestic regulators have played a very significant role.

Within private non-judicial enforcement, the organizational model so far described presents specific functional features, drawing on membership of a collective entity. Functionally, enforcement is based on deterrence through signaling rather than via direct punishment. Two complementary aims are pursued by these private enforcers: general deterrence, to discourage other members from engaging in unlawful behavior, and specific deterrence, to reduce the incentives of repeat infringements by the same regulated entity. Punishment often constitutes the last resort, which arises when the threat to the collective reputation calls for exclusion from the organization or for contractual termination. Corrective measures, and to a

⁵⁸ Sources of these codes are multiple. Ever more they are the outcome of multilateral initiatives led by MNCs within a negotiating framework with NGOs and trade unions. Estlund in her contribution to this volume (Chapter 8) points out that often within the third party auditing systems (including SAI, ETI, FLA), additional requirements like freedom of association become part of the regulatory scheme. She concludes by analyzing the relationship between enforcers and infringers. See Cynthia Estlund, Chapter 8 this volume, p. 241ff.

limited extent fines, are generally deployed, in association with a reputational mechanism based on community or market incentives.

A third, alternative model, is that of third-party enforcer; these are independent organizations that do not participate in standard setting. They tend to be not sector-specific but general transnational enforcers. This model, developed in arbitration, has subsequently spread over different enforcement techniques. Rules are designed by each organization (for example different arbitral institutions) but tend to converge on the core, which is also the case for the important role of international treaties and conventions. The hybrid sources of the rules, especially when there is a strong international public law component, constitute a driver towards uniformity. These organizations are often electing the not-for-profit form for their enforcement function, producing public goods more similar to those generated by courts than those arising from for-profit commercial enforcers.⁵⁹ Unlike the previous models, including the supply chain – where even in the case of structural separation the enforcers are part of the same group and come from the regulated or the beneficiaries' community – in this model enforcers are professionals.

The professionalization of transnational private justice with the combination of consolidated forms like arbitration and new forms arising from a private meta-regulator constitutes an important trend worth underlining.

Governance of enforcers affects the selection of enforcement instruments. A different combination of private and judicial enforcement emerges between contractual and organizational regulatory models. This is: (a) partly due to the legal framework, for contractual agreements – except for self-enforcing contracts – relying, to a greater extent than organizational models, on both judicial and non-judicial external enforcers; and (b) partly due to the differences among domestic private legal regimes, which govern the features of transnational regulatory bodies. Even within organizational models, the complementarity between judicial enforcement and professional third-party private enforcers (for instance, arbitral or mediation institutions) reflects a different dynamic from the nature of complementarity existing between courts and supply chains models. In the first case, complementarity can become a form of alternative dispute resolution and private justice can replace judicial enforcement; in the case of supply chains, and other forms of regulatory contracts, the role of domestic courts is much stronger and it would be inappropriate to speak of non-judicial enforcement as an alternative dispute resolution mechanism to courts.

⁵⁹ See for a full discussion Kevin Davis, Chapter 7, this volume.

THE LINK BETWEEN THE NATURE OF DISPUTES, THE IDENTITY OF THE LITIGANTS AND THE ENFORCEMENT MODELS

Models of enforcement vary not only across sectors but also within each field.⁶⁰ As mentioned we observe at least three concurring enforcement mechanisms concerning disputes arising within TPR: (1) the increasing role of domestic courts in enforcing and reviewing transnational private regimes; (2) the complementary development of transnational private dispute resolution mechanisms, including both first and third-party enforcers; and (3) the oversight and direct enforcement by both domestic and international public regulators.⁶¹

Judicial, administrative and non-judicial private enforcement are often combined with the intervention of gatekeepers. These are private bodies with formal or informal links to private regulators and/or the regulated firms. Gatekeepers vary from field to field and tend to be sector-specific but contribute significantly to effective enforcement within TPR. They range from the media in advertising, to banks in CSR, to credit rating agencies in financial markets. In the first case, media bodies have powers arising from contracts with advertisers and from legislation to stop and remove deceptive or injurious advertisements. In the case of CSR, banks can make access to credit conditional upon the respect of fundamental rights or social standards by firms in the supply chain. Often they have promoted supply chain regulation by requiring the lead firm to monitor suppliers' compliance with fair and equitable labor standards. There is also a development of general, cross-sectorial techniques like auditing and certification, increasingly deployed in combination with direct TPR, giving rise to new forms of private meta-regulation.

⁶⁰ Differences exist not only among but also within regimes. Even within the same regime enforcement strategies may be tailored to different classes of regulated entities. In the case of firms, responsiveness to an enforcement strategy may vary according to size, market power, and the regulatory capacities of regulatees.

⁶¹ Domestic administrative regulators come to oversee and enforce TPR through different avenues. The most common is when domestic statutory laws endorse private standards in legislation and confer on them the power to enforce the standards. This is clearly the case for financial accounting, for advertising, for certification in the field of timber, forestry just to name a few. A different path is when international organizations (FSB, World Bank, BIS, ILO, FAO, WHO) endorse or refer to transnational private standards in soft law instruments to be enforced at the domestic level by way of administrative acts.

Important questions emerge about their interaction: how do the enforcement regimes interplay?⁶² Is there any manifestation of hierarchy among them? Is the interaction reflected in different sequencing (i.e. first private, then administrative, then judicial)? Can parties decide which sequence should occur? What are the consequences of the adoption of a decentralized review system, encompassing all the systems, for transnational private rule-making?

The book explores these questions from various disciplinary perspectives and methodological approaches, looking at which coordinating and which conflict-avoiding systems are in place among the three types of enforcers and the gatekeepers, given that often they operate at both transnational and domestic levels.

In order to compare the various enforcement mechanisms, it is useful to distinguish among different types of disputes according to the litigants' identity, building on the notion of regulatory relationship developed in earlier work:⁶³

(a) disputes between the regulator and the regulated;⁶⁴

⁶² On the complementarity of judicial and private responses to violation of human rights by non-state actors see J. Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 7 April 2008, in particular points 82ff. (hereafter Ruggie, *Protect, Respect and Remedy*). The reporter states (p. 9): 'The framework rests on differentiated but complementary responsibilities. It comprises three core principles: the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies'. For an analysis of the different modes of interaction between private and administrative enforcement see Cassese, D'Alterio, De Bellis, Chapter 12, this volume. For the complementarity between judicial and private non-judicial enforcement see Cafaggi, Chapter 2, this volume.

⁶³ F. Cafaggi, 'New foundations of transnational private regulation', 38 *Journal of Law and Society* (2011), 20, pp. 31ff.

⁶⁴ These disputes may arise both for nonfeasance and misfeasance. They concern the relationship between MNCs and suppliers, the associations and its members or third parties engaged in contractual relationships with them. The private regulator has a contractual or an organizational right/duty to regulate. It follows that inaction or violations can be subject to judicial scrutiny. The regulator has to comply with substantive (non-discrimination) and procedural duties (information, reason giving) which may also give rise to judicial claims or regulatory intervention when oversight is allowed.

- (b) disputes among the regulated;⁶⁵
- (c) disputes between the regulator and third parties;⁶⁶
- (d) disputes between the regulated and third parties.⁶⁷

The distinction highlights the differences between judicial and private non-judicial enforcement mechanisms as to how they solve these classes of disputes. Furthermore, there is an implicit, albeit conscious, division of labor between the two.

Private non-judicial enforcement tends to focus on the first two classes of disputes, often denying or making access to third parties very selective.⁶⁸ Access for NGOs to industry-led regulatory regimes is rather limited. Limitations are stronger for participation in enforcement than in standard setting. This is unlike transnational public regulation where, having overcome the traditional obstacles posed by public international law, the rights of NGOs before domestic courts and agencies have been recently more widely granted to secure compliance, and sometimes (i.e. in relation to the

⁶⁵ These disputes arise for instance when all the members of a standard setting body have committed to a certain standard and one of them deviates from that standard to gain competitive advantage over the other members. A different type of dispute is that of a regime that generates a collective reputation with, for example, a certification system, and certified members violate the rules that secure compliance with the collective goals.

⁶⁶ A third party is not a member of the organization or a signatory of the contract depending upon which instrument has been used to govern the transnational regime. For example a consumer or a consumer organization is a third party of a regime which is regulated by industry members. Third parties can be negatively or positively affected by the regulatory activity. They are often the beneficiaries of the regulatory process and are granted rights to ensure that the benefits really accrue.

⁶⁷ This is, for example, the case when workers want to enforce provisions of the code enacted by the MNC concerning obligations of suppliers; similarly if product safety regulations imposed on suppliers by an MNC give rise to a claim by consumers. These disputes may be brought under a tort claim when there is no relationship between the regulated and the third party who has been negatively affected by the violation. They can be brought under contract if the regulated has committed itself contractually to comply with the standards set by the private regulator like in a sale contract where the food safety standards become part of the warranty or an employment contract where the provisions of the CSR code of conduct are incorporated into the contract. A third avenue is that of a contract for the benefit of a third party when the claimant is the intended beneficiary of the relationship between regulator and regulated.

⁶⁸ See Scott, Chapter 4, this volume. This might not always be the case, however. In the field of advertising, for example, the majority of claims come from individual consumers or their organizations, not from competitors.

World Bank panel) to participate in the negotiations concerning remedies.⁶⁹ Increasingly however, important exceptions can be identified, where private enforcement mechanisms have been made accessible to third parties, as in the field of advertising, CSR and e-commerce. In advertising, individual and consumer organizations can bring claims before SROs (self-regulating organizations) and seek remedies to correct or to eliminate misleading or indecent advertisements.⁷⁰ In CSR, workers of the suppliers are given access to compliance committees composed of representatives of trade unions and the enterprises.⁷¹ However, access is not the only explanatory variable for the allocation of dispute resolution among different enforcement mechanisms. Exit can certainly contribute to explaining the division of labor between the three modes of enforcement. Private enforcers dispose of organizational sanctions through which they have control over membership, since they can order expulsion or terminate the contract. These sanctions typically apply to disputes between regulator and regulatees, or among the latter. They do not apply by definition to those with third parties. Thence different sanctioning techniques can explain the division of tasks.

Private non-judicial enforcement is used in the first two cases, where disputes concern regulators and regulatees in compliance with the principle of forbearance.⁷² Judicial enforcement often limits its intervention to the last two cases; that is, those in which third parties are involved.

In fact, as exemplified in the field of corporate law, the first two sets of disputes are often considered internal affairs of the organization and left to their internal rules, but for listed public corporations where a higher level of monitoring, both by internal members (minority shareholders) and by the regulator, is required. On the contrary, judicial enforcement often grants wider access to third parties, who are negatively affected by the private regimes, be they competitors of the regulated or their customers.

Enforcement of these four types of disputes plays a very different role within the context of the regulatory regime and, consequently, its link with legitimacy differs. In order to examine the different mechanisms and compare them, it is useful to distinguish between: (1) *internal legitimacy*, concerning the relationships and disputes between regulators and the regulated or among the latter; and (2) *external legitimacy*, concerning the

⁶⁹ See the examples provided by Richard Stewart, Chapter 1, this volume. For a more general overview see A. Peters (ed.), *Non-state Standard Setters*, CUP, 2009.

⁷⁰ See Paul Verbruggen, Chapter 11, this volume.

⁷¹ See Estlund, Chapter 8, this volume, p. 237ff.

⁷² In the domain of international organizations this is the area where litigation before domestic courts has developed.

relationship between the regulator and the regulated on the one hand, and third parties, on the other hand. Access to and definition of jurisdiction by private enforcers reflect different combinations of internal and external legitimacy to be achieved via enforcement.

A more complex set of issues, beyond the scope of this paper, concerns regimes' interdependences and their effects on enforcement.⁷³ Conflicts are understood to exist among regimes even if they take the form of disputes between the regulated and beneficiaries or between two classes of regulated entities, which have subscribed to different, competing regulatory regimes. These conflicts, and the subsequent disputes, occur between different private regimes but also between public and private regimes.⁷⁴ One example is provided by regimes making rules in violation of other regimes. The enforcement of rights, grounded on one TPR and violated by another TPR, occurs when, for example, a technical standard setting body defines standards in violation of environmental or consumer rights conferred by a different private regime. Disputes among regimes are often settled by way of negotiation rather than adjudication. When they repeatedly arise, a governance response beyond simple negotiation is provided.

THE AIM OF THE BOOK AND ITS CONTRIBUTIONS

Enforcement of TPR is manifested in a large variety of forms, which have emerged over time as a result of sector-specific dynamics associated with different market and governmental failures and distributional effects. Therefore, addressing enforcement mechanisms implies factoring sector-specificity into the general scheme of transnational adjudication, which makes generalization rather hard. The contributions show that no single answer to the question of TPR's enforcement can be given: adjudication of disputes in transnational private regimes reflects a very diverse set of rules and principles, partly associated with the specificity of sectors, and partly with divergent national legal systems supplying substantive and procedural rules, elected according to the *lex fori* and the applicable law when private enforcers are created. Nonetheless, it may be useful to try to identify a

⁷³ In the domain of transnational public regulation an ever more frequent example is that of financial conditionality deployed by the World Bank and the IMF to impose on firms the adoption of standards concerning employment, safety or environmental standards. See on these issues Stewart, Chapter 2, this volume and Francioni, Chapter 5, this volume.

⁷⁴ See Stewart, Chapter 2, this volume.

common frame to explain the high degree of differentiation among enforcement regimes in different fields.

Enforcement in TPR operates to ensure compliance with privately produced rules, which are often conflicting. It influences the process of transnational legal harmonization and the creation of regulatory practices, which could give rise to private regulatory customary law. Unlike public international law, where a common framework exists, it operates in the background of different, at times conflicting, procedural and substantive domestic laws, which may result in privileging private rather than judicial enforcement to the extent that parties have a choice between the two regimes, or at least, can sequence access to them. Voluntary sequencing occurs when disputant parties, or the organizations to which members have subscribed, introduce a mandatory provision imposing the preliminary use of private non-judicial enforcement and only after unsuccessful attempts at non-judicial enforcement permits access to courts.

Research both within TPR and comparative research on the interplay between TPR and public regimes, specifically focusing on enforcement, is still very preliminary. The contributions to this book aim to fill this gap by providing a conceptual framework to be complemented by further empirical research which will shed light on rules and practices. In the first section, framing chapters provide a general overview of public and private transnational enforcement models; the second section looks at enforcement models of public international law, primarily in terms of public enforcers, while the third, in contrast, is specifically devoted to enforcement of private regimes. The fourth part contains a final concluding chapter which offers a broader view of hybrids and how public and private enforcement systems are linked.

Richard Stewart (Chapter 1) focuses on the enforcement of transnational public regulation. He subscribes to a broad definition of enforcement, which includes administrative orders, requiring or prohibiting conducts, imposition of penalties, criminal prosecutions and civil actions brought by governmental officials. The chapter begins from the premise that credible and effective enforcement is essential to those transnational regimes which promote the protection of regulatory beneficiaries. Stewart distinguishes between enforcement and review, and, within the latter, between the review of administrative domestic bodies, implementing transnational rules, and the direct review of transnational rules by administrative and judicial bodies. He emphasizes the role of liability as a monitoring device to secure compliance by the regulated, with both private rights of initiation and private enforcement rights. In relation to judicial review, he distinguishes three approaches adopted by domestic courts: one applies the same test for

domestic and transnational norms, another gives more deference to transnational norms, while the third denies the applicability of transnational norms altogether, asserting their political rather than legal status. Stewart provides a conceptual framework for enforcing transnational public law, identifying four sets of related variables: applicable laws; targets of remedy; courts or tribunals providing the remedies; and types of remedy. He emphasizes that there has been a growing trend towards extending the rights of the regulated against the regulators to regulatory beneficiaries. The empowerment of beneficiaries derives primarily from transnational norms, giving NGOs rights to enforce compliance before national administrative bodies or courts. He specifies however that this trend is uneven across jurisdictions, and even where it is more pronounced (i.e. the USA) regulatory beneficiaries have not yet gained an equivalent position to that of the regulated. Stewart suggests that the rationales – harmonization and enhanced protection of regulatory beneficiaries – for this expansion of rights, might differ in relation to transnational regulation as compared to domestic regulation.

Fabrizio Cafaggi (Chapter 2) provides a framework for examining the enforcement of TPR, focusing primarily on the relationship between judicial and non-judicial private enforcement. The former occurs primarily via domestic courts engaged in enforcing, interpreting, and, to a limited extent, reviewing transnational private regulation. The latter follows very different patterns and is much less homogeneous than judicial enforcement, even internalizing divergent interpretations. It goes from first-party to third-party enforcement via professional, specialized institutional bodies such as arbitral institutions. Cafaggi first identifies the main differences between the two sets of mechanisms along the same variables, focusing on the nature of the dispute and the identity of litigants, the power of the enforcer, the adversarial or inquisitorial nature of the proceedings, the relationship between the enforcer and litigants, the type of sanctions and their enforcement, and the degree of procedural due process. He comes to the conclusion that they operate as complementary devices, both horizontally and vertically (at the international and domestic level). Complementarity however is spontaneous rather than designed and often the interaction is not optimal and does not achieve the expected results, consequently giving rise to divergences and resulting in a situation lacking coordination and sequencing. He concludes with some policy recommendations for better coordination mechanisms, both within and across jurisdictional mechanisms, designed to ensure effective compliance with transnational regulatory policies.

Eyal Benvenisti and George Downs (Chapter 3) discuss the role of NCs in regulating TPR, examining substantive and procedural doctrines in the light of the values of economic efficiency, democracy and equality. Among

the former, they indicate those concerning the limits and constraints of delegating rule-making power, the role of competition law, the *Drittwirkung* and the principle of proportionality. These examples illustrate how NCs have been trying to ensure compliance with (some) public values, thereby reducing the risk of self-interested private regulation. Benvenuti and Downs then examine procedural norms, starting from the premise that private law litigation, within which TPR disputes are decided, is generally less open to participation than public law litigation. Standing is based on different requirements: that is, showing a legally protected interest versus establishing the infringement of a right. On the other hand, private litigation does not face territorial boundaries to the same extent as public law litigation, especially when the regulator is protected by immunity. Given the functional rather than the territorial dimension of TPR, NCs can subject private regimes to judicial scrutiny on the basis of their (adverse) effects. They then analyze NCs' incentives to intervene and police TPR, suggesting that collective action problems arise in relation to two different issues: (1) the adverse or beneficial effects produced by TPR; and (2) considering potentially conflicting incentives they allude to how the NCs can coordinate or avoid divergent interpretation of the same TPR.

Colin Scott (Chapter 4) firstly addresses the boundaries between compliance and enforcement, suggesting that they should be examined contextually. Scott analyzes and contrasts public, private and hybrid enforcement regimes, asking in particular whether and how the enforcement of TPR differs from public enforcement in the domestic realm. On the basis of the debate triggered by Ayres and Braithwaite's enforcement pyramid, Scott concludes that the distinction between public enforcement, based on formal legal instruments, and private enforcement, based on soft, informal features, is inaccurate. The effectiveness of soft and informal measures is often ensured by the reinforcement (potentially) provided by formal sanctions. Within the private domain, he focuses on non-judicial enforcement, pointing out that the reach of these regimes is at the same time narrower, because of contract law limitations on third-party effects, and wider, because it crosses States' boundaries to a much greater extent than public enforcement. He then examines the different private models, including organizations, supply chains and contracts, underlining the importance of non-judicial enforcement and their interaction with compliance-securing devices in relation to the courts' intervention. Scott finally moves on to consider hybrid forms of enforcement where public, including judicial, and private enforcement mechanisms co-exist. He identifies three sets of reasons why such hybrids might emerge: incomplete regulatory capacity, demand by national legal systems to make enforcement binding and lack of organizational capacity and expertise.

Francesco Francioni begins the second section, which is devoted to public international law. His contribution focuses on the role of national courts in enforcing international law and thus serving international justice, complementing the contributions of both international courts and diplomatic means. After glossing over the influence of the monist/dualist debate on domestic enforcement and suggesting that the subject has gained new insights, Francioni examines the different functions of domestic courts. He distinguishes between the production of customary law and treaties' applications. In relation to the former, he draws attention to the necessity for domestic courts to engage in comparative evaluation and international practices in order to avoid diverging interpretations. In relation to the latter, he focuses on enforcement, interpretation, and then, in relation to treaty application, touches upon invalidity and termination. He then moves on to consider the relationship between domestic courts and national executives, subscribing to Conforti's thesis of judicial independence, and contends the desirability of limiting the executive's power to 'breach' international law by adopting new practices, thereby deviating from current treaty-based law. According to Francioni, NCs are asked to play a more active role in 'governing' the interaction among international and domestic legal orders. Three challenges stand before them: (1) the removal or minimization of doctrinal obstacles to the effective implementation of international law in the domestic sphere (judicial deference to the executive, incorrect application of immunity); (2) the infusion of international law concepts in domestic laws in order to contribute further to legalizing international relations; and (3) the widening of the sphere of justice beyond the boundaries of nation states.

Ernst-Ulrich Petersmann's chapter locates TPR within the broader context of international economic law and its constitutional foundations. TPR, with its multilevel judicial review and enforcement, constitutes a response to the constitutional Westphalian failures of international law in supplying global public goods in a manner similar to an efficient world trading system, promoting the adequate protection of fundamental rights and the rule of law. However this response is not boundless. Limitations of both governmental and market failures require constitutional restraints of abuses, of both public and private powers; the same is true within TPR. Compliance with the rule of law can serve to minimize risks of abuses; however it is a highly contested concept, both from a disciplinary and an institutional perspective. Petersmann analyzes different disciplinary and institutional perspectives of the concept, reaching the conclusion that only an integrated view could satisfactorily address the governance failures that give rise to the underproduction of global public goods. In particular he defends a constitutional approach to economic international law based on citizens' fundamental rights. The international rule of law that emerges

should, in Petersmann's view, prevent abuses of foreign policy powers and promote a moral duty of justice.

Kevin Davis' chapter opens the third section. He compares different legal forms of transnational enforcement institutions. In particular he addresses for-profit, non-profit and public international organizations, evaluating the advantages and disadvantages of each form in relation to both incentives and resources. He firstly critically addresses the literature on for-profit/commercial providers, and then describes the real world of transnational arbitral institutions, and shows that an interesting mix might exist between for-profit and non-profit forms, with a significant relevance attached to the latter. Davis suggests that for-profit enforcement providers may be at a disadvantage in terms of access to labor, capital and information vis-à-vis non-profit enforcers. Furthermore, they may be less responsive to public interest and third-party externalities and to demand for high quality services. In the following section, he identifies the benefits of using non-profit forms among which, the following stand out: the ability to internalize third-party effects and the provision of procedural incentives to widen access; the willingness to consider distributional effects; the incentives to promote legal innovation; and the possibility to rely on professional volunteerism. From the perspective of incentives, the non-profit forms show remarkable advantages, which partly explain the choice made by arbitral institutions, on which the discussion is primarily based. However, he concludes that the analysis is too preliminary to draw final conclusions on the optimal organizational forms of transnational enforcement, but for the claim that they are relevant in relation to efficiency.

The focus of Cynthia Estlund's chapter is supply chain enforcement of labor standards. Cynthia Estlund concentrates on the MNCs' role in monitoring and enforcing codes of conduct concerning suppliers' compliance with labor standards. The chapter is divided into two parts; the first describes the field's most recent evolution while the second addresses the main issues arising in relation to codes' enforcement. She suggests that the structure of the supply chain is changing due to the adoption of new monitoring practices, confirming the general view that there is a dual causal correlation between private regulation and the supply chain features. She identifies two potential trade-offs framed as policy dilemmas: (1) increasing enforceability raises costs and may create disincentives to buy into CSR programs; and (2) the use of CSR programs may crowd out public norms or at least decrease their effectiveness. Estlund explores the different types of relationships involving labor standards' implementation and the various available enforceability instruments. She reaches the conclusion that current doctrines, especially in the US, and the institutional weaknesses of judicial systems in developing economies, make judicial enforcement a

relatively poor response, and thus she examines the potential of non-judicial mechanisms as more effective alternatives. After briefly touching on the possibility of creating a global tribunal for enforcing privately designed labor standards, she focuses on arbitration and the core principles that should guide labor arbitration as the enforcement mechanism for transnational disputes. She concludes that, building on the Fair Labor Association's party complaint procedures, the inclusion of arbitration provisions could increase the level of lead firms' accountability for compliance with CSR standards.

Geoffrey Miller (Chapter 9) considers different types of regulations actively involving private actors: house rules, cartels, contracts, internal compliance, private standard setting bodies, and private litigation management-based regulation. In some cases they are limited to standard setting, leaving enforcement to public bodies, as is the case for the accounting standard system, primarily implemented and enforced by public or private but state-created bodies. The extent of the involvement of the public varies; it is minimal in the first three (house rules, contracts, cartels), it induces private regulation in the other three (internal compliance, private standard setting bodies and private litigation), while it is rather more relevant in the case of management-based regulation. The chapter identifies seven factors that determine the pattern of public/private interaction and ultimately the mode of enforcement: (1) minimization of transaction costs; (2) access to information; (3) expertise; (4) political power of the regulated industry; (5) contests over regulatory turf; (6) regulatory budget constraints; and (7) history or path dependence. It is the different combination of these variables that can explain the current forms of enforcement and their evolutionary pattern.

The chapter by Federica Casarosa (Chapter 10) deals with Internet regulation, with particular emphasis on private regulation. The analysis focuses on two peculiar cases of private regulation: one, already addressed within the academic debate, concerning the ICANN regulation; and the other, more recent but amassing interest, concerning the online auction website regulation, taking as an example, the eBay website. The two cases provide distinct examples of private regulation where the enforcement systems are organized differently, due both to the governance structure adopted and to the type of actor that is subject to the regulation. While the ICANN model is focused on the management of the technical architecture of the Internet network, providing a transnational private regime based on a chain of contracts, the eBay model is focused on the regulation of commercial exchanges through an online auction system, where the parties accept the rules of behavior defined therein without involving the latter in the commercial exchange. The comparison between the two cases shows

that the level of formality of the enforcement system is higher where the technical infrastructure of the Internet is involved and the rules are to be included in linked contracts, to the extent that such a framework requires not only clear-cut rules concerning procedures but also specific rules about the proceedings, thereby ensuring some degree of procedural fairness.

Paul Verbruggen (Chapter 11) examines enforcement in advertising. While standard setting follows a multilevel pattern, enforcement is highly decentralized with some efforts made to harmonize by reference to best practices defined by the European Advertising Standards Alliance (EASA). After describing the regulatory chain and emphasizing the importance of the International Chamber of Commerce (ICC) and EASA, and the discretion of national SROs in designing their codes, Verbruggen focuses on the five key variables concerning decentralized enforcement systems in order to answer the more general question of the potential costs to which decentralization gives rise. The first variable is timing: the relationship between *ex ante* and *ex post* control. Within the discussion of *ex ante* control, copy advice (voluntary) and pre-clearance (when there is a duty on the enforcer to act) are considered. Here, variations of the *ex ante* and *ex post* combination among private enforcers are significant. The second variable is the composition of the enforcing body, and in particular the participation of non-industry members. The third is related to procedural features. The fourth variable is concerned with differences in remedies and sanctions and the fifth concerns the type of media involved. In the conclusion of his chapter, Verbruggen examines the degree of procedural fairness in SROs' proceedings. The reason for the variation observed across private enforcers is that the occurrence of this variation depends on whether the SRO (is considered to) exercise(s) a public function. Where this is the case, jurisdiction over third parties, recognition of a duty to give reasons, and an open hearing are generally granted, with some differences existing across jurisdictions. In the negative case, where the SRO is not considered to exercise a public function, a much lower threshold of procedural fairness is required. Verbruggen concludes that while common standards of procedural fairness are not applied in their entirety, nevertheless, a common principle recognizing due process rights applies to private and judicial enforcement. Further empirical research is required to explore private regulation in action.

In their concluding chapter, Cassese, D'Alterio and De Bellis describe enforcement mechanisms in TPR. They start by asking definitional questions, concerning both the nature of private regulation and its enforcement mechanisms, and specifically whether enforcement of TPR should be considered to be an oxymoron. In particular, they examine whether TPR enforcement is limited to self-enforcement mechanisms, usually deployed

by conventional self-regulatory regimes, or whether it is based on a combination of private and administrative enforcers that jointly collaborate to enforce transnational private rules. After considering ten examples in various sectors, building on the Leebron linkages approach among different regimes, they identify three different sets of mechanisms in relation to which this hybridity materializes, according to the various degrees of effectiveness exhibited therein. A first model, with soft effectiveness, is based on monitoring by administrative bodies within private regulators. A second model, with medium effectiveness, encompasses arbitration and quasi-judicial remedies. A third model, with hard effectiveness, operates when public actors participate directly in enforcing the standards, primarily through decentralized mechanisms that include direct sanctioning power. According to the authors, linkages among public and private enforcement regimes can reach the point of interchangeability, thence creating overlapping jurisdictions. Regimes' linkages are grounded on various rationales: they improve effectiveness, they avoid or solve overlapping problems, and they facilitate the interchangeability of enforcement mechanisms. Cassese, D'Alterio and De Bellis conclude that the enforcement of TPR is not a fictitious oxymoron since 'first, it is not always self-enforcement, but often third party (public or private) enforcement; second, it is not always private, but increasingly hybrid, regulation' (p. 365).

LOOKING FORWARD: A RESEARCH AGENDA FOR TPR ENFORCEMENT

TPR regimes vary significantly across organizations, sectors and territories. Their enforcement results from different combinations of judicial, administrative and private non-judicial enforcers. They deploy different instruments to solve disputes, and review and interpret private regulations. The current diversity suggests that different TPRs call for related enforcement schemes and that a one-size-fits-all model would not adequately reflect normative regulatory pluralism.

An important distinction emerges from the public/private divide. The jurisdiction of public enforcement regimes, including both administrative agencies and domestic courts, tends to be general and territorially-based; while private non-judicial regimes are sector-specific and functionally-based, with jurisdictions overcoming states boundaries. This has not always been the case but it goes back to the move, in the public domain, from personal to territorial jurisdiction. The public/private distinction today remains, even if, especially within judicial enforcement, a tendency towards extraterritorial effects of judgments and specialized global international

courts is becoming consolidated, albeit with important differences among states. Clearly the public/private divide is reduced when TPR is directly enforced by international organizations whose 'jurisdiction' tends to be both functional and territorial. The second difference concerns the existence of general principles in public international law and global administrative law, while within the private field, no general framework exists and domestic jurisdictions differ both institutionally and substantively (especially in relation to procedural laws). These differences pose additional problems when, as it is often the case, the enforcement regimes co-exist and overlap, thereby making coordination at transnational level a necessity. Coordination is necessary not only within the public (between courts and agencies) and the private spheres, but also between them.

While the book provides a new conceptual framework to integrate diverse methodological approaches, given the preliminary stage of the research it poses more questions than it is able to answer. The following list summarizes some of the main findings while refining open research questions to be further investigated.

1. In transnational regulation, and particularly in TPR, enforcement cannot be disjoined from standard setting and compliance. There is a significant functional interdependence among the different stages of each regulatory process, far stronger than that observable in other areas of transnational private law, that is commercial transactions. Such interdependence is linked to the governance structure of private regulators, and, in particular, to the degree of functional separation between standard setting and enforcement. The need for independent private enforcers has characterized the evolution of TPR over the last 20 years; impartiality and other due process guarantees are correlated to independence. Less independence corresponds to lower procedural due process. Structural separation between rule-makers and enforcers depends also on the choice between first and third-party enforcement. When lead firms are direct enforcers, it is achieved by devising internal separation within the corporate form. When associations of firms or multi-stakeholders are the enforcers, the separation is realized through the creation of groups or independent bodies coordinated via regulatory agreements or memoranda of understanding. Clearly, the degree of functional separation, and consequently of impartiality, is lower than that potentially achievable through third-party enforcement, where professional and 'independent' organizations operate. However within third-party enforcement, there exist numerous models exhibiting different degrees of impartiality depending on the for-profit/non-profit nature of the organization, the 'for

sale' or 'for free' performance of enforcement services, and the professional or voluntary identity of the enforcer.

The efforts to achieve separation have been quite successful in some sectors, like sports, advertising and CSR, and less so in others, such as e-commerce and data protection. They vary according to the number of standard setters and the level of market concentration of regulated entities. Clearly, the necessity for functional separation within the private regulatory entity is linked to the role of public, domestic and transnational regulators and that of courts. Effective public enforcement renders less dramatic the need for structural separation in the private domain. However, it does not eliminate the desirability of functional separation between standard setters and enforcers in order to grant impartiality, accountability and legal innovation.

There is no necessary conflict between: (i) the need to separate private standard setters and enforcers to avoid conflicts of interest and to ensure effective compliance; and (ii) the necessity to govern interdependence among different stages of the regulatory process. However, the simultaneous pursuit of structural separation and functional integration requires the careful governance design of transnational private regulators. More empirical research is needed to verify how effective structural separation has been and how the trade-offs between impartiality and effectiveness operate.

2. The specific correlation between standard setting and enforcement is highly relevant. Enforcement tools and institutions are linked to the choice of the specific regulatory model and the composition of the private regulatory body. Command and control requires enforcement mechanisms quite different from responsive or market-based regulation.⁷⁵ Different relationships between regulators, regulatees and beneficiaries, reflected in each regulatory option, give rise to various combinations of legal and non-legal enforcement, and, within legal instruments, between judicial and non-judicial ones. The attempt to provide a general framework for TPR enforcement has to meet the challenge of distinguishing among different rule-making techniques and sector-specificity. The framework developed in CSR differs from that deployed in environmental or data protection because private regulators have to address different market failures, and in doing so, address different incentives to infringe rules within the same regime, let alone among diverse regulatory regimes.

⁷⁵ See Stewart, Chapter 1, in this volume.

Often, when these are industry-driven standards, firms are both the regulators and the regulated, but having different incentives across sectors. The regulation of data protection developed by IT firms will be applied to environmentally-friendly firms that enact environmental standards to be applied to other manufacturing enterprises. The regulatory cascade is sometimes entirely within the industry components but with divergent regulatory objectives. The scope of regulation for these three categories may differ significantly and bring about the misalignment of incentives, a result that has to be addressed in the enforcement design.

The picture becomes more complex when private regulators include, in their governing bodies, several potentially conflicting components both within industry and between industry and NGOs. An even higher degree of complexity occurs when the interplay with international organizations is added. More empirical research is needed to identify the differences that private regulatory autonomy has developed when devising the correlation between standard setting, monitoring and enforcement. What needs to be tested is, for example, whether private regulators, with a high degree of NGOs present in their governing bodies, will set up different enforcement mechanisms which open up to third parties to a greater extent than those established by industry-led regulators, in relation to which NGOs act only as external claimants.

3. The link between governance and regulation influences enforcement options and their effectiveness. This is clear for private non-judicial enforcement but to some extent might be true for courts and administrative bodies as well. The regulatory strategy depends also on the models of private regulators' governance. In particular, it is relevant whether the choice between contractual or organizational forms and, within them, between for-profit and non-profit, will affect the selection of enforcement mechanisms and the degree of (domestic) judicial intervention. In the case of contractual transnational regulation, as represented, for example, by supply chains, the regulator, generally the lead MNC, acts as an enforcer vis-à-vis the regulatees (the suppliers), using its market power to threaten contract termination in the case of non-compliance along the chain. Contractual arrangements generally call for a higher degree of judicial enforcement, but in relation to self-enforcing contracts, courts generally only intervene *ex post*. When in place, regulatory contracts may increase the effectiveness of regulatees' compliance, but will have very limited access to third-party beneficiaries. Hence they do not enhance protection of regulatory beneficiaries and fail to capture the losses suffered,

through regulatory infringements, by the whole chain. When organizational models are chosen, especially multi-stakeholder bodies, dispute resolution and enforcement mechanisms tend to be more proceduralized and combined with peer monitoring, supplemented by social and market accountability systems. Clearly, there is a correlation between the degree of internal hierarchy of the organization and the combination of legal and non-legal enforcement.⁷⁶ Non-legal enforcement often increases with the growing degree of hierarchy in the governance of the regulator.⁷⁷

4. Enforcement, effectiveness and legitimacy are strongly linked. Effective enforcement provides legitimacy to the regulatory process. Depending on the identity of the litigants and the nature of the disputes, different effects on legitimacy emerge. When access to the dispute resolution is limited to the members of the regulatory body, internal legitimacy may be preserved, but external legitimacy towards third parties and the public is limited.
5. A fifth question concerns the relationship between judicial and non-judicial enforcement and the manifold role of domestic courts in enforcing transnational regulation. The implementation and enforcement of TPR are still decentralized, creating coordination failures both within and between enforcement mechanisms.⁷⁸ A general transnational legal framework concerning principles of implementation and enforcement could help to address some of these failures. Some indications come from private meta-regulators, which have started to propose common rules for quality and effectiveness. Enforcers can freely adopt these rules or refer to them in the case that a specific dispute arises. The rate of adhesion by private regulators to these rules is quite impressive given the short time they have been in place; it suggests that when the goal is bottom-up harmonization the regulatory failures generated by the absence of common rules are rather significant.

⁷⁶ However there is no necessary causal correlation between the choice of organizational form and the degree of internal hierarchy. In some organizations hierarchy is very low and compliance is secured through peer control rather than authority.

⁷⁷ Hierarchy is not a substitute for enforcement, but it affects the ratio between legal and non-legal tools.

⁷⁸ In relation to transnational public regulation, Stewart identifies three causes of enforcement failures: lack of coordination among enforcement bodies; lack of legal capacity; and inaction. (See Chapter 1, this volume.)

6. A related issue is that of jurisdiction over inter-regime disputes. The development of regulatory instruments that apply across sectors is raising important jurisdictional questions about the identity of the competent enforcer and how far its powers can go.⁷⁹ Private enforcers have limited jurisdiction and are often unable to settle inter-jurisdictional disputes. Which bodies can solve conflicts among transnational regimes? Domestic courts have often provided solutions, but the rendering of divergent interpretations has reduced certainty and caused implementation problems. Increasing judicial cooperation on transnational disputes constitutes a partial answer to this problem, but, ultimately, any solution should also include the vertical dimension between national and international courts.⁸⁰
7. The widespread use of TPR poses daunting challenges to the principle of state-sovereignty and democracy.⁸¹ Domestic courts can exercise a powerful role by accepting or denying the effects of private regulation. They can incorporate transnational private standards into domestic systems or oppose their entry into national legal orders. How legitimate is their role? Which institutions should contribute to the evaluation of whether and how TPR should have access to domestic orders? How useful is the scheme developed by public international law?
8. Enforcing TPR implies references to domestic private laws since most of the constitutional contracts and charters are incomplete. Traditional domestic private and procedural laws, developed primarily within States' boundaries, provide the basis for the governance of these transnational regimes, but show their weaknesses in respect of the foregoing challenges. Transformations of private law instruments are taking place in contract, property and tort law. As a result, a combination of private and public law instruments, the former mainly related to governance, the latter to the activity, has been designed by regulators or imposed by enforcers, in particular by

⁷⁹ For example, when the members of one organization have committed to comply with those undertakings contained in a code of conduct enacted by a different organization. The DSB would have jurisdiction only for violations of those undertakings committed by regulated entities but not over the interpretation of the code enacted by a different regulator, if this is conflicting with that provided by the drafting organization.

⁸⁰ See on both vertical cooperation and competition, Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, OUP, 2007.

⁸¹ Many contributions to this volume refer to these challenges and the role of enforcement. See in particular Benvenisti and Downs, Chapter 3, this volume, p. 00, and Cassese, D'Alterio and De Bellis, Chapter 12, this volume, p. 238.

domestic courts, to meet accountability and effectiveness requirements.⁸² The GAL project has contributed to a better and innovative understanding of these instruments and their operation across sectors. This combination, however, requires that a fresh look is taken of the private and public divide in the transnational context. The distinction remains important but it requires that hybrid features, combining public and private enforcement mechanisms, be accommodated. Internal reforms of both substantive and procedural private laws to adapt the regulatory nature are necessary.

This book's contributions address these challenges both to scholarly and practitioners' communities.

⁸² See e.g. Swiss Federal Tribunal decision of November 24th 2010, BGE 132 III 389 SC.2 2 pp. 392ff; Federal Tribunal decision of January 5th 2007, 4P 240/2006; Federal Tribunal decision of September 28th 2010, 4A_144/2010 of September 28, 2010; Swiss Federal Court 15 March 1993 *Gundel v Federation Equestre Internationale*, BGE 119 II, S. 271ff.; *Club Atlético de Madrid SAD gegen Sport Lisboa E Benfica – Futebol SAD*, Federal Court, 136 III 345/4A_490/2009, 13 April 2010.