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Convergences and divergences: Comparing contractual and organizational models in international regulatory cooperation.

Transnational private regulation has dramatically grown in the past decades. Many private regimes spurred, sometimes as a response to fragmentation and proliferation of public domestic regulations. Different forms of regulatory cooperation among private actors have emerged, often supported by international organizations. On the one hand the model of multistakeholder organizations, including various constituencies whose interests are divergent and at times conflicting. On the other hand agreements between regimes' owners which have designed forms of cooperation ranging from mutual recognition to common standard setting. A third pathway is creation of private meta-regulators, entities which regulate private regulators. The paper describes and compares the three models providing possible explanations about the drivers of each form and the evolutionary patterns driving from 'contractual' to organizational forms of regulatory cooperation. It deploys the conventional contract/organizational alternative to explain different patterns of regulatory cooperation based on the degree of divergence and convergence of regulatory objectives amongst the various transnational constituencies. It concludes with some policy recommendations concerning the governance of multistakeholder organizations engaged into regulatory cooperation and the features of regulatory agreements among private regulators.

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Introduction

Transnational private regulation (TPR) includes a large number of private regimes that regulate behavior of multinational firms and their interaction with investors, consumers, local communities². It consists of regulatory regimes designed and implemented by private actors often in collaboration with international organizations³. Standards are voluntary and firms subscribe to the regimes. The legitimacy of TPR is linked and partly based on its effectiveness. Effectiveness of TPR differs from that of public regulation and its metric for evaluation is defined accordingly. What makes a private standard successful or unsuccessful both in terms of adhesion and effectiveness is the response of regulated entities to the standard and its governance. Supply and demand of private standards are determined by market like dynamics which differ from public standards where states play a dominant role⁴. This is not the case in public regulation where standards are usually mandatory and compliance is binding⁵; the incentives of regulated entities to comply play an important role but are not the only determinant of the standard's effectiveness. Despite these differences private and public regulation at transnational level are intertwined and the international organizations play a significant function in making TPR effective⁶.

¹ This paper was first presented at the conference on Convergence and Divergence in Singapore on december 8th and 9 th 2016 organized by SMU and City University of Hong kong. It has benefitted from several interviews and conversations. I would particularly like to thank Daan de Vries and Dirk Straathof (UTZ), Jeanne Stampe (WWF), Daniele Gerundino and Sean McCurtain (ISO) for their time and their insightful comments about private regulatory competition and cooperation. For useful exchanges I would also like to thank Celine Cauffman and Nick Malyshev of OECD. Responsibility is mine.

² See F. Cafaggi, the many features of transnational private rule making, unexplored relationships between custom jura mercatorum, and transnational private regulation, Penn Journal of international law, 2015, p. 00, G. Shaffer, Theorizing Transnational Legal Ordering, available on ssrn.

³ On the role of IOs in relation to transnational private standards and the different types of transnational regulations see Abbott and Snidal, The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State, in Walter Mattli and Ngaire Woods, eds., THE POLITICS OF GLOBAL REGULATION, princeton University Press, 2009, p. 44-88. *"The explosion of transnational regulation is a very recent phenomenon. Figure 1.4a above shows the situation before 1985, when there were very few transnational schemes of any kind.8 Figure 1.4b shows the decade 1985-94; the rapid proliferation of Zone 2 business schemes in Figure 1.4b reflects the beginnings of the corporate social responsibility movement, which has made it de rigueur for companies operating internationally to adopt codes of conduct and report their social and environmental impacts. In Figure 1.4c, 1995-2004, self-regulation continues to spread, involving entire industries as well as individual firms. And civil society and private collaborative organisations begin to proliferate. Finally, Figure 1.4d shows the period since 2005. One might expect the formation of transnational regulatory organisations to have slowed by this point in time; remarkably, however, it has accelerated: nearly half of all Zone 6 schemes, and virtually all tripartite Zone 7 schemes, were created since 2005. "*

⁴ This is not to deny that private actors do not play an indirect paramount role to influence states' decisions about international standards.

⁵ Even in the field of public international standards there is an increasing number of voluntary standards based on soft law. These standards are often addressed to firms as the OECD Guidelines on multinational enterprises or the Multinational enterprise declaration issued by ILO. Both soft law and private standards are voluntary but the incentives to adopt and comply with them significantly differ.

⁶ See Kingsbury and Stewart (eds.) Global Hybrid and Private Governance (Oxford University Press, 2017., K. Abbott, International organisations and international regulatory co-operation: Exploring the links, in International organizations and international regulatory cooperation, OECD, 2014, p. 17, *" The UN Environment Program (UNEP) has been a particularly active orchestrator, helping to create and support the Global Reporting Initiative (the most widely used standard for corporate sustainability reporting), the Principles for Responsible Investment and other transnational*

The chapter examines these regimes and tries identifying determinants of convergence and divergence. Do private transnational regulatory models vary? Are they converging towards common characteristics? What are the factors determining divergences or convergences?

Differences across private regulators concern standard setting, implementation, monitoring compliance and assessing conformity, enforcement and sanctioning. The models of TPR are sector specific and generally tailored to the particular market structure of regulated entities. These variations relate to both the governance and regulatory activities⁷. How can differences be explained beyond sectoral distinctions that certainly contributes to variation? They concern the content of the standards: private regulators engaged in financial regulation differs from those addressing e-commerce or sustainability. Differences are driven by market structures and trade flows where regulated entities operate. But differences can also be based on the regulatory objectives and in particular whether regulators aim at increasing efficiency by removing barriers to trade or protecting interests and values that are not internalized in market prices (negative externalities, global bads) or are undersupplied (global public goods). These variations when excessive may produce fragmentation, increasing regulatory costs without additional benefits. Furthermore differences can generate race to the bottom and undermine the credibility of the entire field. Reputation in private regulation is a key feature to legitimacy and accountability. Regulatory cooperation can represent one possible response.

A satisfactory comparative methodology for transnational private regimes is still missing. The objective of the chapter is however more limited. The main question concerns the impact of international regulatory cooperation on divergence or convergence of transnational regulatory models. The paper demonstrates a correlation between forms of cooperation and modes of convergence. Firstly the analysis shows that conventional comparative methodology used for state laws is unsuitable to compare transnational private regimes. Secondly the determinants of convergence or divergence of transnational regulatory models differ from those affecting the evolutionary patterns of state legal systems. The thesis developed in the chapter is that conflicts in the private sphere generate divergences in regulatory models whereas alignment of interests produce cooperation and convergence. Conflicts trigger institutional responses which may promote different degrees of convergence in regulatory models. Various forms of regulatory cooperation may bring different types and degrees of regulatory convergence. We distinguish between contractual and organizational forms of cooperation and describe the type of convergence that results from each family of cooperative instruments. First contractual cooperation among regime owners is examined. Secondly the role of private meta-regulator as drivers of cooperation is considered Thirdly organizational cooperation is analysed up to the most extreme form of regulatory integration. Then a comparative analysis of the different forms describe the correlation with convergence of regulatory models. Concluding remarks follow.

Transnational private regulation and the private sphere: from conflicts to cooperation. The drivers of regulatory convergence

Private actors include trade associations, global labor unions, NGOs, multistakeholder organizations encompassing industry, trade unions, and NGOs. NGOs are engaged in regulatory activities when they design and implement standards and principles to be applied by enterprises along their global supply chains⁸. Within the term NGOs we include single and multistakeholders representing various interests affected by the economic activities. A well known example is the Forest stewardship Council (FSC) with the three chambers

schemes. The International Finance Corporation (IFC), part of the World Bank Group, helped launch the Equator Principles; the two organisations meet regularly to keep their standards aligned."

⁷ On the interplay between governance and regulatory activities by private regulators see F. Cafaggi, Transnational private regulation. A comparative analysis, legitimacy, effectiveness, quality and enforcement. EUI w.p. 2014/15 available at www.eui.eu.

⁸ I use the term non governmental organizations interchangeably with the term Civil society organizations (CSO).

that represent environmental, social, and economic interests⁹. A similar multistakeholder structure is that of Round table of sustainable palm oil (RSPO) or the Roundtable on sustainable soy (RSS) with many constituencies represented in different chambers¹⁰. Multistakeholder organizations have emerged in other fields like defence and military service international code of conduct for private security service providers (ICOCO) or in the area of advertising with EASA¹¹.

Unlike the conventional self-regulatory regimes, where there is a coincidence between regulators and regulated entities, TPR presents a different composition and architecture¹². On the one hand it includes interests and organizations other than those of the industry (regulated entities), on the other hand takes fully into account the conflicts of interest within industries¹³. Even within the same industry, interests may significantly diverge and the distribution of regulatory power among enterprises (large, medium and small) can be uneven. Enterprises with different size and geographical scope may have divergent regulatory objectives depending on how close to the market of destination they are. Firms that are closer to supply may be more sensitive to the needs of local communities, firms closer to consumers may privilege the final product and have less interest in the process. A key divergence concerns the distribution of costs of regulatory compliance along the global chain.

A second factor of differentiation is related to the interaction between the transnational, regional, and national levels. In some organizations the model is a federation of pre-existing national entities, in other organizations the birth is transnational and then for purpose of standards' implementation and enforcement national chapters are created. The different approaches reflect power allocation between levels and across regions and may have an impact on the intensity and degree of convergence¹⁴.

TPR differs also from industry customs and *jus mercatorum*¹⁵. The inclusion of NGO as independent standard setters or as members of multistakeholder organizations marks a major difference with self-regulatory models. This difference has represented first a major factor of divergence in transnational rule making. Later the proliferation of standards and toolkits to monitor compliance has forced forms of cooperation between conventional self-regulatory bodies and transnational private regulators¹⁶.

In a recent line of research the notion of regulatory intermediaries has been used to identify the many entities standing between rule makers and rule takers engaged in the implementation process, affecting not only effectiveness but also the accountability of the regulatory chain¹⁷. Whereas this characterization seems to be appropriate and useful in the field of public regulation it raises some conceptual questions in transnational private regulation. Clearly the definition of intermediaries can change depending on that of rule makers. If rule making coincides with standard setting then all those involved in monitoring compliance and

⁹ See the FSC statute available at www.fsc.org.

¹⁰ See the RSPO statute available at www.rspo.org, and the RSS statute available at www.rss.org.

¹¹ See ICOC

¹² On the distinction between conventional self-regulation and transnational private regulation see F. Cafaggi, Transnational private regulation, New foundations, Journal of law and society, 2011, p. 21 ff. and

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¹⁴ See F. Cafaggi, A comparative analysis, cit. p. 00

¹⁵ See F. Cafaggi, The many unexplored features of transnational private rule making, Penn Journal of International law, 2015, p. 00

¹⁶ Marx and Wouters distinguish between different functions and modes of cooperation. According to their analysis meta-regulation addresses the credibility gap while mutual recognition is directed at cost reduction. See A. Marx and J. Wouters, Competition and cooperation in the market of voluntary sustainability standards in P. Delimatsis, the law, economic and politics of international standardization, Cambridge University Press, 2016, p. 215 ff. part. pp.

¹⁷ See Levi Faur, David, and Shana M. Starobin. 2014. Transnational politics and policy. From two-way to threeway interactions. Jerusalem Papers in Regulation & Governance Working Paper No. 62, The Hebrew University, Abbott, Kenneth W., David Levi-Faur, and Duncan Snidal. 2017. Theorizing intermediaries in regulatory governance. The ANNALS of the American Academy of Political and Social Science, 2017, p. 14 ff.

enforcement can be considered intermediaries¹⁸. If rule making encompasses also monitoring and enforcement the space for regulatory intermediaries is radically reduced; many entities participate in the same regulatory process as players and not intermediaries¹⁹. Even in the latter case however the role of intermediaries can be meaningful and their influence on convergence of regulatory models and practices remarkable²⁰. Hence we shall consider the role of regulatory intermediaries taking a narrow definition as those who do not play one of the three traditional functions (e.g. standard setting, monitoring, enforcement).

Empirical research across different sectors shows that there is substantial isomorphism in relation to the organizational forms²¹. Private regulators select their legal forms according to the national law of the place of incorporation. Most of the organizations incorporate in Switzerland, Belgium, England and the US. The structures reflect the differences among not for profit forms in national legal systems. Heterogeneity of legal forms is increased by different procedural choices about the relationship between standard setting, monitoring, and enforcement²². Some organizations choose to separate them into different entities, others simply build internal divisions with functional rather than structural separation²³. In the former case functional separation is combined with structural differentiation, in the latter the organization remains unitary whilst functions are played by different units. Clearly structural separation ensures higher independence. If the monitoring system is entrusted in a different organization or at least an independent entity it is more likely that they will evaluate the compliance more objectively and will report whether the standard achieves or not its objectives. When the same entity performs all the functions coordination costs are lower but the risks of capture and that of conflict of interest are higher. The example of certification bodies and their independence from the standard setters is a good illustration of the structural separation between setting standards and monitoring compliance²⁴. Similarly in the case of military service providers the decision of creating a separate grievance mechanism was driven by the necessity to increase accountability. Variations concerning governance are significant when considering the organization of the regulatory process. The degree of differentiation increases even more if one considers the adoption of global administrative standards related to transparency, participation, duty to give reasons, establishment of a separate and independent enforcement mechanism²⁵. Stakeholders' participation in the activities may modify significantly the balance between conflicting interests even if the organizational models are identical. The same associational model with different instruments favoring stakeholder participation to the regulatory

¹⁸ See Loconto, Models of assurance: diversity and standardization of modes of intermediation, *Annals of American Academy*, 2017, p. 112 ff., T. Havinga and P. Verbruggen, Relationships in Food Safety Regulation: The RIT Model as a Theoretical Lens, *Annals of American Academy*, 2017, 59 ff.

¹⁹ See F. Cafaggi, A comparative analysis, cit. p. 00

²⁰ See Auld and Renckens, Rule making feedback through intermediation and evaluation in transnational private governance, *Annals of American Academy*, 2017, 93 ff. part. p. 97 ff. distinguishing between intermediation and evaluation feedback. Their contribution focuses on the role of intermediaries which participate in the regulatory process and those which are not technically regulators like the media which, nevertheless, provide information about (non) compliance with standards. This distinction results into a difference between co-regulation and intermediation.

²¹ See F. Cafaggi, Transnational private regulation. A comparative analysis, legitimacy, effectiveness, quality and enforcement. EUI w.p. 2014/15 available at www.eui.eu.

²² Global administrative law (GAL) produces differentiations of legal forms in TPR. That is two associations whose legal form are very similar may have important governance difference depending on how they apply stakeholders' participation, transparency, duty to give reasons.

²³ Sometimes separation is required by common principles as it is the case by ISEAL that requires independence of certifiers from standard setters. See ISEAL Assurance code standard below p. 00

²⁴ Different views on how independence should be achieved are reflected in the conformity assessment standards produced by ISO and ISEAL which determined the creation of different rules by the latter after adhering to the standard issued by ISO (17065).

²⁵ See Kingsbury, Krisch, Stewart, The emergence of global administrative law, *Law and contemporary problems*, 2005, Cassese S., *Research handbook in global administrative law*, EE, 2016, p. 00

process may diverge on their regulatory outputs and their level of accountability²⁶. Hence there is a strong correlation between organizational governance and procedural rules that affects the degree of convergence or divergence²⁷. Differences concern in particular monitoring and auditing. This is probably the area where variations are most significant and they reflect the different approaches to accountability. The move from auditing to more structured conformity assessment; the distinction between first, second, and third party verification generate a high degree of divergence on how to measure effectiveness. The consequences of non compliance and the use of grievance mechanisms between the scheme owner and regulated entities and among regulated entities. These features represent important variations across regulators.

These dimensions are partly and occasionally related to conflicts about regulatory objectives and instruments. This is the main topic of the paper to which we turn.

Conflicts in the private sphere: a brief conceptual map.

Private regulatory regimes are voluntary; regulated entities choose to subscribe to them. The degree of voluntariness may vary across global chains depending on how the contractual power is concentrated. It is often the case that small suppliers are forced to comply with private standards on the basis of a decision to join, exclusively made by the chain leader. Private regimes are sector specific and their variations is significant across industries. Within industries (electronics, agri-food, textile, extractive, etc.), variations of regulatory regimes concerning the institutional design and the content of standards which can be explained by conflicting interests among different actors²⁸.

Conflicts within industries occur between large enterprises and small suppliers often located in different countries. SMEs often find difficult to meet the standards because of low capabilities, partly associated with the socio-economic and institutional environment they operate in²⁹. Not only these conflicts concern the objectives of the standards but also their distributional consequences. Compliance with private standards requires costs that are not evenly distributed along chains between various regulated entities.

Conflicts arise between industries and NGOs about the targets and the compliance methods. NGOs require rigorous compliance and effective monitoring and enforcement. When they own certification schemes, NGOs influence not only the activity of supply chain but also their governance. For example sustainable supply chains require a traceability system that may force information sharing along the chain beyond the level that would otherwise be chosen in ordinary commercial relationships. A classical conflict in the forest sector between FSC and PEFC has evolved from fierce competition into an informal process of mutual learning and then ...³⁰. Whereas conflicts persist, increasingly cooperation has developed to integrate different approaches that combine efficiency (reducing costs and increasing benefits of tPR) and effectiveness (achieving the objectives of regulatory standards).

Thirdly, conflicts exist among NGOs. Conflicts may occur when NGOs pursues different objectives in the same industries or similar objectives with different strategies. In the field of crop certification related to sustainability in agriculture different scheme owners coexist: some focus more on the protection of smallholders and local communities, some on the protection of the environment, others on the working conditions of employees and their families. Not only differences concern regulatory objectives but also the

²⁶ See R. Stewart, *the disregarded*,

²⁷ See F. Cafaggi, *A comparative analysis*, cit. p. 00

²⁸ On the variations among private regulators and their explanations see in relation to Sustainability Marx and Wouters, *Competition and cooperation*, p. . For a comparison between technical and financial standards, see Buthe and Mattli, *the new global rulers*, Princeton, 2011.

²⁹ See OECD and World bank report on inclusive value chains. Report OECD World bank, 2015

³⁰ See C. Overdevest, *Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector*. *Socio-Economic Review* 8, 47–76, Overdevest and Zeitlin, *Assembling an experimentalist regime: Transnational governance interactions in the forest sector, regulation and governance*, 2012, p.00

relationships with multinationals. Some prefer to engage in dialogue or even in cooperation with common projects, others privilege a more adversarial perspective and jealously preserve their independence. As the palm oil example shows these differences may translate into conflicts among NGOs over compliance with labor standards³¹.

We suggest that conflicts within the private sphere may be one of the drivers of cooperation which can promote transnational regulatory convergence.

International regulatory cooperation and convergence.

There is an increase of regulatory cooperation at international level that involves states, international organizations, private actors³². In their famous governance triangle Abbott and Snidal provided a first taxonomy of different typologies of interactions between states, industry, and NGOs³³. Since then the debate on the public/private interactions and the drivers of conflicts and cooperation has bloomed, providing deeper and more comprehensive analyses³⁴.

Cooperation can take various forms and deploy different instruments³⁵. In addition to the traditional forms of treaty based and international organizations multiple 'informal' or semiformal instruments have emerged like networks, associations, Memorandum of understanding and agreements. There has been a shift from intergovernmental organizations to transgovernmental networks³⁶. The latter do not need the formal step of state ratifications and are considered more flexible and effective³⁷. Transgovernmental formal and informal networks are generally created by independent administrative authorities and central banks; they do not follow the conventional paths of Intergovernmental organizations³⁸. However IGOs increasingly act as institutionalized forums to orchestrate regulatory cooperation among public and private actors³⁹. Variations occur between intergovernmental organizations and transgovernmental networks but also within each

³¹ See below on the conflict between Amnesty and RSPO concerning the compliance by WILMAR with international labor standards. See Amnesty international, The great palm oil scandal, labour abuses behind big brand names, Amnesty International, november 2016, available at www.amnestyinternational.org.

³² See OECD 2013, International Regulatory Co-operation: Addressing Global Challenges, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264200463-en>, International regulatory cooperation, 2016. See for a pioneering account G. Bermann, Herdegen, Lindseth, Transatlantic regulatory co-operation, legal problems and political prospects, OUP, 2000, and then Vogel and Swinnen, Transatlantic regulatory cooperation. The shifting role of EU, US, and California, EE, 2011.

³³ From a wider perspective Abbott and Snidal, Governance triangle, cit.

³⁴ Eberlein et al.,..... Regulation and governance, 2014, p. 00, Kingsbury and Stewart (eds.) Global Hybrid and Private Governance (Oxford University Press, 2017).

³⁵ The OECD identifies 11 forms of IRC based on over forty case studies OECD (2013), International Regulatory Co-operation: Case Studies, Vol. 3, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264200524-en>. This taxonomy has been revised by K. Abbott, International organisations and international regulatory co-operation, cit. p. 31-32: "They include treaties; legally binding Council Decisions; model conventions, which shape inter-state negotiations; diverse and nuanced forms of "soft law," including declarations, Council Recommendations, principles and guidelines; and statements of good practices and other forms of agreed policy guidance."

³⁶ See A.M. Slaughter, The new world order, 2004

³⁷ See K. Abbott, International organisations and international regulatory co-operation: Exploring the links, in International organizations and international regulatory cooperation, OECD, 2014, p. 17, part 23 "Transgovernmental institutions are seen as having several advantages. They can adopt rules without ratification by states. They may reach cooperative agreements more easily because all participants share common experiences and understandings. And they may be more flexible than formal IOs in responding to changing conditions. On the other hand, transgovernmental rules are not binding under international law, although participating agencies typically face strong pressures to adopt and comply with those rules."

³⁸ See Pawelyn, Wessel, Wouters, Informal law making, OUP, 2013.

³⁹ See Abbott, Genschel, Snidal, Zangl, international organizations as orchestrators, Cambridge University Press, 2015 and before Abbott, K. W. and D. Snidal (2010), "International Regulation without International Government: Improving IO Performance through Orchestration", Review of International Organizations, Vol. 5, No. 3, pp. 315-34

category⁴⁰. The instruments differ but the focus on coordination and the promotion of collaboration to define and implement international standards is similar to IGOs⁴¹.

International regulatory cooperation (IRC) can be driven by multiple factors: (1) harmonizing sector specific regulation that may impair free trade and increase regulatory burdens without additional benefits, (2) solving policy conflicts and trade-offs among diverging objectives (e-commerce and data protection, trade and environmental protection, environmental and consumer protection), (3) supplying global public goods when market incentives may lead to undersupply, (4) tackling global bads⁴². The focus of this chapter is on the relationship between conflicts and IRC: Conflicts avoidance and conflicts mitigation can lead to forms of regulatory cooperation between public actors, public and private actors, and private actors. Clearly this is only one driver of regulatory cooperation. Complementarity of activities may be another factor leading to regulatory cooperation. They may have different effects over convergence of transnational regulatory models.

Cooperation between public and private actors in the definition of standards and implementation has become very frequent⁴³; IOs have modified their toolkit to define collaborative modes with different private actors⁴⁴. FAO, for example, identifies six instruments to collaborate with civil society organizations (memorandum of understanding, exchange of letters, letters of agreement, formal relations, partnership committees for review of financial and other agreements, multidoors trust funds to support civil society organizations) and three instruments to collaborate with the private sector (memorandum of understanding, partnerships agreements, exchange of letters)⁴⁵.

MOUs and agreements have proliferated. A powerful illustration of public/private cooperation aimed at avoiding or at least mitigating conflicts in the field of corporate social responsibility is the MoU between the international labor organization (ILO) and the International Standard organization (ISO). ISO wanted to enter the field of social and labor standards. Mindful of the strong presence of ILO and other intergovernmental organizations, ISO decided to enter the field with a cooperative attitude and proposed MoUs to ensure the respect of existing international standards. The MoUs with ILO and with the OECD have had a specific

⁴⁰ See K. Abbott, International regulatory cooperation, cit. p. 32 “ *Importantly, however, there appears to be wide variation among IOs in the procedures and instruments they employ. In contrast to the OECD, for example, the WTO acts almost exclusively through multilateral treaties; as a result, WTO negotiations over IRC are highly formalised and almost always inter-state. The case study of the International Maritime Organization (IMO) in this volume suggests that it too relies primarily on treaties. The ILO embodies international labor standards in treaties, but these are frequently supplemented with recommendations on implementation. The ILO has also adopted some prominent soft law declarations, notably the Declaration of Philadelphia and Declaration on Fundamental Principles and Rights at Work – as well as the Tripartite Declaration on Multinational Enterprises. The WHO, in contrast, has adopted only a single treaty, the Framework Convention on Tobacco Control; it is, however, empowered to adopt “regulations” in specified areas, most quite technical. The WHO has recently invoked the broadest of its regulations, the International Health Regulations 2005, in response to the Ebola outbreak in West Africa.*”

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⁴² See I. Kaul, I. Grunberg and M. Stern, Global public goods: International cooperation in the 21st century, OUP, 1999, K. Abbott, International organisations and international regulatory co-operation: Exploring the links, in International organizations and international regulatory cooperation, OECD, 2014, p. 17, part. p. 22 ff., S. Battini, The proliferation of global regulatory regimes, in Research handbook of global administrative law, cit. p. 45 ff. I. Kaul (ed.), Global public goods, EE, 2016.

⁴³ Such cooperation is changing the nature of the public/private distinction giving rise to hybrids that do not easily fit with the conventional description of international public and private standards. This change does not eliminate the distinction it forces to reconsider its features. See Kingsbury and Stewart, The structures and problems of global hybrid and private governance in Kingsbury and Stewart (eds.) Global Hybrid and Private Governance (Oxford University Press, 2017).

⁴⁴ IOs distinguish between instruments of collaboration with for profit entities like multinationals and non profit entities like Non governmental organizations (NGOs).

⁴⁵

procedural focus, defining the consultation over the content of the standard and the procedure to solve disagreement in case of conflicting views⁴⁶. ISO had a duty to ILO to respect their conventions and consult with ILO; ILO had the right to participate in the standard setting process and provide comments and suggestions. ILO could express its disagreement which ISO had a duty to take into account. In case of persisting disagreement ISO could go ahead but should make ILOs' observations publicly available and circulate them among the stakeholders⁴⁷.

This specific instrument of collaboration has been followed by a wider agreement in the area of health and safety at work related to the issuance of the new ISO standard 45001⁴⁸. The agreement broadens the scope of collaboration to all subject matters that concern ILO's mandate. It specifically provides for an obligation to respect ILOs' standards in case of conflict⁴⁹.

Similar forms of collaboration between ISO and international organizations have developed in different areas. But ISO is also involved in cooperative activities with private organizations⁵⁰. Cooperation serves multiple objectives: it avoids conflicts between ISO and international organizations and promote the implementation of international standards by enterprises subscribing to ISO standards, making them more effective.

Other examples have flourished in the field of financial regulation like the cooperation between IOSCO and ISDA, in the field of civil aviation with the long standing collaboration between ICAO and IATA, in the field of sustainability with the United nations forum on sustainability standards (UNFSS), or the case of SAFA, where collaboration between FAO and many private actors has led to the issuance of guidelines, in the field of CSR between OECD and trade associations or in the case of UN Global Compact giving rise to Sustainable development goals set in agenda 2030⁵¹.

Private transnational regulatory cooperation: agreements.

The exponential growth of private schemes is not homogenous across sectors. In some areas the number is growing exponentially in other areas it remains quite stable with some schemes playing a dominant role in the market. Schemes' proliferation can produce adverse selection. On the demand side users may not be able to distinguish between good and bad schemes; such inability can drive to a race to the bottom. Fragmentation can also increase costs of compliance forcing enterprises to engage into double or triple certification without additional benefits for the environment or consumer protection.

Transnational private regulators are under pressure to reduce fragmentation, to harmonize standards, to implement them according to comparable logics, to enforce them on the basis of common principles⁵². Drivers to cooperation are based both on costs' evaluation and on the increasing complementary nature of different forms of private regulation. Cooperation is often deployed to reduce the differences or at least to reduce those differences that may impair the achievement of regulatory objectives. The example of

⁴⁶ See ISO/ILO MoU. see J. Diller, private standardization in international law making, Michigan journal of international law, 2012, p. 00

⁴⁷ See ISO/ILO MoU

⁴⁸ See Agreement between the International Labour Organization (ILO) and the International Organization for Standardization (ISO) hereinafter Agreement ILO/ISO

⁴⁹ See Agreement ILO/ISO: " 3. To date the ILO and ISO have cooperated on a case-by-case basis, such as through the Memorandum of Understanding (MoU) on social responsibility and liaison arrangements with ISO committees. This Agreement between the ILO and ISO provides the following framework for cooperation on any proposed new work in the ILO or ISO that may be of mutual interest as specified below. 4. Given the broad mandate and action of the ILO to promote social justice and decent work, and ISO's broad mission, ISO standards that relate to issues within the ILO's mandate (ILO issues) should respect and support the provisions of ILS and related ILO action, including **by using ILS as the source of reference with respect to ILO issues in case of conflict.**"

⁵⁰ See the ISO case study within the OECD project on international regulatory cooperation available at www.oecd.org.

⁵¹ See SAFA guidelines ... available at www.fao.org.

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sustainability - where environmental and social regulation once perceived as different if not conflicting are now integrated into a single standard - is illustrative of a process of integration taking place in other areas like data protection and e-commerce⁵³. While in the paper conflicts as causes of divergences and drivers to cooperation are the main focus, causes of variations and determinants of cooperation are manifold.

Cooperation can take place at different stages of the regulatory process. It can concern standard setting, reporting, auditing, and enforcement. When one regulator only performs a single function cooperation with other private regulators is necessary. This is the case for private standard setters which cooperate with other regulators defining standards for reporting and auditing. The joint guidelines ISO/GRI on corporate social responsibility is a case in point. Bilateral cooperation can link standard setting and reporting, standard setting and auditing and more generally monitoring compliance and standard setting⁵⁴. These forms of cooperation integrate regulatory activities performed by different entities at various stages of the regulatory process. These are instances where cooperation is not only the response to conflict between regulators with different approaches but it is also the result of regulatory specialization and an appropriate institutional response to conflicts of interest. In other instances the monitor is an independent organization and provides either at individual or collective level information about the compliance with a standard or with multiple standards. This is the case for WWF scoreboard on palm oil, used to evaluate regulatory performance in the field of sustainability by multinational enterprises engaged in agri-food⁵⁵. A different interesting example in the field of palm oil concerns violations of labor standards. An important agri-food enterprise, subject to RSPO monitoring for sustainability standards has been found in violation by Amnesty international⁵⁶. Amnesty in its report not only described the violations committed by the enterprise but also passed negative judgments on the adequacy of RSPO standard and their monitoring practices. RSPO responded to the criticisms and engaged to internal review of its practices.

Auditing and reporting focus on practices and feed back the standard setter with information about the causes of non compliance and possibly the solution when they are rooted in the design of the rules⁵⁷. Reporting when addressing the differences in compliance among regulated entities can contribute to an understanding of divergences in action when there was an aim of convergence in the books.

Regulatory cooperation among private regulators occur in many areas. In the field of data protection..., . In the field of intellectual property rights platforms between internet providers and associations of right holders have generated various forms of cooperation to contrast copyright abuses and the production of counterfeited goods. Another area is certainly that of financial markets where collaboration in the field of financial accounting and reporting have brought to agreements between private organizations like ...

Regulatory cooperation may concern the activity or include some organizational dimensions. The former is generally softer and operate via contract: agreements and MoUs. The latter is generally stronger and may deploy both agreements and organizational devices. Cooperation may result in integration when the cooperating entities decide to create a single organization by merging the existing ones.

Transnational private regulatory cooperation deploys agreements with different degree of binding commitments. Even within memorandum of understanding there are various levels of commitments resulting in different enforceability (legal and non legal). Despite the fact the legal enforceability may not be

⁵³ See A. Marx and J. Wouters, Competition and cooperation in the market of voluntary sustainability standards in P. Delimatsis, the law, economic and politics of international standardization, Cambridge University Press, 2016, p. 215 ff.

⁵⁴ See GRI G4 Guidelines and ISO 26000:2010 How to use the GRI G4 Guidelines and ISO 26000 in conjunction, available at www.iso.org.

⁵⁵ See WWF palm oil scoreboard available at www.wwf.org.

⁵⁶ See The great palm oil scandal. Labor abuses behind big brand names. Amnesty international, november 2016 available at www.amnestyinternational.org.

⁵⁷ Auld and Renckens, Academy, 2017, and before See G. Auld, Constructing private governance,

a feature entirely in the hands of the signatories, parties' expression of their willingness to make legally binding commitments is relevant to define legal enforceability and the boundaries with non legal modes of enforceability. The legal enforceability is however relatively unimportant. Conflicts resolution tends to be amicable; courts are generally not used when cooperation is limited to contractual agreement with little or no financial resources at stake.

MOUs can either be specific and focus on one standard or one activity (auditing, reporting, grievance mechanism) or be general and include various activities performed by the regulator. Even in the latter case they do not involve organizational changes but focus on the regulatory process.

Contractual cooperation among private regulators via MOUs is aimed at avoiding conflicts and increase effectiveness but does not change either the identity or the structure of transnational private regulators. It focuses on the standards and their implementation but does not impact on the organizational features and the relationships with stakeholders. Exit costs are relatively low and the degree of cooperation can change over time. The influence on convergence relates to the standards but does not influence the organizational structure.

Private meta-regulation

A more intense form of cooperation results in the establishment of meta-regulators. The creation of meta-regulators whose members are individual regulators may pursue different objectives: to strengthen legitimacy, to prevent or solve conflicts among standard setters, to ensure uniform compliance, to promote mutual learning, to define best practices. We focus on one particular objective: conflicts avoidance and the mitigation of the consequences when they arise.

Meta-regulation is an intermediate form of regulatory cooperation between agreement and organization because a new entity is created but the participants preserve their independent and autonomous existence and their mission. It does not give rise to a full organizational integration. Private meta-regulators encompass individual entities engaged into regulation in the same field or in a particular type of standards (for example sustainability or food safety). Each regulator maintains its independence and autonomy and the freedom to exit the meta organization at any time, with limited exit costs. Some meta-regulators are composed by entities coming from different constituencies within the private sectors, others all belong to either industry or NGOs. Private meta regulators can differ from multistakeholder organizations on two different grounds: first they focus on regulation and not on the operational side, secondly they are not necessarily multistakeholders. The key feature is represented by a multiplicity of private regulators aiming at creating common principles or a regime of mutual recognition.

We examine here membership based meta-regulators where various private regulators decide to create/join a meta regulator and commit to comply with its principles⁵⁸. The members are often competitors and their market shares are contested. Clearly a prominent role of meta-regulators is to ensure that competition is not disruptive and does not lead to a race to the bottom. But divergences and potential conflicts may arise from different regulatory objectives even beyond competition. Meta-regulation can contribute to address divergences and steer towards cooperation mitigating conflicts.

Mutual recognition is one institutional response to differences arising out of the proliferation of private standards. The Global food safety initiative (GFSI) is a foundation that encompasses many food safety certification programme owners, mainly retail driven⁵⁹. Many certification programme owners (CPOs) primarily governed by group of retailers (British retail Consortium (BRC) IFS,...) decided at the end of last

⁵⁸ Private meta-regulators can be membership or non membership based. The latter is an organization that provides principles or rules for private regulators but it is not composed by the regulated entities. See F. Cafaggi, *Regulating private regulators*, cit. p. 00

⁵⁹ See

century to create an organization to define common principles in order to ensure that standards of participants be mutually recognized⁶⁰. It represents a form of collaboration between trade associations in the agri-food business and certification schemes that define minimum requirements and monitor compliance along supply chains. These are primarily BtoB schemes with no involvement of consumer organizations in the regulatory process. Mutual recognition favors a process of convergence over standards and their monitoring; at the same time it contributes to reduce costs for large enterprises that sources from suppliers linked to different certification schemes across the world. GFSI defines benchmarks that CPOs have to comply with in order to be members⁶¹. Both the process of setting the benchmarks and that of monitoring are participatory but the involvement of external stakeholders is very limited.

Another example of regulatory cooperation aimed at mutual recognition in the private sphere is represented by the International accreditation forum (IAF). IAF has produced a mutual recognition arrangement that ensures signatories' compliance with ISP conformity assessments⁶². The objective of the arrangement is to create common rules among accreditation bodies when accrediting Certifying Bodies (CBs). IAF membership grants the licensee the right to use IAF mark when accrediting the certification bodies.⁶³ IAF controls the ABs and should ensure that they have appropriate criteria to control certification bodies that have to certify compliance of regulated entities.

Meta-regulators can create common rules that members have to abide by. International Social and environmental Accreditation and Labelling Association (ISEAL) is an organization encompassing a large number of scheme owners in the field of sustainability⁶⁴. Its goals range from "enhancing the livelihoods of people living in poverty, to supporting workers' rights and gender equality, to addressing water and energy use, to minimising negative impacts on the climate, biodiversity and ecosystems". They have a full commitment to contributing to the Sustainable development goal (SDG) agenda 2030⁶⁵. ISEAL is steering its members towards alignment of their objectives with SDG and focuses on impact by stimulating them to measure their effectiveness based on changes they produce⁶⁶.

ISEAL is a membership based organizations that has recently moved to a broader objective to reach out also non members. With the issuance of the Credibility principles ISEAL is trying to influence the entire sustainability field beyond its membership⁶⁷. In this analysis the focus is on the membership organization to describe how the three codes issued by ISEAL (standard setting, impact, and assurance) have promoted regulatory convergence in the area of sustainability among the members⁶⁸. The codes define general principles that members have to comply with in their activities. The standard setting code has produced radical changes in codes' drafting procedures imposing stakeholder's consultation and duty to periodically revise the code after a thorough analysis⁶⁹. The impact code has generated remarkable changes in the

⁶⁰ See T. Havinga and P. Verbruggen, Relationships in Food Safety Regulation: The RIT Model as a Theoretical Lens, *Annals of American Academy*, 2017, 59 ff.

⁶¹ See the

⁶² "The International Accreditation Forum, Inc. (IAF) facilitates trade and supports regulators by operating a worldwide mutual recognition arrangement among Accreditation Bodies (ABs) in order that the results issued by Conformity Assessment Bodies (CABs) accredited by IAF Accreditation Body members are accepted globally. Accreditation reduces risk".

⁶³ See General Principles on the Use of the IAF MLA Mark available at www.iaf.org.

⁶⁴ See Loconto and Fouilleux, Politics of private regulation: ISEAL and the shaping of transnational sustainability governance, *Regulation and governance*, 2014, p. 165 ff.

⁶⁵ See WWF-ISEAL joint report, 2017 and ISEAL, Sustainability standards and the SDGs, Evidence of ISEAL members contribution, 2017 both available at www.iseal.org.

⁶⁶ See for example the Impact analysis of UTZ certified

⁶⁷ Currently it has 20 full members and ... associate members

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⁶⁹ On the differences between standard setting practices before and after ISEAL membership see F, Cafaggi, Regulating private regulators, cit. p. 00

organizational culture, shifting the focus from rule making to effective implementation. ISEALs members have to engage in both ex ante and ex post impact analysis on the basis of objective indicators. Their impact assessment requires monitoring and evaluation (ME). To implement the Code each member has created an internal ME division responsible to assess the impact of the standard. This is a clear illustration of how the structure of the regulatory process influences the organizational structure of the members. But ISEAL has also cooperated with other private regulators to make sustainability standards effective. In relation to conformity assessment ISEAL refers to ISO accreditation standards and also to other standards like ...⁷⁰ Even if outside a formalized cooperation ISEAL - by making reference to ISO and imposing compliance to its members - contributes to the diffusion and implementation of ISO model operationalizing transnational regulatory cooperation⁷¹.

ISEAL's codes have an influence not only on members' activities but also on their internal organizations. Hence they strive to organizational convergence of private regulation in the field of sustainability. In particular ISEAL requires its members to have independent compliance monitoring regimes⁷². This requirement has driven important governance changes in ISEAL's members, steering towards organizational convergence within ISEAL and via the credibility principles also outside ISEAL members⁷³.

ISEAL provides its members with a conflict resolution mechanism which has recently been reformed and been made independent from ISEAL itself⁷⁴. The mechanism solves conflicts between members and between ISEAL and individual members. GFSI also has an internal dispute resolution mechanism.

GFSI and ISEAL reflect two models of private regulatory cooperation. Whereas GFSI defines principles aimed at benchmarking different standards, ISEAL requires by its members compliance with the three codes. In both cases the definition of the common rules is the result of collaboration of the individual regulators and the organization monitors its compliance. But the benchmarking model is more interactive and mainly reflects the existing common features of the schemes. To oversimplify: ISEAL is more proactive with respect to the members, GFSI is more reactive⁷⁵. This difference is partly related to the independence of the management.

A case of private meta-regulation that deserves special attention is ISO⁷⁶. ISO produces technical standards for enterprises. Recently it entered the field of certification and has issued a conformity assessment standard (ISO 17065) adopted by many certification schemes often upon request of national legislation. ISO 17065 standard addresses both governance and procedural issues and constitute a powerful driver of regulatory convergence of certification models

Meta regulators have a significant impact on convergence of regulatory models through different and often complementary instruments. They deploy mutual recognition and common codes or principles. Their impact varies but it often includes not only standard but also relevant features of the organizational models including forms of participation aimed at increasing effectiveness and accountability.

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⁷¹ **CHECK with Dirk and BRITTA. ISEAL members have to comply with the ISO/ Iec 17011:2004 guide for accreditation bodies**

⁷² See A. Loconto "From 2005, then, member schemes needed to separate their standard-setters and certifiers into independent legal entities; standard-setters were required to comply with ISEAL's code for setting standards, and certifiers had to be accredited according to the ISO guide 17065 by a national accreditation body."

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⁷⁴ See

⁷⁵ This is indeed an oversimplification since in many respects GFSI benchmarking Guidance has introduced new rules and principles rather than simply mirroring the state of the art. see F. Cafaggi, *Regulating private regulators*, cit. p. 00

⁷⁶ See P. Delimatsis, in P. Delimatsis, *The law, economic and politics of international standardization*, Cambridge University Press, 2016,

International regulatory integration of private regulators: organizations.

Competition and/or complementarity between regulatory activities may give rise to forms of organizational integration between two or many private regulators. Private regulators may decide to cooperate when their activities are complementary and they can broaden their market share e.g. the number of firms subscribing to their regimes. But cooperation may also arise out of competition when competing for market shares increases the costs without adding benefits to the regulated entities (the firms) and even more to the final beneficiaries (consumers, investors, environmental organizations, human rights NGOs).

Historically there are examples of programs initiated by the cooperation of large enterprises and NGOs giving rise to new entities. The classical examples are Marine stewardship council, created by Unilever and WWF, and UTZ certified, created by ...⁷⁷ In this analysis we focus more on the integration between existing regulators as a radical form or regulatory convergence.

Patterns of integration may concern only the activity e.g. designing common standards, conducting joint auditing, creating a single enforcement mechanism. Or it can involve the organizational dimension from the creation of common entities to the more radical organizational integration giving rise to a single entity. Mergers in the field of TPR have so far been rare. More common is the opposite phenomenon of splitting.

Regulatory integration can follow different pathways. We distinguish between incremental and radical integration to identify ideal models that can present many variations in between. Incremental integration follows a step by step logic where two or more private regulators decide to have common standards and/or common compliance monitoring and then might integrate part of the activity into a single entity. This process will eventually end into a merger. Even after the merger the degree of integration can differ with the two or more entities preserving some or even a high degree of independence when for example the types of certifications differ (e.g. one related to product safety and the other to sustainability).

Radical integration occurs when two or more separate entities that have had soft forms of cooperation decide to merge without intermediate steps like agreements to cooperate or joining standard setting. It results in the creation of a new organization and the disappearance of the old ones.

The decision between incremental and radical integration may depend on several factors. For example the control of opting out by some of the participants and the costs that exit can generate for those which remain. Opting out of an incremental process of integration may have disrupting consequences on one or both sides giving rise to unraveling the entire process. Radical integration reduces the risks of opting out by increasing the level of common stakes since the very beginning making exit a costly option. What is relevant in incremental integration is the strategic use of the opt out option to renegotiate the terms of the process. Therefore the risks of opportunistic behavior in renegotiating the process of integration is lowered by selecting the radical integration option. The advantages of incremental integration may be however significant. Especially when the level of reciprocal trust is initially low, to engage in radical integration may be perceived as risky and even dangerous. The number of players may have relevant impact on the decision to integrate and the modes of integration. When the number of parties willing to integrate is small (two) the opt out is extremely costly and the entire process may unravel. When the number is relatively large the exit of one player may undermine the integration project only if its participation is considered to be essential by the other players.

Even when radical integration is chosen the process of regulatory convergence is slower and a good and realistic design features progressive steps towards full integration

In practice we observe different degrees and various paths towards regulatory integration in the world of private regulation. The area of sustainability provides interesting examples of integration. We have seen that

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the creation of ISEAL has promoted common procedural rules related to standard setting, implementation and impact assessment, assurance and enforcement.

UTZ and Rain Forrest alliance, together with Fair Trade represent the three most relevant market players in the field of certification of coffee, tea and cocoa. They are all members of ISEAL. Their origin is different but their standards have become increasingly similar. Fair trade labeling organization (FLO) is a certification scheme owner with a strong focus on distributional issues⁷⁸. Rain Forrest Alliance is part of the Sustainable agriculture network (SAN) and also a member of ISEAL. It has been focusing on environmental issues and has entered the certification market of agricultural commodities later bringing closer the relationship between environment and agricultural quality and efficiency⁷⁹. Its primary area of activity has been the US. UTZ was born with an agreement between an NGO (Max Havelaar) and an enterprise. Its focus has been single commodities (first coffee and then tea and cocoa) and the final market is primarily though not exclusively Europe.

UTZ and RA are merging towards a single entity. As a result there will be two major players in the sector: Fair trade Labeling Organization International (FLO) and the new entity complementing the 'business like' approach of UTZ and the environmental focus of RA. The decision to merge has arisen out of a relatively soft cooperation in the field of joint auditing. This is a case of radical integration where the two managements decided that there was room for integration and selected the fast track option rather than incremental. Interestingly ISEAL has not played a major role in promoting and defining the terms of integration. The

⁷⁸ See A. Loconto, *Models of assurance*, cit. p. "FLO is one of the best-known sustainability standards. emerging from a charity shop movement, the fair trade concept was first established in 1988 under the label Max Havelaar in the Netherlands; it quickly spread through national labeling initiatives across Europe and North America (Raynolds, Murray, and Wilkinson 2007). In 1997, FLO was established as the Fairtrade Labelling Organizations International (a nongovernmental organization) and developed the first international standards for Fairtrade, which included a label and a certification scheme. FLO now operates a suite of standards that differ by type of producer (e.g., smallholder organizations, hired workers) and also apply to traders. Its standards cover production practices, treatment of workers, and terms of trade. FLO also has product-specific standards that define minimum prices for producers and a "social premium" that must be paid to producers and/or farm workers (t+B). **FLO retains control over the implementation, interpretation, and monitoring of its standards.** FLO provides direct support to producer organizations to strengthen their operational capacity. FLO trainers work directly with producers (t+B) to interpret the standards and develop implementation strategies. FLO also monitors and evaluates its standards. through its audit and producer support processes, FLO collects monitoring data on twelve key indicators; it also commissions impact and evaluation reports by external experts. Following initial ISeAL rules, FLO separated its standards-setting and enforcement activities, putting it in compliance with the ISO model"

⁷⁹ See A. Loconto, *Models of assurance*, cit. p. 00 "R: SAN and RA jointly regulate in this scheme. Rainforest Alliance, Inc. is an international nonprofit organization, founded in 1986, dedicated to the conservation of tropical forests. It owns the Rainforest Alliance certified seal, which is awarded to farms that meet the environmental, social, and economic standards of SAN, a coalition of conservation organizations (including RA) that had set the first standards for sustainable farming in rainforest areas in 1992. Over the years, SAN has consolidated numerous crop standards into one whole-farm standard for sustainable agriculture and one standard for sustainable livestock production. It also maintains a standard for group certification, a chain of custody standards that ensures traceability along the supply chain, and an optional module on climate change. SAN standards cover ecosystem conservation, worker rights and safety, wildlife protection, water and soil conservation, agrochemical reduction, and education for farm children. In addition, RA manages other standards systems, which can carry the RA Verified mark, related to forestry, carbon, and tourism, but unlike the RA certified seal, this mark cannot be used on product packages. While SAN is clearly the regulator, RA plays a major role as a secondary regulator in implementing and monitoring its standards. Implementation is done through the creation and enforcement of rules regarding the use of RA labels, collaborations with the private sector to train producers (t+B) to meet the standard, and work on ecosystem-focused community projects (Loconto 2015). Since the creation of ISeAL's impacts code in 2010, all ISeAL members have begun to collect monitoring and evaluation data. RA is at the forefront of these efforts, with a research and evaluation program that includes three levels of monitoring. through local interpretation guidelines that are country-, product- and standardspecific, RA guides the interpretation of its standards instead of delegating this task to certifiers (SAN 2015). Feedback in this model occurs through research, interpretation guidelines, and conformity assessments, where producers (t) communicate their concerns to certifiers (I)."

decision to merge has followed a bottom up process. Clearly ISEAL will play a role in the new scenario with the two big players being both members.

How will this integration affect the practices in the field of crop certification? How will the relationships between scheme owners and large enterprises change? Will there be a EU/US integrated market for crop certification?

The impact of transnational regulatory cooperation on divergence and convergence of transnational regulatory models

When regulatory cooperation is in place partial or limited convergence may be the objective but divergences may still occur. It is important to distinguish between divergences in the design and divergences in practices. Here we are considering multiple regulators which decide to have some degree of common principles to orient their activities. The former occurs by design, the latter by failure to properly implement the rules. Both may need to be governed but the governance tools differ.

Divergences by design are meant to promote choice by regulated among alternative regulatory regimes. Governance in this case serves the purpose of limiting the scope and number of different regimes so that the scope of choice is sufficiently wide but not too broad. It should also ensure that differences are about means and not about ends.

Divergences in practice may occur because the standards are differently implemented or because they are not correctly implemented. Even when the objective is convergence of regulatory regimes divergences can occur. Divergences may in this context be seen as undesirable effect that should be addressed and reduced. TPR often deploys monitoring and reporting mechanisms to address divergences in practices and provide the standard setter with the necessary information to deal with them.

Conclusions

- The paper bridges comparative transnational law and global governance.
- Private rule makers concur to produce transnational private law
- Divergences and convergences in private law making cannot be explained with the conventional comparative methodologies applied to state laws
- Legal divergences amongst private regimes depend on conflicting interests (within industry, between industry and NGOs, amongst NGOs)
- Legal convergences depend on the institutional responses to these conflicts. The paper examines three alternatives:
 - 1) The development of international regulatory cooperation through agreements between private rule makers
 - 2) The creation of private metaregulators
 - 3) the creation of multistakeholder organizations
- The quality and type of convergence depends on the governance responses to divergences
- Organizational responses tend to generate higher level of convergence than contractual models of cooperative private rule making. More empirical research is needed to confirm these findings

Conclusions

The chapter links transnational governance and comparative law by filling a gap in comparative methodology. Traditional comparative law based on state as unit of analysis is unsuitable to examine drivers and consequences of convergences and divergences at the global level. Legal variations in transnational private regulation may depend on the conflicts of interests within the private sphere. These conflicts affect mainly the regulatory activity but, to a limited extent, they also explain variations and divergences of organizational models. Divergences may generate high costs and require mitigation. This can occur via institutional responses leading to regulatory cooperation. We have examined different forms of regulatory cooperation ranging from contractual to organizational. It has been shown that the nature of the institutional response e.g the form of cooperation influences the type of convergence. The use of regulatory agreements leads to soft and unstable regulatory convergence. The creation of private meta-regulators can offer a system of shared principles or common rules reducing conflict and increasing legitimacy and effectiveness. The deployment of organizational responses via regulatory integration brings more stable and stronger convergence. In this framework the role of meta-regulators is significant and likely to increase. Symmetrically an important role will be played by international organizations to promote regulatory cooperation among private actors and with states and steer towards different forms of regulatory convergence