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Transnational Private Regulation

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Introduction

Transnational private regulation has attracted great attention from academics in the last decade. Scholars from different disciplinary background, including economics, political science, law and sociology, have studied the emergence, governance and impact of this form of regulation. Transnational private regulation is not a new phenomenon as such (the Medieval *lex mercatoria* arguably being the oldest example), but the way it has developed in the last two decades, both in terms of coverage and depth, definitely is innovative.

Transnational private regulation has now developed across a wide range of policy areas, from finance to food safety, and from labor to environmental sustainability. As such, it has become a key policy instrument to regulate transnational business conduct, either as an alternative or complement to public regulation.

Transnational private regulation is an analytical construct that emerged to capture the observation that private, non-state actors pursue regulatory objectives beyond the territorial borders of the nation state. In doing so, these actors use predefined norms and goals as standards and deploy instruments for monitoring and enforcing compliance with these standards. These activities raise various governance challenges. Many scholars have drawn attention to the legitimacy and accountability challenges triggered by transnational private regulation. Compared to the way in which the legitimacy of treaty-based international governmental organizations is secured, regimes of transnational private regulation suffer a clear legitimacy deficit due to the apparent lack of representative democratic structures or the delegation of regulatory powers by state actors. This legitimacy deficit seemingly increases given that traditional accountability mechanisms such as parliamentary committees, ombudsman schemes or judicial review by courts do not readily apply to them. Other challenges relate to ensuring compliance with transnational private regulation and its effectiveness. How to ensure astute and robust enforcement? How can transnational private regulators deliver on their promises? The answers to these questions are key in preventing that transnational private regulation turns into a mere paper exercise.

In this overview we present the steadily growing body of literature on transnational private regulation by first focusing on the concept itself and relating this to parallel concepts developed in political science, law and sociology. Next, we discuss manifestations of transnational private regulation in the domains of technical standardization, environmental sustainability, labor, consumer protection, banking and finance, sports and Internet. This literature identifies a number of fundamental governance challenges. The scholarly responses to these challenges and the theorization around them are discussed in conclusion.

Concept

Bartley 2007 coins coalitions of non-state actors who codify, monitor, and in some cases certify firms' compliance with labor, environmental, human rights, or other standards of accountability systems of 'transnational private regulation'. Scott, Cafaggi and Senden 2011 discuss transnational private regulation as being a composite notion, involving the activities of standard setting, monitoring compliance and enforcement that have cross-border effects while being driven by private actors. The law merchant (*lex mercatoria*) may be considered an early form of transnational private regulation. As Cafaggi 2011 and 2015 explain, however, modern regimes of transnational private regulation involve different kinds of actors, assume different legal and organizational forms, and employ different instruments and procedures to regulate transnational business conduct. Braithwaite and Drahos 2000, Bütthe 2010, Cafaggi 2011 and Vogel 2009 provide important insights into the drivers for the rise of transnational private regulation, discussing the need for transnational rules in globalizing market conditions and the failure of state actors to meet that need as the primary drivers. Bartley 2007 argues that the rise of specific forms of transnational private regulation (certification schemes) cannot be explained by these drivers and holds that the political contestation around the regulation of transnational business conduct provides a better explanation. Also Bütthe and Mattli 2011 place greater emphasis on the politics in transnational private standard setting to explain regulatory outcomes. Finally, OECD 2013 highlights the prominence of transnational private regulation currently assumes as a policy instrument to regulate global business conduct, either as an alternative or complement to regulation by state actors at the international or national level.

Bartley, Tim. "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions." *American Journal of Sociology* 113.2 (2007): 297-351.

This article argues that market-based approaches to understand transnational private regulation in labor and sustainability need to take greater account of the political contestation that underpins the emergence of such regulatory systems. The analysis illustrates how conflicts and subsequent compromises about the politics of global regulation led to certification as a dominant institutional format of transnational private regulation in the case studies discussed.

Braithwaite, John and Peter Drahos. 2000. *Global business regulation*. Oxford: Oxford University Press.

Building on no less than 13 case studies, this seminal book provides an authoritative account of how public and private business regulation has shifted from national to global institutions. A conclusion from all case studies is that 'state regulation follows industry self-regulatory practice more than the reverse, through the reverse is also very important' (p. 481).

Bütthe, Tim. "Private Regulation in the Global Economy: A (P)Review." *Business and Politics* 12.3 (2010): [<http://www.degruyter.com/view/j/bap>] Article 2.

This article is an introduction to a special issue and combines a review of the existing literature about the causes and consequences of private regulation in the global economy with a preview of the articles in the issue. It also asks how such private regulation may attain regulatory authority.

Bütthe, Tim and Walter Mattli. 2011 *The New Global Rulers: The Privatization of Regulation in the World Economy?* Princeton: Princeton University Press

Examining three transnational private regulators (International Accounting Standards Board, International Organization for Standardization and International Electrotechnical Commission) this book shows the politics of global private standard-setting, even in areas where standard setting considered to be of technical nature only. Winners in this political game, the authors claim, are those actors that effectively organize interests at the national level, provide timely information to negotiations at the international level, and speak with one voice.

Cafaggi, Fabrizio. "New Foundations of Transnational Private Regulation." *Journal of Law and Society* 38.1 (2011): 20-49.

This article discusses the concept of transnational private regulation, as well as its drivers and institutional forms. The author also reflects on the interaction between the private and the public sphere at the transnational level and asks whether this relationship differs from the one at national level.

Cafaggi, Fabrizio. "The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, *Jura Mercatorum* and Global Private Regulation." *University of Pennsylvania Journal of International Law* 36.4 (2015): 101-159.

The article provides a comprehensive account of transnational private regulation, exploring its historical roots, current governance design and linkages with the law merchant (*lex mercatoria*) and custom.

OECD. (2013). *International Regulatory Co-operation: Addressing Regulatory Co-operation*. Paris: OECD [<http://dx.doi.org/10.1787/9789264200463-5-en>].

This report considers the potential of regulatory cooperation between international actors to address global challenges. It explores the role of transnational private regulation as an example of such cooperation and discusses to what extent public actors may engage with such regulation to achieve policy goals.

Scott, Colin, Fabrizio Cafaggi and Linda Senden. "The Conceptual and Constitutional Challenge of Transnational Private Regulation." *Journal of Law and Society* 38.1 (2011): 1-19.

This article, which is an introduction to a special issue, explores the concept of transnational private regulation and discusses its constitutional standing from the perspective of a variety of state and non-state mechanisms through which legitimacy may be achieved.

Vogel, David. "The Private Regulation of Global Corporate Conduct" in *The Politics of Global Regulation* edited by Walter Mattli and Ngaire Woods. Princeton: Princeton University Press. This article describes the growth of transnational private regulation (here coined the 'civil regulation' of global business conduct) and places it in broader historical and institutional contexts. It thus accounts for the drivers of transnational private regulation and explains how large numbers of global firms have come to accept this form of non-state transnational governance.

Parallel frameworks in political and social sciences

The regulatory roles of non-state actors, operating across state borders or producing effects which transcend borders, has been a core interest of a number of other parallel bodies of political and social sciences. These bodies of literature largely overlap with transnational private regulation, but use different vocabularies, methods or disciplinary approaches. Some, such as Abbott and Snidal 2009 and Cashore 2002, have had a clear formative role in transnational private regulation studies, while others have remained more peripheral. Cashore 2002 focuses on 'non-state market-based' mechanisms through which industry and civil society actors develop regulatory capacities. Likewise, Snidal and Abbott's 2009 study on Transnational New Governance assesses the role of states in the new regulatory environment populated extensively by private actors (including both NGOs and firms). Dingwerth and Pattberg 2006 argues that transnational private regulation, and other non-state forms of governance, should be considered a primary element of global governance. Under the labels of transnational governance and global regulation, Djelic & Sahlin-Andersson 2006 and Mattli and Woods 2009, respectively, have focused on the institutional characteristics of transnational private regulators. Eberlein et al 2014 and Wood et al 2015, under the moniker of 'Transnational Business Governance Interactions' have emphasized interactions between transnational private regulators and with other types of public and private actors, including at various interactional levels. Along a similar vein, Abbott et al 2017 has emphasized the role of 'Regulatory Intermediaries' in relationships between rule makers and regulatory targets; it is argued that transnational private regulators often rely on, or provide themselves, intermediary capacities. Finally, from an economic perspective, Ostrom's 1990 seminal book on common pool resource management has been influential for understanding the economic dynamics of transnational private regulation when it concerns common pool resources.

Abbott, Kenneth, et al. "Theorizing Regulatory Intermediaries: The RIT Model." *ANNALS of the American Academy of Political and Social Science* (2017) *forthcoming*.

In this article, the authors construct a theoretical model which emphasizes the role of intermediary actors in the regulatory relationships between rule makers and targets of regulation. The model identifies the numerous drivers that make intermediaries attractive to rule makers, as well as capture risks associated with intermediaries. Although written for the general field of regulatory governance, the prominent role of intermediaries in transnational private regulation makes this article exceptionally important for the sub-field.

Abbott, Kenneth and Duncan Snidal, "Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit." *Vanderbilt Journal of Transnational Law* 42.2 (2009): 501-578.

This seminal article maps out different regulatory governance bodies onto the 'governance triangle' based on the involvement levels of states, non-governmental organizations and firms, each representing a corner of the triangle. Zones 2, 3, and 6 of the governance triangle are particularly relevant for transnational private regulation scholarship. Moreover, the analytic framework introduces orchestration roles for states and intergovernmental organizations in transnational new governance.

Cashore, Benjamin. "Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority." *Governance* 15.4 (2002): 503-529.

This article develops the analytic framework of non-state market-driven (NSMD) governance to describe the conditions and dynamics in which transnational private governance systems emerge. Relying on analytic constructs from organizational sociology, the study primarily explains how NSMD governance systems can gain the status of legitimate rule-makers despite their lack of formal public authority.

Dingwerth, Klaus, and Philipp Pattberg. "Global Governance as a Perspective on World Politics." *Global Governance* 12.2 (2006) 185-203.

This article argues that global governance should be understood as a field of inquiry separate from international relations. The authors argue against ascribing state-based actors an *a priori* hierarchical status and emphasize norms and rules rather than specific actors. This article therefore implies the need to expand the field of global governance in order to include transnational private regulatory activities.

Djelic, Marie-Laure, and Kerstin Sahlin-Andersson. *Transnational Governance: Institutional Dynamics of Regulation*. Cambridge, UK: Cambridge University Press, 2006.

This book comprises a collection of empirical studies that examine the structuration of transnational governance by focusing on the dynamic and institutional nature by which transnational rules are created, maintained and transformed. In doing so, it touches on a series of themes such as 'networks', 'scientization', 'marketization' and 'rationalization' which impact transnational regulatory governance in general, as well as private variations within the field.

Eberlein, Burkard. et. al. "Transnational business governance interactions: Conceptualization and framework for analysis." *Regulation & Governance* 8.1 (2014): 1-21.

This article introduces an analytical framework for analyzing the role of interactions between both state and non-state entities in transnational business governance. It argues for the importance of studying interactions that structure a process-based understanding of transnational governance. The article establishes a matrix for analyzing interactions along five stages in the regulatory process and in three levels of analysis.

Mattli, Walter, and Ngaire Woods, eds. *The Politics of Global Regulation*. Princeton, NJ: Princeton University Press, 2009.

This edited volume comprises of a series of empirical case studies focused on conditions and risks of regulatory capture found in global regulation. In general, they suggest that the institutional characteristics of global regulation entities pose high risk of capture due to low

levels of transparency and accountability. Their findings readily translate to the more limited field of transnational private regulation.

Ostrom, Elinor. *Governing the Commons: The evolution of institutions for collective action*. Cambridge, UK: Cambridge University Press, 1990.

In this Nobel-prize winning book the author presents various models for common resource management based on core design principles. The book argues that private, voluntary organizations sometimes govern common resources better than states, suggesting new possibilities for global commons governance.

Wood, Stepan. et. al. "The interactive dynamics of transnational business governance: A challenge for transnational legal theory." *Transnational Legal Theory* 6.2 (2015): 333-369. This article argues for the value of middle-range theory building in the study of transnational governance interactions. It establishes a series of criteria to structure theory building that emphasize the multiplicity of entities, scales, agencies, structures and pathways.

Parallel frameworks in legal scholarship

Aside from parallel bodies of interdisciplinary literature, there is a notable body of legal scholarship that has contributed to, and built on, transnational private regulation literature. Teubner 1997 prominently argues for greater attention to be paid to the quasi-legal nature of transnational private regulation as well as other forms of transnational rule making without state actors. Zumbansen 2012 further contributes to this endeavor in arguing for the need to view transnational law as a method for studying the transcending nature of legal and regulatory activities as they cross national boundaries and conceptual distinctions between the public and private sphere. From the perspective of constitutionalism, Walker 2015 demonstrates how transnational private regulation and other forms of global governance constitute an emergent form of global law governing global public goods. This perspective is buttressed by Kingsbury et al 2005, which describes the administrative law-like nature of the way that transnational regulators are institutionalized and operate, labelling these actors, norms, and procedures as constituent elements of a global administrative law. Finally, Berman 2012 raises a normative claim for the desirability of plural orders of rules and norms used to govern global and transnational activities, and identifies procedures that foster this plurality. In summary, this field of legal scholarship is primarily interested in the way that quasi- and non-legal forms of regulation by private and transnational entities interacts with legal orders, the norms and processes which govern them, and their broader role in constituting and governing global public interests.

Berman, Paul Schiff. *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*. Cambridge, UK: Cambridge University Press, 2012.

This book provides a comprehensive study of transnational and global forms of legal pluralism in order to argue for the normative desirability in fostering plural and overlapping forms of lawmaking and governance. The author identifies mechanisms and procedures that assist in maintaining such pluralism, including forms of interaction with transnational private regulation that purposefully creates regulatory redundancies.

Kingsbury, Benedict. et. al. "The Emergence of Global Administrative Law." *Law and Contemporary Problems* 68.3-4 (2005): 16-61.

This article develops an administrative law framework for understanding the rules, norms and procedures found in global governance. The authors argue that many of these phenomena can be analyzed as administrative laws promoting transparency, participation and accountability.

Teubner, Gunther. "Global Bukowina: Legal Pluralism in the World Society" in Teubner, Gunther (ed). *Global Law Without a State*. Aldershot, UK: Dartmouth, 1997.

In this seminal article, the author draws on the legal sociology of Eugen Ehrlich to develop a concept of global law premised on the activities of a global civil society instead of nation states. Teubner describes transnational private regulation and other forms of global governance in terms of *lex mercatoria*, arguing that these regulatory phenomena operate in a legal fashion despite lacking the traditional binding authoritativeness of state legal orders.

Walker, Neil. *Intimations of Global Law*. Cambridge, UK: Cambridge University Press, 2015. This book provides an expansive attempt to generalize a theoretical description of global governance, transnational law, and transnational private regulation as constituent elements of an emergent global law. Drawing largely on theories of (global) constitutionalism, international law, and human rights, the author reviews the role that these trans- and post-national forms of rule making affect the governance of global public goods.

Zumbansen, Peer. "Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism." *Transnational Law and Contemporary Problems* 21.1 (2012): 305-335.

In this article, the author pursues the theoretical argument that transnational law and regulation should not be conceived as a 'field' of study but rather as a method for assessing how legal and regulatory forms of governance transcending territorial boundaries and public/private distinctions. The author argues for a primary focus on the actors, norms and processes. This article illustrates how transnational private regulatory activities are influencing theoretical foundations in legal scholarship.

Sector specific regimes of transnational private regulation

Much of the literature on transnational private regulation has been developed in relation to specific domains or sectors. In this section we provide an overview of the literature in the sectors in which this literature is best developed. As we will see, a number of common themes will emerge from these bodies of literature. Those 'grand' themes will be discussed in the final section.

Technical standard-setting

Technical standardization by international bodies is a classic manifestation of transnational private regulation. Expert-driven bodies such as the International Standardization Organization (ISO) and its sectoral, regional and national equivalents have since long adopted technical standards. These standards ensure interoperability of products or set quality requirements for products, processes or services to protect health, safety and the environment. More recently, quality management standards have emerged, which lay down procedures for the production of products or the provision of services only. Brunsson et al 2012 describe this as a transition from standardization by organizations to the standardization of organizations. Brunsson and Jacobsson 2001 argue that to understand the modern world, one needs to understand standardization. While standard setting as such might be perceived as a scientific exercise driven by experts, Bütthe and Mattli 2011 and Hallström 2004 find that it is in fact highly political. Ponte et al 2011 assess standards from both political economy and governmentality perspectives. Murphy and Yates 2009 explores how ISO, as a key actor in this field, has developed to become a facilitator of the technical infrastructure for the globalizing economy. Delimatsis 2015 and Schepel 2005 provide legal insights on the role of technical standardization in (international) trade law.

Brunsson, Nils and Bengt Jacobsson. 2001. *A World of Standards*. Oxford: Oxford University Press.

This collection of contributions is among the first to discuss in a comprehensive fashion the rise of technical standardization and the rise of process and management standards.

Brunsson, Nils, et al. "The Dynamics of Standardization: Three Perspectives on Standards in Organization Studies." *Organization Studies* 33.5-6 (2012): 613-632.

This article approaches standards and standardization from the perspective of organization studies to compare three variations of standardization: standardization *by* organizations, standardization *of* organizations, and standardization *as* organization. In each variation the authors identify dynamic properties that challenge previous descriptions of standardization as an essentially stable process.

Bütthe, Tim and Walter Mattli. 2011 *The New Global Rulers: The Privatization of Regulation in the World Economy?* Princeton: Princeton University Press.

Examining the International Organization for Standardization and International Electrotechnical Commission, along with the International Accounting Standards Board, this book shows the politics of global technical standards. Winners in this political game, the authors claim, are those actors that effectively organize interests at national level, provide timely information to negotiations at international level, and speak with one voice.

Delimatsis, Panagiotis. 2015. ed. *The Law, Economics and Politics of International Standardisation*. Cambridge: Cambridge University Press.

This collection includes contributions from economists, political scientists and lawyers on the emergence, politics and impact of technical standardization. Prominent in many of these contributions is the question of how to make standardization bodies more accountable and legitimate to those affected by their standards.

Tamm Hallström, Kristina. 2004. *Organizing International Standardization. ISO and the IASC in Quest for Authority*. Cheltenham: Edward Elgar.

This book provides an empirical analysis of the institutional design and practice of two global technical standard setters: International Organization for Standardization and the International Accounting Standards Committee. The author finds that while the standards presented are voluntary, they are widely adopted and complied with. This impact explains the intense political struggles that take place within these organizations to wield influence on the content of these technical standards.

Murphy, Craig and Joanne Yates. 2009. *The International Organization for Standardization (ISO) – Global Governance through Voluntary Consensus*. New York: Routledge.

This book provides an in-depth analysis of one of the principle actors in the field of technical standardization, namely ISO. It explores ISO's role as a facilitator of technical standardization for the global economy.

Ponte, Stefano, Peter Gibbon and Jakob Verstergaard, *Governing through Standards: Origins, Drivers and Limitations*. Basingstoke, UK: Palgrave Macmillan, 2011.

This edited volume provides a broad overview of the use of technical standards in banking and finance, environmental management and agriculture. The authors combine international political economy and governmentality perspectives to analyze the internal governance of technical standards and external governance effects that technical standards have in their respective fields. Through this combination of perspectives, this collection extends the literature on technical standards beyond its traditional origin in political economy.

Schepel, Harm. 2005. *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*. Oxford: Hart Publishing.

This monograph provides an authoritative (legal) account of technical standardization in the European Union and the United States, exploring its interplay with international trade law, EU and US public law, competition law, and tort law.

Environmental Sustainability

Environmental sustainability is a governance field in which transnational private regulation has gained an immense amount of attention. This is partially due to insufficient international public law protections for the environment and to the increasing reputational risks lead-firms experience when their global value chains are found to have benefited from harmful environmental practices. The most attention in this body of literature has been given to the role of private standards in forestry, with considerable focus given to the Forest Stewardship Council. There are also many closely related studies on private standards in fisheries, and the Marine Stewardship Council in particular. Auld 2014 examines early institutional stages of forestry, fisheries and coffee standards, while Gulbrandsen 2010 assesses how the institutional design of fisheries and forestry standards impacts their effectiveness. McDermott et al 2010 and Lister 2011 have focused on the interactions between private forestry standards and public legal and regulatory frameworks, suggesting that states still play influential roles in fostering private forestry governance. From the opposite angle, Bartley 2014 has examined the use of legality requirements in private forestry standards to assess how transnational private regulation can support public regulators concerned with forest

sustainability. Djama et al 2011 and Ponte and Daugbjerg 2015 have examined the role of transnational private regulators in industrial agricultural, the profile of which has risen in recent years as the expanded use of biofuels raises new sustainability concerns. Auld et al 2015 have used a cross-industry comparison to develop a theoretical distinction between transnational private regulators oriented empowering actors in an industry versus those oriented towards controlling actors, noting also that these logics can rise to tensions within a scheme as it evolves over time. From a considerably different theoretical approach, Prakash and Potoski 2006 evaluates firms' voluntary participation in sustainability standards (ISO 14001 in particular) using the economic theory of club goods to explain participation patterns. Finally, Dingwerth and Pattberg 2009 takes a wider perspective to study the organizational field of transnational private sustainability governance and evaluate how regulatory schemes interact, cooperate and compete in this field.

Auld, Graeme. *Constructing Private Governance: The Rise and Evolution of Forest, Coffee, and Fisheries Certification*. New Haven, CT: Yale University Press, 2014.

This book compares private sustainability governance systems in forestry, coffee and fisheries sectors. It focuses on market structures, political contexts and strategic decisions of influential actors in the early institutional stages to understand why some sectors have fostered extensive private governance systems while other sectors have seen few or unsuccessful initiatives. The study argues for greater attention to be given to emergence patterns and early design decisions in private governance.

Auld, Graeme, et. al. "Transnational private governance between the logics of empowerment and control." *Regulation & Governance* 9.2 (2015): 108-124.

This article argues that transnational private governance schemes address social and environmental sustainability problems by prioritizing either logics of empowerment or control. The authors compare governance systems dealing with organic agriculture, fisheries, forestry and fair labor to compare evolutionary effects between systems that initially favor one logic and must accommodate the other at a later stage, versus those which attempt to balance the two logics in early stages.

Bartley, Tim. "Transnational governance and the re-centered state: Sustainability or legality?" *Regulation & Governance* 8.1 (2014): 93-109.

This article evaluates the impacts of an emerging 'legality regime' in which transnational governance schemes are enlisted by public authorities to determine the legality – but not sustainability – of timber and other forestry products entering their markets. The author argues that the legality regime may hamper further expansion of private governance; instead, it may illustrate a shift in emphasis back towards the roles of domestic public authorities in transnational governance.

Dingwerth, Klaus, and Philipp Pattberg. "World Politics and Organizational Fields: The Case of Transnational Sustainability Governance." *European Journal of International Relations* 15.4 (2009): 707-743.

In this article the authors explain the extensive organizational similarities among transnational sustainability governance organizations. Using the concept of 'organizational fields' the article argues that interactions among a constellation of actors in the field of transnational sustainability politics led to the evolution towards common practices and institutional features. The study illustrates the importance of considering the convergence effects of micro-dynamics in organizational fields.

Djama, Marcel, et. al. "Standard-setting, Certifying and Benchmarking: A Governmentality Approach to Sustainability Standards in the Agro-Food Sector" in Ponte, Stefano, et. al., eds. *Governing through Standards: Origins, Drivers and Limitations*. Basingstoke, UK: Palgrave Macmillan, 2011.

This chapter approaches the field of transnational sustainability governance systems through the lens of governmentality in order to assess how power conflicts in their respective industry sectors are managed for 'consensus formation' that allows the systems to operate. In particular, the authors focus on the managerial techniques and logics that are found in sustainability governance as a strategy for avoiding political contestation.

Gulbrandsen, Lars H. *Transnational Environmental Governance: The Emergence and Effects of Certification of Forests and Fisheries*. Cheltenham, UK: Edward Elgar, 2010.

This book provides a comparative analysis of the emergence, organizational design and effectiveness of the Forest Stewardship Council and the Marine Stewardship Council. The analysis includes evidence of convergence among forest certification competitors, the role of the World Wide Fund for Nature in shaping the MSC in the FSC's mould, limitations to the effectiveness of these governance initiatives, and the challenges of increasing uptake in developing economies.

Lister, Jane. *Corporate Social Responsibility and the State: International Approaches to Forest Co-Regulation*. Vancouver, BC: University of British Columbia Press, 2011.

This book provides a comparative empirical analysis as to the role of state actors in private forestry governance systems in the US, Canada and Sweden. The author argues that state actors can and do play influential roles in private forestry governance, which instead should be considered collaborative co-regulation rather than industry self-regulation. The study is based on extensive interviews with public actors, industry representatives, auditors, and other stakeholders.

McDermott, Constance. et. al. *Global Environmental Forest Policies: An International Comparison*. London, UK: Earthscan, 2010.

In this book, the authors comparatively assess environmental forest policies in twenty different countries. In this comprehensive study, private regulation is studied within a broader multi-level (sub-national, national and international) and multi-actor (state and non-state) governance approach.

Ponte, Stefano, and Carsten Daugbjerg. "Biofuel sustainability and the formation of transnational hybrid governance." *Environmental Politics* 24.1 (2015): 96-114.

In this article, the authors analyze two hybrid relationships that have increased the significance of sustainable biofuel certification. They assess how the EU has relied on private biofuel certification initiatives to monitor compliance with the Renewable Energy Directive (RED), and the role that the World Trade Organization regime played in shaping the RED's approach to biofuel sustainability. The authors emphasize the blending of public and private authority and legitimacy in these relationships.

Prakash, Aseem, and Matthew Potoski. *The Voluntary Environmentalists: Green Clubs, ISO 14001, and Voluntary Environmental Regulations*. Cambridge, UK: Cambridge University Press, 2006.

This book relies on the economic theory of club goods to explain when and why corporate actors voluntarily subscribe to environmental regulations. Focusing in particular on ISO's 14001 Environmental Management System standard, this study draws lessons on how club designs in transnational private regulatory bodies can affect their efficacy.

Labour

Transnational private regulation scholarship has engaged in depth with labor governance, producing a body of literature that is closely related to the above studies on environmental sustainability, and sometimes overlapping with it. As global value chains have increased the connectivity of labor and production across the globe, the awareness and concern of labor violations as been met with increased transnational private regulatory initiatives. Bartley et al 2015 and Locke 2013 both provide comprehensive studies of the possibilities that various transnational private labor standards in apparel, electronics, and footwear industries, among others, have in effecting change in labor practices. These studies include both 1st party and 3rd party labor standards, the former being more predominant in the literature on labor governance than environmental sustainability governance. Toffel et al 2015 review an elaborate quantitative data set on compliance with private labor standards to evaluate which regulatory environments are more prone to producing compliance among firms. As with sustainability, there has been considerable interest in the relationships between transnational private regulators and public actors. O'Rourke 2003 identifies transparency, independence and accountability as key factors which determine whether or not transnational private labor regulators can compliment public labor regulations. From the opposite perspective, Zandvliet

and van der Heijden 2015 argue that the International Labour Organization (ILO), a public international organization, is empowered by its cooperation with private labor regulators that are better able to implement core labor standards in workplace settings. Finally Reinecke et al 2012 evaluates the competitive dynamics between various private regulatory schemes in the coffee industry (concerning both labor and environmental sustainability), arguing that it is possible to think of a 'market of standards' in which broader evolutionary patterns towards convergence among standards occur.

Bartley, Tim, et. al. *Looking Behind the Label: Global Industries and the Conscientious Consumer*. Bloomington, IN: Indiana University Press, 2015.

This book evaluates the capabilities that conscientious consumption has to transform the labor and environmental practices of global value chains in forestry, agriculture, apparel, footwear and electronics industries. To accomplish this, the authors focus on four factors: local-global linkages, the 'puzzle of rules', the constituencies behind standards, and market structures of both production and consumption. It also includes analysis of transnational private regulatory initiatives targeting environmental sustainability.

Locke, Richard M. *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy*. Cambridge, UK: Cambridge University Press, 2013.

This book provides a comprehensive evaluation of the capacity and limits of transnational labor regulation to effect change in labor conditions. The scope of the book includes first-party codes of major brands (i.e. Nike), private third-party standards, and initiatives originating from the ILO. Relying on data from audits and interviews, the book argues for a mix of public and private regulation to make transnational labor regulations more effective.

O'Rourke, Dara. "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring." *The Policy Studies Journal* 31.1 (2003): 1-29.

This article provides a critical assessment of the potential that private regulatory systems have for labor governance. In particular, the author raises concerns regarding the transparency of transnational private labor regulation, its accountability towards beneficiaries, and the independence of monitoring actors. Ultimately, the author argues for improvements that would enhance the complementary role that private labor regulatory bodies can hold vis-à-vis public authorities.

Reinecke, Juliane, et. al. "The Emergence of a Standards Market: Multiplicity of Sustainability Standards in the Global Coffee Industry." *Organization Studies* 33.5-6 (2012): 791-814.

This article examines how competitive effects between seven different sustainability standards in the coffee industry can influence of the evolutionary development of individual standards, as well as drive convergence towards shared norms through the process of 'meta-standardization'. The study claims that competitive market logic constitutes an essential characteristic of private, voluntary, and market-based transnational labor and sustainability regulation.

Toffel, Michael W., et. al. "Codes in context: How states, markets, and civil society shape adherence to global labor standards." *Regulation & Governance* 9.3 (2015): 205-223.

This article relies on an extensive data set of more than 44,000 social audits to examine the institutional conditions corresponding to compliance with transnational labour regulation. The findings suggest that compliance is highest among suppliers in states that ratify more ILO conventions, in states with stringent domestic labor regulations, and when press freedom is strongly protected.

Zandvliet, Ruben, and Paul van der Heijden. "The rapprochement of ILO standards and CSR mechanism: towards a positive understanding of the 'privatization' of international labour standards" in Marx, Axel, et. al. *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives*. Cheltenham, UK: Edward Elgar, 2015.

This chapter examines the role that the ILO plays in corporate social responsibility and transnational private labor regulatory bodies. The authors argue that the 'privatization' of labor law through transnational regulation is necessary for enforcement purposes and co-shaped by state actors and private regulators alike. Furthermore, they also provide evidence that

transnational labor regulations are referring to ILO norms in a more complete and systematic manner.

Advertising

Private regulation in the field of advertising has the general aim to ensure that advertisements and other forms of marketing communications are legal, fair, not misleading, in good taste, and socially responsible. It operates across multiple levels of governance and reflects the balance between the potential transnational scope of advertising and its national impact. While much of the advertising we experience is financed and created by multi-national companies, and is increasingly diffused through the global medium of Internet, it is still very often nationally distinctive using the language, characters and humor familiar to the audience targeted. Therefore, rule-making activities occur at both the national and transnational level, while monitoring and enforcement is limited to the national context. Literature in this field reflects the transnational-national interplay in regulation. Boddewyn 1992, EASA 2010, and Shaver and An 2015 provide comparative overviews of private regulation, discussing the history, institutional design and practices of private regulatory bodies. Harker 1998 and Verbruggen 2011 provide a critical analysis of the governance design that underpins private regulation in advertising. Harker 2008 and Verbruggen 2014 discuss the effectiveness of traditional private regulation in relation to Internet as a global medium for advertising.

Boddewyn, Jean. 1992. *Global Perspectives on Advertising Self-Regulation, Principles and Practices in Thirty-eight Countries*. Westport, Connecticut: Quorum Books.

This book provides a compelling comparative analysis of advertising self-regulation reviewing the history, governance design and practices of no less than thirty-eight jurisdictions.

EASA (European Advertising Standards Alliance). 2010. *Advertising Self-Regulation in Europe and Beyond: An Analysis of Self-Regulatory Systems and Codes of Advertising Practice*. 6th edn. Brussels: Poot Printers.

This book offers overview of private regulatory bodies in Europe and beyond, providing insights on their governance design and practices.

Harker, Debra. "Achieving Acceptable Advertising: An Analysis of Advertising Regulation in Five Countries." *International Marketing Review*, 15.2 (1998): 101-118.

This article provides an analytical framework for the creation of robust and effective systems of advertising self-regulation.

Harker, Debra. "Regulating Online Advertising: The Benefits of Qualitative Insights" *Qualitative Market Research: An International Journal*. 11.3 (2008): 295-315.

This article examines the regulatory options available to control advertising on the Internet. It argues that as the promotion of products and services through the Internet raises a number of significant problems, regulators must progress in an ad hoc manner also including private regulation as a model to control advertising in a globalizing and internet-driven society.

Shaver, Marie Alice and Soontae An. 2015. *Global Advertising Regulation Handbook*. New York: Routledge.

This book offers an overview of advertising regulation, including private regulation, in twenty different countries around the globe.

Verbruggen, Paul. 2011. *Transnational Private Regulation. Case Study Report on Private Regulation in the Advertising Industry*, Florence, available at:

<http://dx.doi.org/10.2139/ssrn.2256043>.

This report provides a critical analysis of the emergence and governance of transnational private regulation in the advertising industry, focusing on the activities pursued by the International Chamber of Commerce (ICC), the European Advertising Standards Alliance (EASA) and European trade associations in the alcohol, food and digital media sectors.

Verbruggen, Paul. 2014. *Enforcing Transnational Private Regulation: A Comparative Analysis of Advertising and Food Safety*

This book assesses the mechanisms used to enforce transnational private regulation in the domain of advertising and food safety. For advertising it finds that the institutional design and practice of enforcing advertising codes of conduct faces significant concerns, in particular in relation to online advertising.

Food safety

Transnational private regulation of food safety plays a significant role in the regulation of global food supply chains. In the aftermath of the BSE crisis (mad cow disease) and other international food safety incidents, the food processing industry and major food retailers developed initiatives for decreasing food safety risks and increasing consumer confidence in food. Since the 1990s, large retailers (i.e. supermarket chains), manufacturers and their representative organizations are playing an active role in food safety regulation. They have now developed elaborate certification schemes and compelled suppliers of food products to comply with these standards. Fulponi 2006 and Havinga 2006 provide early empirical insights into the drivers for international retailers to develop private food safety standards, the nature of these standards, and the impact they have on the ground. As private standards have become a key instrument of regulation of food safety, Henson and Humphrey 2009 discusses their impact on the global value chains and international standardization by the Codex Alimentarius Commission. Compliance with transnational private food safety standards is typically assessed through certification schemes. Hatanaka, Bain and Busch 2005 explains why third party certification has become the dominant form of certification in this area. Lytton and McAllister discusses a fundamental concern relating to the design of these certification schemes, namely the conflict of interest that exists among the auditors working under these schemes. Conflicts of interest challenge the legitimacy of transnational private regulation in this field. Casey 2014 and Fuchs, Kalfagianni and Havinga 2011 discuss how the legitimacy of these regimes of regulation can be conceptualized, challenged and maintained. Finally, Verbruggen and Havinga 2017 and Verbruggen 2017 provide empirical insights into the development of transnational private food safety standards and their relationship with (international) state actors.

Fuchs, Doris, Agni Kalfagianni and Tetty Havinga. "Actors in Private Food Governance: The Legitimacy of Retail Standards and Multistakeholder Initiatives with Civil Society Participation." *Agriculture and Human Values* 28.3 (2011): 353-367.

This article presents the normative argument that owners of transnational private food retail standards should meet basic criteria of participation, transparency and accountability to legitimize their regulatory activities and the impact they have on foreign suppliers (developing) countries.

Fulponi, Linda. "Private Voluntary Standards in the Food System: The Perspective of Major Food Retailers in OECD Countries." *Food Policy* 31.1 (2006): 1-13.

This article presents the findings of a survey among major food retailers in OECD countries and discusses their use of private standards to shape the agri-food system.

Havinga, Tetty. "Private Regulation of Food Safety by Supermarkets." *Law & Policy* 28.4 (2006): 515-533.

As one of the first articles to notice the rise of transnational private regulation in the field of food and food safety, this article discusses the question of whether private regulation in this field can be effective in delivering food safety. On the basis of a case study involving Dutch retailers, Havinga develops seven conditions for effective private regulation in this field.

Hatanaka, Maki, Carmen Bain and Lawrence Busch. "Third Party Certification in the Global Agrifood System." 30.3 (2005): 354-369.

This article discusses the rise of third party certification as a dominant form of how compliance with transnational private regulation in global value chains is assessed. It argues that this form of regulation mirrors the economic power of supermarkets to regulate the global agrifood system and provides opportunities for socially and environmentally sustainable production of food.

Henson, Spencer and John Humphrey. 2009. *The Impacts of Private Food Safety Standards on the Food Chain and on Public Standard-Setting Processes*. Report Prepared for FAO/WHO. Rome/Geneva: FAO/WHO.

This report analyzes how and why private food safety standards have evolved and identifies the linkages between the development of public and private regulation at national and transnational level. It also outlines the impacts these private standards have on value chains in developing countries. Finally it considers the impact of these standards for the work of the Codex Alimentarius Committee and public regulation more generally.

Lytton, Tim and Lesley McAllister. 2014. "Oversight in private food safety auditing: Addressing auditor conflict of interest." *Wisconsin Law Review* 2014.2 (2014): 289-335.

This paper focuses on the conflict of interest that arises when auditors working under certification schemes for private food safety standards are paid by the firms that they audit. The paper critically discusses nature and sources of this conflict, efforts to prevent it, and responses when it occurs. The paper shows how different institutional responses are linked and argues that effective solutions will necessarily involve a combination of public and private responses.

Verbruggen, Paul. "Understanding the 'New Governance' of food safety: Regulatory enrolment as a response to change in public and private power" *Cambridge Journal of International and Comparative Law* (forthcoming 2017).

This article provides a comprehensive overview of how public and private, national and transnational standards of food safety become interlinked in the 'new governance' of food safety. The article argues that the concept of 'regulatory enrolment' can be used as an important contemporary governance response to make sense of this interplay and make regulators more responsive to changes in regulatory power.

Verbruggen, Paul and Tetty Havinga. 2017. Eds. *Hybridization of Food Governance: Types, Trends and Results*. Cheltenham: Edward Elgar.

Drawing on law, economics, political science and sociology, contributors in this volume discuss how food standards travel between public and private actors and between local and global levels of governance. Original empirical case studies provide insights into how in China, Europe and North America private food standards are developed and interplay with (international) public standards.

Banking and finance

Transnational private regulation also plays a crucial role in the regulation of global financial markets. Biggins and Scott 2012 and Janczuk-Gorywoda 2012 show that private actors like the International Swaps and Derivatives Association (ISDA) and European trade associations in banking provide the necessary legal infrastructure for the global trade in over-the-counter derivatives and payment services in the EU respectively. Credit rating agencies have been among the most discussed actors in the aftermath of the global financial crisis. These actors, which produce ratings of creditworthiness and in this way they regulate the flow of credit in significant ways, were held to have failed in adequately predicting the crisis and later on worsening its fallout. Before the global financial crisis hit, Kerwer 2005 already raised pertinent questions as regards the legitimacy and accountability of these transnational private regulators. Kruck 2017 seeks to explain how states have empowered these actors to develop into strongly independent global regulators and now are struggling to regain the upper hand. Another significant strand of literature on transnational private regulation concerns financial reporting standards. Botzem 2012 and Bütthe and Mattli 2011 discuss the politics involved in the creation of these standards. Finally, Conley and Williams 2011 discusses a different kind manifestation of transnational private regulation in this area, namely that of responsible and sustainable finance under the Equator Principles.

Biggins, John and Colin Scott. "Public-Private Relations in a Transnational Private Regulatory Regime: ISDA, the State and OTC Derivatives Market Reform." *European Business Organization Law Review* 13.3 (2012): 309-346.

The article shows the complex interactions between public legislators and influential transnational private trade associations, most notably the International Swaps and

Derivatives Association (ISDA), in the regulation of global trade in over-the-counter derivatives, thereby debunking the claim that the unregulated trade in these financial products was at the root of the global financial crisis.

Botzem, Sebastian. 2012. *The Politics of Accounting Regulation: Organizing Transnational Standard Setting in Financial Reporting*. Cheltenham: Edward Elgar.

Focusing on the International Accounting Standards Board (IASB), the author contends that transnational standard setting in financial reporting is characterized by contests between various interest groups that aim to shape international standards and the institutions in which they are set.

Büthe, Tim and Walter Mattli. 2011 *The New Global Rulers: The Privatization of Regulation in the World Economy?* Princeton: Princeton University Press.

Examining International Accounting Standards Board along with two other transnational private standard-setting bodies, this book shows the politics of global private standard setting. Winners in this political game, the authors claim, are those actors that effectively organize interests at national level, provide timely information to negotiations at international level, and speak with one voice.

Conley, John and Cynthia Williams. "Global Banks as Global Sustainability Regulators". *Law & Policy* 33.4 (2011): 542-575.

The authors discuss the emergence, content and initial results of the Equator Principles, a voluntary agreement amongst a group of global banks to manage the social and environment impacts of large, privately sponsored infrastructure projects (dams, oil pipelines, etc.) that are financed by them. While such infrastructure finance constitutes only a small part of banking business, the authors also explore the potential of the Equator Principles to apply across a wider range of financial product categories.

Janczuk-Gorywoda, Agnieszka. "Public-- - Private Hybrid Governance for Electronic Payments in the European Union." *German Law Journal* 13.12 (2012): 1438-1458.

This article traces the evaluation of the Single European Payments Area (SEPA) as providing the vital technical infrastructure for cross-border payments in Europe. It argues that the construction, its management and review has been a constant interplay between public and private actors, showing how transnational private regulatory rules break away and are subsumed by public laws and policies. It led the author to conclude that SEPA is a form of hybrid European governance.

Kerwer, Dieter. "Holding Global Regulators Accountable: The Case of Credit Rating Agencies." *Governance* 18.3 (2005): 453-475.

This article seeks to understand the nature and scope of the accountability gap in transnational private regulation by analyzing the way in which credit rating agencies operate and respond to legitimacy and accountability demands. The author argues that addressing this gap is particularly difficult to address given the centrality of and dependence on credit rating agencies in global financial markets.

Kruck, Andreas. "Asymmetry in Empowering and Dis-empowering Private Intermediaries: The Case of Credit Rating Agencies" *ANNALS of the American Academy of Political and Social Science* (2017) *forthcoming*.

This article seeks to understand how credit rating agencies rose to power using public legislation in the US and elsewhere, and how states are now struggling to regain control over these transnational private regulators. It argues that this struggle is more costly and difficult the stronger the sources of power are that credit rating agencies themselves possess, the larger the transfer of power from public actors to these private agencies, and the more public actors rely on these agencies for regulatory purposes.

Internet

Private actors play a key role in the regulation and governance of the Internet. They not only provide the technical infrastructure for Internet, they also police its content and provide mechanisms for dispute resolution. Lessig 1999 provides an influential theoretical account of how the Internet is regulated, highlighting the role of architecture of computer hardware and

software code as a private means of regulation. Marsden 2011 provides a compelling overview of the different forms of regulation of the Internet and highlights how public and private actors are co-regulating Internet technologies, e-services and its usages. Also Goldsmith and Wu 2006 explore how public and private actors seek to control the Internet, emphasizing the centrality of nation-states in that process. Tusikov 2016 provides an analysis of how powerful, US-based Internet intermediaries act as global private regulators for states and other multinational corporations to control online behavior. In discussing the creation and governance of the private, non-profit organization called the Internet Corporation of Assigned Names and Numbers (ICANN), Mueller 1999 and Von Bernstorff 2013 provide insights in the private regulation of a key aspect of the infrastructure of the Internet, namely the management of the Internet domain name system.

Goldsmith, Jack and Tim Wu. 2006. *Who Controls the Internet? Illusions of a Borderless World?* New York: Oxford University Press.

The authors provide an analysis of state responses to the Internet's challenge to national sovereignty. While other authors (as cited here) emphasize the role of private, non-state actors, they authors provide an insightful state centric approach on Internet regulation.

Lessig, Lawrence. 1999. *Code and Other Laws of Cyberspace*. New York: Penguin.

This influential and widely cited book discusses the centrality of technology in the regulation of the Internet. It is argued that the design of computer hardware and software code constitutes a way of (private) regulation that is distinct from regulated produced by the state (laws), the community (norms) and market (business). It discusses the implications of such conceptualization for copyright law.

Marsden, Christopher. 2011. *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*. Cambridge: Cambridge University Press.

This book provides a critical analysis of the various forms of regulation of the Internet, showcasing different public, private and co-regulatory regimes concerned with the infrastructure of the Internet, its content and usage. It examines to what extent these forms of regulation comply with accepted principles of administrative justice and fundamental rights, and as such offers a 'constitutional' view on the Internet regulation.

Mueller, Milton L. 2002. *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge, MA: MIT Press.

Using institutional economics, this book provides an historical account of ICANN, the private, non-profit organization managing the global system of Internet domain names. As the author argues, ICANN and domain name registration has become highly politicized, involving a small self-regulatory private community backed by US federal government.

Tusikov, Natasha. 2017. *Chokepoints: Global Private Regulation of the Internet*. Oakland, CA: University of California Press.

This book discusses how powerful, U.S.-based Internet intermediaries such as Google, Yahoo, Microsoft, Paypal and eBay act as global private regulators in the enforcement of intellectual property rights in online environments. The author argues that since states and other multinational corporations have purposefully empowered Internet intermediaries with this task and this task extends further than the law requires, this regulatory strategy challenges fundamental notions of democratic legitimacy.

Von Bernstorff, Jochen. "Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony." *European Law Journal* 9.4 (2003): 511-526.

This article discusses ICANN as a manifestation of a sectoral polity beyond (international) state-driven governance and asks how it may constitute a legitimate global polity. It argues that this form of transnational private regulation is network-driven, necessarily excludes certain actors and interests, and fosters the hegemony of the Internet community elite, thus challenging central values of democratic governance.

Grand themes

Relationship between public and private spheres in rulemaking

The relationship between public and private spheres, or public and private actors, throughout the process of rulemaking in transnational private regulation has been of particular interest for scholars. The interest in these interrelationships is found in a wide range of studies on transnational regulation. However, it is possible to identify a number of key theoretical findings on this topic. For instance, Héritier and Eckert 2008 identifies the instances in which the threat of legislative action by public authorities result in private self-regulatory initiatives, some of which are inevitably of a transnational nature. Others, such as Abbott and Snidal 2009, suggests that state actors hold specific sets of unique resources that transnational private regulators continue to rely upon, particularly in the agenda-setting and negotiation stages of rule making. While the majority of the literature focuses on the identity of actors in assessing public-private relationships, Mügge 2006 illustrates how a focus on the institution through which regulation is being produced may at times be a more appropriate approach to understanding the public-ness and private-ness of transnational regulation. The perspective opens transnational private regulation scholarship to instances in which public regulatory institutions are captured by private interests, demonstrating yet another angle on public-private relationships in rule making. Finally, there is a common understanding espoused by both Bartley 2011 and Wai 2008 that public-private relationships can be either conflicting or complementary, and that transnational private regulation inevitably operates in a regulatory environment defined by multiple levels of both public and private forms of rules overlapping and interacting with each other. From this point of view, a context thick with interrelationships ought to be a starting point for comprehensive studies of transnational private regulation.

Abbot, Kenneth, and Duncan Snidal, "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Mattli, Walter, and Ngaire Woods (eds), *The Politics of Global Regulation*. Princeton, NJ: Princeton University Press (2009): 44-88. With reference to the 'governance triangle' of the state, non-governmental organizations, and firms, the authors of this article argue that while new regulatory schemes are emerging without state mandates or direct involvement, the state still retains an influential role 'as catalyst, coordinator, and supporter of diverse regulatory activities' (p. 88). They identify agenda-setting, negotiation and enforcement as regulatory stages in which the state's unique resources are still very influential.

Bartley, Tim. "Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards." *Theoretical Inquires in Law* 12.2 (2011): 517-542. This article argues against the study of transnational private regulation in isolation from public law and governance by assessing the layering of conflicting and complementary rules from both public and private regulatory bodies. In particular, the author examines the regulation of labor and forest resources in Indonesia and China.

Héritier, Adrienne, and Sandra Eckert. "New Modes of Governance in the Shadow of Hierarchy: Self-Regulation by Industry in Europe." *Journal of Public Policy* 28.1 (2008): 113-138. This article uses empirical research to explain how the threat of legislative action – 'the shadow of hierarchy' – creates an environment in which industry actors are more likely to develop self-regulation. Their study covers the implications of both positive and negative threats of legislative action, and argues that threats of legislation must be dynamic if they are to be effective, rather than single events.

Mügge, Daniel. "Private-Public Puzzles: Inter-firm Competition and Transnational Private Regulation." *New Political Economy* 11.2 (2006): 177-200. This article argues for the need to shift perspectives away from the private-private distinction with relations to actors and instead focus on the institution in which private regulation manifests. The author offers the critical re-assessment of the field in suggesting that, at times, public institutions can be captured by private power, and private institutions can better reflect public interests. The theoretical arguments are grounded in case studies on Eurobond underwriting, auditing and derivatives trading.

Wai, Robert. "The Interlegality of Transnational Private Law." *Law and Contemporary Problems* 71.3 (2008): 107-127.

The author of this article argues that transnational private law serves as a governance form tasked with managing various forms of rule making by international and national legal systems, as well as private orders such as transnational private regulation. Essential to this theoretical model is the dual presence of both contestation and harmonization relationships manifesting within transnational private law.

Meta-regulation

Due to the proliferation of transnational private regulatory initiatives, and lack of hierarchical authorities in transnational space to govern competing and parallel regulatory activities, a growing interest in transnational private meta-regulation has tracked the development of private actors that provide such coordination despite their lack of formal authority over private regulators. Meta-regulation, as described by Scott 2006, is the use of competitive and communal pressures to steer self-regulatory actors. While this concept can equally be applied to public meta-regulation over domestic self-regulatory initiatives, the literature below is limited to studies directly connected to transnational private regulation. Bomhoff and Meuwese 2011 and Cafaggi 2016 argue that meta-regulatory activities are important strategies for guaranteeing the legitimacy and effectiveness of transnational private rule making. The ISEAL Alliance, the Global Food Safety Initiative (GFSI), and the European Advertising Standards Alliance (EASA) have all been assessed as examples of transnational private meta-regulation. Loconto and Fouilleux 2014 finds that ISEAL primarily provides meta-standards and procedures for private sustainability standards initiatives to establish their common interests. Paiement 2016 builds off this study to illustrate that ISEAL's meta-regulatory role is more adept at coordinating along shared collective interests, rather than regulating the practices of its members through the intervention of external interests. Along similar lines, Cafaggi 2016 and Verbruggen and Havinga 2016 find that GFSI and EASA are most successful in establishing common goals and reducing conflicts among transnational private regulators in their respective spheres. Through these case studies, the literature on meta-regulation is gradually identifying the strengths and limitations of this type of governance.

Bomhoff, Jacco, and Anne Meuwese. "The Meta-Regulation of Transnational Private Regulation." *Journal of Law and Society* 38.1 (2011): 138-162.

The authors of this article argue that transnational private regulatory regimes enter into recognition relationships due to legitimacy and effectiveness demands, and that these relationships consist of meta-regulatory norms. Using the examples of Better Regulation and Private International Law, the authors also argue that the role of public norms remains influential in the meta-regulation of private regulators.

Cafaggi, Fabrizio. "Transnational private regulation: regulating global private regulators," in Cassese, Sabino (ed), *Research Handbook on Global Administrative Law*. Cheltenham, UK: Edward Elgar, 2016: 212-241.

In this chapter, the author describes the possibilities of transnational private meta-regulation to organize transnational regulatory spaces defined by the presence of multiple regimes. The author argues that such coordination of a regulatory space can positively influence the legitimacy and effectiveness of regulatory regimes operating in the space.

Loconto, Allison, and Eve Fouilleux. "Politics of Private Regulation: ISEAL and the shaping of transnational sustainability governance." *Regulation & Governance* 8.2 (2014): 166-185.

This article examines the role of ISEAL Alliance in the institutionalization process of the organizational field of transnational sustainability standards. The article argues that ISEAL uses 'meta-standards' and procedural rules to establish common standards while diffusing conflict among members. In addition, it argues that ISEAL is principally involved in the legitimation process of the organization field.

Paiement, Phillip. "ISEAL Alliance and the Administrative Governance of Transnational Sustainability Standards." *Tilburg Law Review* 21.2 (2016): 144-168.

This article assesses the role of ISEAL Alliance from the perspectives of meta-regulation and global administrative law. Drawing a distinction between coordinating and regulating behaviors, the article analyzes the capacity of ISEAL to regulate its members' actions towards broader public interests when they conflict with the members' organizational interests. It argues that there is little evidence to suggest ISEAL is capable of such regulatory action.

Scott, Colin. "Self-Regulation and the Meta-Regulatory State," in Cafaggi, Fabrizio (ed). *Reframing Self-Regulation in European Private Law*. Alphen aan de Rijn, NL: Kluwer Law International, 2006, 131-146.

In this chapter the author describes how communal and competitive pressures can be used for purposes of meta-regulating, by state or non-state actors, fields defined by the presence of self-regulatory regimes. According to the author, meta-regulation should be understood as a process of steering rather than through the language of command-and-control regulation, and offers actors lacking hierarchical authority the possibility of coordinating self-regulatory mechanisms.

Verbruggen, Paul, and Tetty Havinga. "The Rise of Transnational Private Meta-Regulators." *Tilburg Law Review* 21.2 (2016): 116-143.

On the basis of cases studies on the Global Food Safety Initiative and the European Advertising Standards Alliance, the authors demonstrate how these transnational private meta-regulators increase the capacity, credibility and legitimacy among the transnational private regulators in their respective fields. Furthermore, they illustrate how meta-regulators serve to establish common goals among private regulators, platforms to discuss those common goals, and reduce conflicts between competing regulators in the process.

Legitimacy and accountability

From the earliest scholarship on transnational private regulation, legitimacy and accountability have been core concerns for the field. Often operating without a formal relationship to public authorities, the grounds of legitimacy and accountability usually begin from a position of uncertainty and contestation for transnational regulators. Conceptually, these two terms have been ascribed many meanings. Legitimacy can be approached from sociological or formal perspectives, and can emphasize input, throughput or output variations. Accountability can be considered as separate from legitimacy, or as a sub-component of legitimacy as Curtin and Senden 2011 uses the term. A number of authors have identified institutional aspects of transnational private regulation that can foster or hinder the development of legitimacy and accountability. Kerwer 2005 identifies how different institutional structures of standard setting result in higher or lower levels of accountability depending on their openness to participants and third parties. Likewise, Bernstein and Cashore 2007 highlights the importance of providing spaces for argumentation in private governance initiatives operating on the basis of market pressures. Others have focused more on the process-based nature through which legitimacy is constructed. Bernstein 2011 describes how legitimacy requirements evolve over time and can reflect tensions between different competing interests that operate in a transnational regulatory organization. Likewise, Black 2008 develops a communicative based theory of legitimacy construction premised on exchanges of legitimacy claims and responses. Finally, Curtin and Senden 2011 is unique in this list for reinforcing a more traditional, democratic-based understanding of accountability, although reconfigured for the non-electoral nature of transnational governance.

Bernstein, Steve. "Legitimacy in intergovernmental and non-state global governance." *Review of International Political Economy* 18.1 (2011): 17-51.

In this comparative study of legitimacy within the Kyoto Protocol and the ISEAL Alliance, the authors identify that legitimacy requirements faced by intergovernmental and non-state governance bodies are not static but rather evolve over time. Further, they argue that different regulatory communities are developing diverging legitimacy requirements for their respective fields. They describe how the co-presence of environmental, social and market related interests could create internal tensions related to legitimacy.

Bernstein, Steve and Benjamin Cashore. "Can non-state global governance be legitimate? An analytic framework." *Regulation & Governance* 1:4 (2007): 347-371.

This article describes the procedures by which non-state market-driven (NSMD) systems establish their political legitimacy. It argues that the social structure and the creation of spaces for argumentation among stakeholders play important roles in their evolution and legitimation.

Black, Julia. "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes." *Regulation & Governance* 2.2 (2008): 137-164.

In this seminal article on legitimacy and accountability in transnational regulatory spaces, the author takes a dynamic approach to understanding how legitimacy and accountability are constructed over the course of dynamic and communicative processes. Throughout these processes, the author maintains, organizations receive and respond to a multiplicity of claims regarding their legitimacy, both at the level of the organization as a whole, and between internal constituent parts of the organization.

Curtin, Deirdre and Linda Senden. "Public Accountability of Transnational Private Regulation: Chimera or Reality?" *Journal of Law and Society* 38.1 (2011): 163-188.

This article critically assesses the state of accountability in transnational private regulatory regimes, arguing that they are often biased towards the interests of industrialized countries with advanced regulatory environments. According to these authors, an electoral democratic approach to accountability is a poor fit for the transnational regulatory space, which should instead look towards arrangements of checks and balances as well as competitive pressures that can support an emergence of democratic accountability.

Kerwer, Dieter. "Rules that Many Use: Standards and Global Regulation." *Governance* 18.4 (2005): 611-632.

Using examples from the private financial regulation, this article examines the risk that transnational private standards become tools of technocratic governance. The author argues that different institutional structures for decision-making over transnational standards have different consequences for the accountability of the standards, with private and committee structures having the lower accountability, while network and organizational structures have higher accountability.

Compliance and enforcement

Compliance and enforcement constitutes the Achilles' heel of transnational private regulation: if compliance with these standards cannot be secured, they may just be a mere paper exercise. The literature on transnational private regulation has identified and assessed various mechanisms of enforcement, involving classifications such as formal and informal, judicial or non-judicial and legal and non-legal enforcement. Lehmkuhl 2008 offers an alternative taxonomy of enforcement mechanisms, using the state, community, market and design as organizing categories. As Lehmkuhl observes on the basis of empirical analysis, enforcement frequently occurs in hybrid regulatory constellations involving both public and private actors across national and international levels. Verbruggen 2013 echoes this finding and argues that public actors are key actors in the enhancing the effectiveness of private enforcement mechanisms for transnational private regulation. From a legal perspective, Cafaggi 2012, Benvenuti and Downs 2012, and Beckers 2015 draw attention to the role that national courts retain in the enforcement of transnational private regulation. As Bernstein 1992 and Whytock 2010 show, commercial arbitration also constitutes an important forum of adjudicative enforcement. Scott 2012 and Miller-Dawkins, Macdonald and Marshall 2016, by contrast, stress the importance of non-judicial and market-based mechanisms for the enforcement of transnational private regulation. Certification schemes can be seen a key institutionalized form of enforcement in this category of mechanisms. Bartley 2011 and Blair, Williams and Lin 2008 provide empirical insights into the rise of such schemes, their institutional design, as well as their impact on the ground.

Bartley, Tim. 2011. "Certification as Mode of Social Regulation" in *Handbook on the Politics of Regulation*. David Levi-Faur ed., 441-452. Cheltenham: Edward Elgar.

This contribution asks why certification has become a dominant form of measuring and enforcing compliance with transnational private regulation, linking certification to other modes of regulation.

Beckers, Anna. 2015. *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law*. Oxford: Hart Publishing.

This book provides a comprehensive legal analysis of the role English and German private law courts have in the enforcement of corporation social responsibility codes developed by multinational corporations. Using the method of sociological jurisprudence, it is argued that national private law can and should treat these codes as genuine legal obligations and thus allow national courts to enforce them as such.

Benvenisti, Eyal and George Downs. 2012. "National Courts Review of Transnational Private Regulation." in *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*. Fabrizio Cafaggi, ed. 76-146. Cheltenham: Edward Elgar.

This contribution discusses the doctrines that national courts use to review and hold to account transnational private regulators, and thereby address the challenges these actors raise in terms of efficiency, democracy and equality. The authors argue that while national courts are important mechanisms for enforcement, their interventions are not likely to present systematic responses to the challenges that transnational private regulation poses.

Bernstein, Lisa. "Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry." *Journal of Legal Studies* 21.1 (1992): 115-157.

This article provides a rich and compelling socio-legal account of how a global business community opts out of the legal system to create an effective enforcement mechanism for trade disputes in the diamond industry. The effectiveness of this arbitration procedure, the author argues, is the result of close-knit reputational bonds, a strong tradition of business practices, and efficient arbitration proceedings.

Blair, Margaret, Cynthia Williams and Li-Wen Lin. "The New Role for Assurance Services in Global Commerce." *Journal of Corporation Law* 33.2 (2008): 325-360.

This article examines the emergence and expansion of certification and assurance services as a substitute for public and legal enforcement in global commerce. The authors claim that while these services are providing an essential enforcement mechanism in developing countries where rule of law is weak and court systems are absent or inadequate, they may also undermine domestic public law developments by allowing commercial actors to contract around national public law.

Cafaggi, Fabrizio. 2012. "Enforcing Transnational Private Regulation: Models and Patterns." in *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*. Fabrizio Cafaggi, ed. 75-130. Cheltenham: Edward Elgar.

This contribution provides an overview of mechanisms used to enforce transnational private regulation and argues that certain types of disputes are more likely to arise before a certain type of enforcement mechanism. Moreover, it argues that the function of judicial enforcement goes beyond the sanctioning of non-compliance with transnational private regulation and also involves the coordination of regulatory regimes, the allocation of rights and obligations within those regimes, and the filling of gaps where these regimes prove incomplete.

Lehmkuhl, Dirk. "Control Modes in the Age of Transnational Governance" *Law & Policy* 30.3 (2008): 336-363.

This article links literatures in international relations and global governance to develop a taxonomy of 'control modes' in transnational regulatory space including hierarchy, market, community, and design. Based on the empirical analysis of three regimes of transnational private regulation, it argues that the enforcement of this regulation frequently occurs in hybrid regulatory regimes involving public and private actors across national and international levels.

Miller-Dawkins, May, Kate Macdonald and Shelley Marshall. 2016. *Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms*. <<http://corporateaccountabilityresearch.net/njm-project-publications/>>.

This report provides insights on the effectiveness of transnational non-judicial redress mechanisms that seek to increase access to remedies for victims of business related human rights abuses. Using a comparative case study method, the report reveals the operation of NGO-led or multistakeholder redress mechanisms both in practice and in political context.

Scott, Colin. 2012. "Non-judicial Enforcement of Transnational Private Regulation." in *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*. Fabrizio Cafaggi, ed. 147-164. Cheltenham: Edward Elgar.

This contribution argues that the enforcement of transnational private regulation frequently occurs in secret world, away from formalized legal bodies such as courts and administrative authorities. This undermines the potential for 'public oversight' and invites scholarship and indeed policy makers to rethink how they can ensure accountable and effective regulation by mixing models of enforcement.

Verbruggen, Paul. "Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation." *Regulation & Governance* 7.4 (2013): 512-532

Based on an empirical analysis of transnational private regulation in advertising and food safety, the article argues that the background presence of state regulatory capacity – sometimes referred to as the "regulatory gorilla in the closet" – bolsters the capacity of private actors to effectively enforce transnational private regulation in these fields.

Whytock, Christopher. "Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration." *Business and Politics* 12.3 (2010), Article 10 [<http://www.degruyter.com/view/j/bap>].

This article examines the influence of transnational commercial arbitration in transnational private regulation and other forms of global private governance. It argues that the state retains a critical role in the transnational commercial arbitration and demonstrates that both rule making and enforcement under that enforcement mechanism depend heavily on interactions between private and public actors.