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Conceptual and Constitutional Debates

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The Conceptual and Constitutional Challenge of Transnational Private Regulation

COLIN SCOTT,* FABRIZIO CAFAGGI,** AND LINDA SENDEN***

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

INTRODUCTION

It has been widely observed that governance powers that were once considered the prerogative of the nation state have emerged in a form where they are exercised by actors distinct from national governments. This transformation has involved both a shift of power towards international

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governance bodies and also to non-governmental bodies.[1] This diffusion of governance power is widely associated with processes of globalization which, though they do not render national governments powerless, nevertheless throw up challenges of coordination and regulation which national governments, acting on their own, cannot effectively address. International governmental organizations such as those associated with the European Union, the Organisation for Economic Cooperation and Development and the United Nations, and many other treaty-based organizations, derive a good deal of their governance capacity in their decision making and their legitimacy from the direct participation of, or delegation from, national governments. Much of the implementation of such governance regimes does, in any case, fall to national governments. Transnational and non-governmental regulatory power does not so obviously have linkages to the electoral politics associated with national governments. Arguably transnational private regulation (TPR) presents a greater challenge in terms of its constitutional standing and legitimacy.

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

The articles in this collection are part of a larger project investigating the emergence, legitimacy, and effectiveness of transnational private regulatory regimes (TPRERs), funded by the Hague Institute for the Internationalization of Law.[4] The project investigates the claims to legitimacy and effectiveness of TPR regimes across different sectors by combining theoretical and empirical research. In this article, we offer an introduction to the constitutional challenges associated with TPR. We first discuss the variety of transnational private regulatory regimes which come within our conception of the phenomenon. This requires an examination of distinctions and commonalities between public and private actions. A central question in the

1 A.C. Cutler, V. Haufler, and T. Porter, *Private Authority and International Affairs* (1999).

2 N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Rev.* 317–59, at 341.

3 O. Perez, 'Using Private-Public Linkages to Regulate Environmental Conflicts: The Case of International Construction Contracts' (2002) 29 *J. of Law and Society* 77–110.

4 Further details may be found on the project website at <www.privateregulation.eu>.

examination of non-state regulation is the extent to which private regulation may be conceived of as serving collective interests. We then examine how each of the different types of regimes addresses core regulatory tasks of setting and enforcing norms. A variety of models have emerged engaging businesses, associations of firms and NGOs, sometimes in hybrid form and often including governmental actors[5]. Whilst the linkage to electoral politics is a central mechanism of legitimating governance activity there are clearly other mechanisms relating to proceduralization and potentially also to judicial accountability. But these public law forms do not exhaust the set of such mechanisms, and we consider also the contribution of private law forms and cooperative and competitive structures which may support similar legitimating functions. Accordingly, the constitutional standing of TPRERs is considered from the perspective of the variety of mechanisms through which legitimacy may be achieved for private regulation.

KEY CONCEPTS OF TRANSNATIONAL PRIVATE REGULATION AND THE CONSTITUTIONAL CHALLENGE

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

Such regimes address activities characterized in some instances by market-oriented needs for intervention and coordination, as with technical standards regimes,[8] but also provide a response to broader political conflicts

5 B. Kingsbury, N. Krisch, and R.B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61; S. Cassese, 'Administrative Law Without the State? The Challenge of Global Regulation' (2005) 37 *New York University J. of International Law and Politics* 663–94.

6 T. Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113 *Am. J. of Sociology* 297–351, at 298.

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

8 N. Brunsson and B. Jacobsson, 'The Contemporary Expansion of Standardization' in *A World of Standards*, eds. N. Brunsson, B. Jacobsson, et al. (2000).

over the appropriate balance between states and markets in determining such matters as entitlements to the protection of human rights and conservation of the environment.[9] Thus, while standardization regimes might be evaluated to some extent by reference to market criteria, there is arguably a stronger political component to regimes which may be characterized as constituting global points of connection between civil society, business, and government and, indeed, global governance without global government. For some, this political engagement between civil society and government, represented in this case at transnational level, merits discussion and investigation of the emergence of a 'new public sphere'.[10] Recent activity, engaging NGOs, governments, and businesses in respect of employment rights provides a key example.[11] This point is well demonstrated by Fiona de Londras's contribution to this volume in which she argues that threats to human rights generated by the delegated activities of private airlines cannot be adequately addressed by conventional litigation strategies but are likely to require more institutionalized and hybrid responses drawing in both NGOs and associations of firms and governments in developing and implementing appropriate protective norms. Her approach involves a critical examination of the capacity for governance within the aviation industry, largely over technical matters, which might be turned towards effectively addressing human rights concerns. An underlying question in her approach is whether there are some activities for which privatization of provision and regulation are inappropriate. This is not simply a question of the limits to legitimate transfer to private firms of state functions, an issue that has been explored in the case of privatization of prisons,[12] but also the appropriate role and limits of *private* regulation over such privatized activities. De Londras's claim that the institutional structures of private regulation, established to address issues of technical standards and safety, might be turned to address human rights issues is made not because of some normative superiority of such private regulation but, rather, because this is where the capacity for such oversight is best developed.

The emergence of TPR regimes may produce transfers of power and authority from state to international level and from public to private, affecting traditional conceptions of sovereignty and self-determination.[13]

9 Bartley, op. cit., n. 6, p. 299.

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

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

12 R. Harding, *Private Prisons and Public Accountability* (1997).

13 N. McCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Rev.* 1–18; N. Rose and M. Valverde, 'Governed by Law?' (1998) 7 *Social and Legal Studies* 541–51; F. Cafaggi, 'The New Foundations of Transnational Private Regulation (in this volume, pp. 23–5).

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

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

The principal objections to self-regulation at both national and supranational level include claims that such regimes are likely to be programmed to be soft or ineffective or, where they are effective, this is to enhance the position of regime members so as to cartelize a market, with not only positive effects for participants but also negative effects for others (both competitors and consumers). Indeed, it has been suggested that the existence of a TPR regime may indicate an absence of competition between firms within a sector.[17] The dismissal of non-state regulation on the grounds that it serves only private interests through ineffectiveness, cartelization or capture is too simple. In her contribution to this volume, Imelda Maher critically

14 J. Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29 *Oxford J. of Legal Studies* 427–55.

15 P. Drahos, 'The Regulation of Public Goods' (2004) 7 *J. of International Economic Law* 321–39, at 323.

16 McCormick, op. cit., n. 13; Walker, op. cit., n. 2.

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

evaluates the modern tendency of competition law policies and agencies to operate a more or less blanket prohibition on cartel agreements, and asks what conditions would be required to satisfy some form of public interest justification for a cartel? She notes that in some contexts, notably export cartels, agreements lawfully evade such prohibitions without state involvement, while others seem to require public sanction and oversight to render them lawful, generating a hybrid form of regulation. Within this discussion there is potential for competition law to offer a means to regulate, in the public interest, private regulation through cartels, as an alternative to prohibition.

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

THE EMERGENCE OF TRANSNATIONAL PRIVATE REGULATORY REGIMES

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

18 A. Katz, 'Taking Private Ordering Seriously' (1996) 144 *University of Pennsylvania Law Rev.* 1745–63, at 1749.

19 Drahos, op. cit., n. 15.

20 A.C. Cutler, 'The Legitimacy of Private Transnational Governance: Experts and the Transnational Market for Force' (2010) 8 *Social & Economic Rev.* 157–85, at 176.

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

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

Quite distinct from the coordination issue, firms may self-regulate to address reputational issues in the market. Thus, individual and collective firm responses to concerns about poor working conditions in the garment manufacturing industry have involved seeking to establish credible regimes to develop and implement higher standards so as to protect market position in industrialized countries.[25] This latter motivation hints at the position of

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

22 W.D. Nordhaus, *Managing the Global Commons: The Economics of Climate Change* (1994); F. Haines and N. Reichman, 'The Problem that is Global Warming' (2008) 30 *Law & Policy* 385–93.

23 B. Eberlein and E. Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' (2005) 12 *J. of European Public Policy* 89–112, at 91.

24 K. Tamm Hallström, *Organizing International Standardization: ISO and IASC in Quest of Authority* (2004).

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

firms within communities and is reminiscent of the idea that firms in extractive industries such as logging and mining are dependent on a 'social licence to operate'[26] which, though it may be implicit, has significant consequences for firms when it is deemed to be breached. This may result in some institutionalization of private regulatory capacity over the issues at the level of individual firms or trade associations.

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

A central example is provided by self-regulation in the area of advertising. In operational terms, advertising self-regulation occurs in many member states as a privately organized and national regime.[30] However, the European

26 N. Gunningham, R. Kagan, and D. Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29 *Law and Social Inquiry* 307–42.

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

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

29 F. Cafaggi, 'Rethinking self-regulation in European Private Law' in *Reframing Self-Regulation in European Private Law*, ed. F. Cafaggi (2006).

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

Commission has been heavily involved in encouraging a transnational private organization, the European Advertising Standards Alliance, to promote more uniform and stringent models of self-regulation and regulatory standards through the national private regimes.[31] The common reference point for the standardization of national codes is the Consolidated Code of Advertising and Communications Marketing Practice promulgated by the International Chamber of Commerce.[32] In turn, legislative measures, such as the Unfair Commercial Practices Directive (Directive 2005/29/EC) both encourage the engagement of stakeholders in the promulgation of self-regulatory codes (recital 20) and require member states to penalize through legislation the abuse of self-regulatory codes by businesses (article 6(2)(b)).[33]

PATTERNS OF TRANSNATIONAL PRIVATE REGULATION

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

With the practices of individual firms involving corporate governance, key issues concern the sources of the norms which they follow and the mechanisms through which compliance is overseen. Corporate governance norms have emerged in recent years through the activities of various private committees, but have been given some official force through reference to some or all of their requirements in national corporate law regimes.

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

32 EASA, op. cit., n. 30, pp. 22–7.

33 F. Cafaggi, 'Private Regulation in European Private Law' in *Towards a Civil Code*, eds. A.S. Hartkamp et al. (2010, 4th edn.) ch. 5.

34 T. Havinga, 'Private Regulation of Food Safety by Supermarkets' (2006) 28 *Law & Policy* 515–33.

Oversight and enforcement has been in part a matter for companies themselves, through their executive and non-executive directors. Often ethical committees have been created independent from the management to oversee the implementation of codes of conducts. But shareholders have assumed increasing prominence, frequently acting through associational groups, in steering firms towards compliance with key corporate governance norms.[35] The increasing importance of private regulation has promoted important changes in the corporate governance structure of multinational enterprises to promote responsiveness towards stakeholders affected by the activity of the corporation.

With multinational enterprises generally, both in their own corporate governance activities, and in their relationships to others, whether in bilateral or associational contracts, there are significant distinctions in the market position of different firms. Proximity to final consumers has the potential to create market pressure on businesses to adopt and implement private regulatory regimes. Private regulators such as NGOs may exert greater pressure because labelling and other marketing mechanisms affecting reputation can be used as a competitive tool. In some instances where consumer pressure is absent, investors may exert a degree of oversight over company practices through investment decisions generally and negotiation with companies through investor associations, a growing trend in the environmental protection area.[36]

Governments also have increasingly sought to assert at least limited enforcement capacity over firms' compliance with privately promulgated corporate governance norms. Thus corporate governance is frequently a multi-level and hybrid affair. As Peer Zumbansen notes in his contribution, corporate governance regimes exemplify contemporary challenges to legal centralism, and require a more pluralistic conception of both law making and law enforcement in the corporate sphere. Such regimes typically comprise both hard and soft law instruments, a theme central to other articles in this volume, notably that of Fabrizio Cafaggi. It is significant that corporate governance and even bilateral contracting practices of companies should increasingly be regarded as not wholly private matters for companies themselves but, rather, representative of hybrid governance arrangements in which a public dimension to corporate activities is recognized. Conventional private law devices have been transformed to perform regulatory functions at the global level. A new body of rules and practices has emerged. Associational regimes in which businesses (and sometimes others, including governmental actors) work together to create regulatory arrangements raise rather different issues, but which may be equally characterized in terms of

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

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

asking to what extent such arrangements should be regarded as private or public matters. It is striking how little scrutiny associations with regulatory purposes and/or effects have had from competition law institutions, a lacuna which Imelda Maher's article seeks to remedy. From a constitutional perspective, questions for such associational regimes include the extent to which they are representative and inclusive, transparent in their policy making, and respectful of rule of law norms in their enforcement activity.

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

Hybridity is an important theme not only in respect of standard setting, but also with respect to monitoring and enforcement, a relatively neglected topic in the literature on transnational governance generally.[38] Within research on regulation it has been widely noted that enforcement tends to emphasize advice and persuasion by enforcement agencies and that this may be effective where there is capacity to escalate enforcement strategies to include more stringent measures such as prosecution and licence revocation.[39] This pyramidal model of enforcement has been extended in ways which are promising for hybrid governance regimes, to recognize the potential for third-party enforcement, such as where businesses, trade associations, and NGOs become involved in enforcing, using powers delegated by legislative bodies or rights assigned to them under contracts.[40] In many TPRERs, enforcement in a conventional sense has limited application since

37 Abbott and Snidal, op. cit., n. 27.

38 F. Cafaggi (ed.), *The Enforcement of Transnational Private Regulation* (2011, forthcoming).

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

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

businesses adopt standards voluntarily and they are, in a sense, judged by the market in terms of the acceptability of their compliance. However the importance of checking for compliance is recognized within many regimes and it is not unusual to find contractual requirements on businesses that they engage third parties to certify compliance.[41] Where participation in a TPRER is less than voluntary, then more conventional bilateral monitoring and enforcement may apply, though, as with many international regulatory regimes, it is frequently the case that the standard setting and the enforcement are organizationally distinct functions with the enforcement being carried out at national or sub-national level. There is, for example, relatively little direct involvement of the International Chamber of Commerce or the European Advertising Standards Alliance in the enforcement of advertising rules which they are involved in designing, nor is GlobalGap directly involved in enforcing its standards on food producers.[42] Rather, the rules are adopted and enforced by others, national self-regulatory bodies in the case of advertising, and large retailers in the case of foods standards. Thus an evaluation of the effectiveness of enforcement is likely to depend substantially on an analysis of the activities of firms, associations, and NGOs operating more locally.

CONSTITUTIONALISM AND TRANSNATIONAL PRIVATE REGULATION

Questions of legitimacy of regulatory governance are not restricted to private regulatory regimes, but are raised also by the tendency within public regimes to distance regulatory decision making from elected politicians. Within public international law, the relationship between legitimacy and constitutionalism has been much discussed.[43] In the European Union, for example, extensive delegation of apparently technical decision making to expert committees ('comitology') exemplifies this problem.[44] To the extent that transnational and private regulatory regimes are assessed by reference to traditional constitutional criteria, they are liable to magnify such issues. For this reason, the emergence of transnational governance generally has stimulated greater attention to more pluralist conceptions of constitutionalism

41 M. Blair, C.A. Williams, and L.W. Lin, 'The New Role for Assured Services in Global Commerce' (2007) 33 *J. of Corporate Law* 325–60.

42 T. Havinga, 'Private Regulation of Food Safety By Supermarkets' (2006) 28 *Law & Policy* 515–33.

43 A. von Bogdandy, P. Dann, and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 *German Law J.* 1375–400.

44 C. Joerges and E. Vos, *EU Committees: Social Regulation, Law and Politics* (1999); M. Pollack, 'Control Mechanism or Deliberative Democracy?: Two Images of Comitology' (2003) 36 *Comparative Political Studies* 125–55.

which emphasize the constitutional potential of private activities where there are plausible claims to authority and common identity within a social or economic group.[45] Within such a perspective, interdependence through the creation of networks, competitive processes, and the potential for judicial accountability may be as important sources of legitimacy as the ballot box.

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

Concerning the setting of norms, constitutionalism is associated with the idea not only that laws should be made by elected legislatures, and not by delegated bodies, but also that lawmakers should be subject to constraints on the content of the laws they pass (ensuring, for example, compliance with human rights norms, and other rule of law principles such as the rule against retrospective legislation). Many jurisdictions allow for a scrutiny of the lawfulness of legislative acts by a constitutional or supreme court. Accordingly, private law making within TPR regimes raises the problem not only of delegation, but also and distinctly, that scrutiny of such private law making may not apply or involve the range of norms and judicial procedures which are applied to parliamentary legislation. In their contribution to this volume, Casey and Scott address this issue in an exploration of alternative mechanisms through which the legitimacy of norms is supported within TPR regimes. Research in a number of regimes is suggestive of deliberate attempts to construct legitimacy and to prioritize certain forms of legitimacy over others in particular instances. Normative legitimacy is closely tied to the appropriateness of processes in terms of such matters as inclusion and transparency. Pragmatic legitimacy is more closely allied to output measures of legitimacy concerned with the acceptance of the effectiveness of a regime. Clearly there may be a trade-off between process and output, for example, because the prioritization of normative legitimacy slows down or increases costs thereby adversely affecting outcomes. Casey and Scott consider also a third possible basis for legitimacy based in a sense that it is

45 Walker, op. cit., n. 2.