



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

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European Union Jean Monnet Chair*

in cooperation with the



THE NEW PUBLIC LAW IN A GLOBAL (DIS)ORDER A PERSPECTIVE FROM ITALY

Jean Monnet Working Paper 17/10

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Public Law and Private Regulators in the Global Legal Space

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ISSN 1087-2221 (print)
ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Maurizia De Bellis 2010
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

The New Public Law in a Global (Dis)Order – A Perspective from Italy

This working Paper was borne of the collaboration between The Jean Monnet Center at NYU School of Law and the IRPA (*Istituto di ricerche sulla pubblica amministrazione* - Institute for research on public administration). IRPA is a nonprofit organization, founded in 2004 by Sabino Cassese and other professors of administrative law, which promotes advanced studies and research in the fields of public law and public administration. The seminar's purpose was to focus attention, in the international context, on the original and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The project challenged some of the traditional conventions of academic organization in Italy. There was a “Call for Papers” and a selection committee which put together the program based on the intrinsic interest of each proposed paper as well as the desire to achieve intellectual synergies across papers and a rich diversity of the overall set of contributions. Likewise, formal hierarchies were overlooked: You will find papers from scholars at very different stages of their academic career. Likewise, the contributions were not limited to scholars in the field of “Administrative Law,” “Constitutional Law,” or “International Law,” but of the integrated approach of the New Italian Public Law scholarship, as explained in the prologue to this paper. The Jean Monnet Center at NYU is hoping to co-sponsor similar Symposia and would welcome suggestions from institutions or centers in other Member States.

J.H.H. Weiler, *Director, Jean Monnet Center for International and Regional Economic Law & Justice*

Sabino Cassese, *Judge of the Italian Constitutional Court*

Prologue: The New Italian Public Law Scholarship

Since the second half of the 20th Century, a new distinctive Italian Public Law Scholarship has been developing.

Originally, traditional Italian Public Law scholarship was highly influenced by the German positivist and dogmatic approach. As a consequence, Italian Scholarship devoted greater attention to the law found in books rather than to law in action; the majority of legal scholars were also practicing lawyers; and Scholarship was focused on interpreting the law, not in analyzing the conditions of legal change and reform.

Beyond the mainstream of this scholarship, and within the line which links the founder of the Italian Public Law School, the Sicilian professor and politician Vittorio Emanuele Orlando to his main pupil, Santi Romano (who had also been the President of the Council of State) and to the most renowned student of Santi Romano, Massimo Severo Giannini, in the last quarter of the 20th century a new generation of scholars grew, whose programme was to find new ways to study Public Law. Since then, therefore, a new Italian Public Law has been developing.

The work of this New School has several distinctive features. It developed in the field of administrative law, but it has greatly contributed to the main subjects of constitutional law, such as the State and its crisis, and the Constitution. It has turned from German to British and especially American legal culture. It combines attention to tradition with that for innovation. It studies institutions and how they operate within their historical development and it contributes to researches on the history of Public Law ideas. It is not confined within the usual borders of the Public Law discipline, but it has a great interest in studying topics that are at the intersection of law, politics, economics, and sociology. It is an example of lateral thinking and it adopts methodological pluralism. It has greatly contributed to the ongoing body of research on the Europeanization and globalization of law, in collaboration with foreign scholars. It combines study of statutes with study of judicial decisions. It is engaged not only in study of the law, but also in legal reforms, participating in several manners to the legal process. It has gained prominence in the general public opinion, because its members play the role of public intellectuals. It is mainly based in Rome, but it has ramifications elsewhere (Universities of Viterbo, Urbino, Siena, Naples, Catania). It has established strong and permanent links with many European (French, German, British, Spanish), and some non-European legal cultures, namely American. It has produced important collective works (treatises, dictionaries) and edits two important law journals (“*Rivista trimestrale di diritto pubblico*” and “*Giornale di diritto amministrativo*”). It has established a research institute (*Istituto di ricerca sulla pubblica amministrazione* - IRPA), that is very active in the field.

For all these reasons, the Jean Monnet Center at NYU School of Law and the IRPA decided to host a seminar in order to focus attention, in the international context, on the original

and innovative contributions made by Italian legal scholars to the study of the transformations of the State, and to the fields of public law and public administration generally.

The seminar – entitled “The New Public Law in a Global (Dis)Order – A Perspective from Italy” – took place on the 19th and 20th of September, 2010, at the New York University (NYU) School of Law[♦].

Here, a selection of the papers presented at the Seminar has been published. Our will and hope is that these articles shall contribute to the growth of the Italian Public Law Scholarship and to strengthen its efforts in dealing with the numerous legal issues raised by globalization.

Sabino Cassese, *Judge of the Italian Constitutional Court*

Giulio Napolitano, *Professor of Public Law at University "Roma Tre"*

Lorenzo Casini, *Professor of Administrative Law at University of Rome "Sapienza"*

[♦] Authors were selected through a call for papers and they were the following: Stefano Battini; Lorenzo Casini; Roberto Cavallo Perin, Gabriella Racca e Gianlugi Albano; Edoardo Chiti; Elisa D’Alterio; Maurizia De Bellis; Federico Fabbrini; Francesco Goisis; Daniele Gallo; Elena Mitzman; Giulio Napolitano; Cesare Pinelli. Discussants at the seminar were Eyal Benvenisti, Sabino Cassese, Angelina Fisher, Matthias Goldmann, Benedict Kingsbury, Mattias Kumm, Giulio Napolitano, Pasquale Pasquino, Richard B. Stewart, Luisa Torchia, Ingo Venzke, and Joseph H.H. Weiler. More information available at <http://www.irpa.eu/index.asp?idA=302>.

PUBLIC LAW AND PRIVATE REGULATORS IN THE GLOBAL LEGAL SPACE

By Maurizia De Bellis*

Abstract

In domestic legal systems, public authorities have incorporated rules first established by private bodies for a long time. In the global arena, public regulatory regimes increasingly connect with private ones. International intergovernmental organizations, transnational regulatory networks and the EU use international standards and rules coming from private entities through a variety of mechanisms. Examples include the FSB's incorporation of international auditing standards, the Basel Committee's reference to credit rating agencies, the WTO agreements' connection with international standards established by private bodies and the EU endorsement of international accounting standards. Notwithstanding the different context in which they are operating, traditional techniques -- such as incorporation and reference -- are surprisingly resilient. Yet, tools at first sight originating from the plain transplantation of instruments well known within national legal orders end up being used for new purposes. Moreover, in some cases systems drawing upon old tools enact new and more complex models.

Concerns about hybrid public-private regulation - under which conditions can a public authority delegate rulemaking functions to private ones? How can the accountability of private entities be pursued? - are old dilemmas. The transplantation of techniques from the national to the global level often aims at finding new solutions to old problems, which appear even more complex in the global arena. The analysis shows that in some cases tools addressing legitimacy concerns, such as procedural ones, seem to be more developed in the global context than in

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national ones – even though not necessarily more efficacy in enhancing accountability comes with the development in the number of these tools.

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1. Introduction

Private actors play a key role in global governance. This is a common claim in studies on globalization.¹ A phenomenon first confined to economic and financial regulation, the rise of global private governance can now be observed in areas such as human rights and environmental protection.² Reasons leading to this phenomenon are several. Public regulatory institutions often lack the expertise necessary to cope with technical innovation, crucial to effectively regulate internationalized markets, and, in order to prevent the costs for developing adequate technical skills, can be eager to delegate a number of functions to private actors possessing resources and highly specialized knowledge.³ The spread of neoliberal ideas influenced this trend as well.⁴

However, purely private regimes are extremely rare, while hybrid public-private patterns are much more common.⁵ Hybridation occurs in different ways. In some cases, the structure of

¹ First contributions pointing out how States were losing part of their sovereignty not only in a vertical direction, towards intergovernmental and transnational organizations, but also in a horizontal direction, towards multinational corporations and NGOs, date back to the 90s: see S. Strange, *The Retreat of the State. The Diffusion of Power in the World Economy* (Cambridge, Cambridge University Press, 1996). Later on, the role of private actors has been further analyzed by A.C. Cutler, V. Haufler, T. Porter (eds.), *Private Authority and International Affairs* (New York, NY, SUNY Press, 1999) and R.B. Hall, T.J. Biersteker (eds.), *The emergence of Private Authority in Global Governance* (Cambridge, Cambridge University Press, 2002). On the new *lex mercatoria*, see G. Teubner (ed.), *Global Law Without a State* (Portland, Dartmouth, 1997) and A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law and The Global Political Economy* (Cambridge, Cambridge University Press, 2003). For a recent critique of the literature on the point, see J.-C. Graz and A. Nölke, (eds.), *Transnational Private Governance and its Limits* (Routledge, London - New York, 2007).

² For an analysis of the different sectors where private regulatory regimes are most relevant, see T. Porter, "Private Production of Public Goods: Private and Public Norms in Global Governance", in E. Grande, L. W. Pauly (ed.), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first* (Toronto, University of Toronto Press Incorporated, 2005), p. 217 et seq., at 219. About the areas of human rights and the environment, see E. Meidinger, "Private Environmental Regulation, Human Rights, and Community", 7 *Buff. Envtl. L. J.* (1999-2000) p. 123 et seq. and J. Clapp, "The Privatization of Global Environmental Governance: ISO 14000 and the Developing World", 4 *Global Governance* (1998) p. 295 et seq.

³ See J.-C. Graz and A. Nölke, "Introduction: beyond the fragmentation debate on transnational private governance", in *Id.*, above n. 1, at 12.

⁴ See T.A. Börzel, T. Risse, "Public-Private Partnerships: Effective and Legitimate Tools of International Governance?", in E. Grande, L. W. Pauly (ed.), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first* (Toronto, University of Toronto Press Incorporated, 2005), p. 195 et seq., at 205, and Graz and Nölke, *supra* note 3, at 7-8.

⁵ About hybrid intergovernmental/private administration and administration by private institutions with regulatory functions, see B. Kingsbury, N. Krisch and R. Stewart, "The Emergence of Global Administrative Law", 68 *Law & Contemp. Probs.* (2005), p. 15 et seq., at 20. See also J.-C. Graz, "Beware of Hybrids: Power Devolution in

the regulators is increasingly a mixture of public and private.⁶ In other cases, public regulatory regimes link and connect with private ones in different ways and at different levels.⁷

Albeit extremely widespread in global governance, connections between public and private regimes were first used within domestic legal orders. The paper uses mechanisms extensively debated in domestic legal traditions to frame new phenomena and challenge their current understanding. The analysis shows the resilience of the traditional models of use of private standards in domestic public regulation – ‘incorporation’ and ‘reference’ – and the emergence of mixed models, which draw upon elements of the old ones but enact a new mixture and balance of public and private.

Concerns laying at the core of private regulation - does the public regulator delegate its power to the private one? Or does public law act as a filter? How does public law try to influence private regulation, and are these efforts effective? - are old dilemmas. The analysis shows how old tool are adapted to answer to these long-lasting problems, which grew more complex in a globalized world. In some cases, adaptations can be surprisingly effective. In other cases, though, new solutions must be shaped.

The paper is divided in two parts. In the first one, the different models of use of private norms in public regulation within domestic legal orders – ‘incorporation’ and ‘reference’ – are illustrated, together with their advantages, limits, and systematic implications. The emergence of mixed models, already at the national level but especially in the EU, with the New Approach for technical harmonization, is given account of. In the second part, the increasing use of international private standards within global regulatory regimes is looked at. Here, three cases –

Globalisation”, Paper for Pekea 2005 Conference, Rennes, November 3-6 2005, available at <http://fr.pekea-fr.org/Rennes/T-Graz.pdf>.

⁶ The ICANN is generally considered to be the most illustrative example of the increasing hybridization of a private regulator: see J. Zittrain, “Between the Public and Private Comments before Congress”, 14 *Berkeley Technology Law Journal* (1999) p. 1077 et seq. With 2002 reform, the powers of the Governmental Advisory Committee (GAC), in which national governments participate, were reinforced: see <http://gac.icann.org/message-chairman>. The WIPO incorporates an opposite trend, with the increasing privatization of an international organization: see L.A. Cunningham, “Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting”, 104 *Michigan Law Review* (2005) p. 2 et seq., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=677647.

⁷ For a general overview, see D. W. Leebron, “Linkages”, in 96 *American Journal of International Law* (2002) p. 5 et seq.

the incorporation of international standards on accounting (IAS/IFRS) and auditing (ISA) in the Financial Standard Board (FSB) Compendium of Standards, the reference to international standards within WTO agreements and the reference to credit ratings in Basel capital accord – seem to correspond to techniques well known to legal scholars, even though their functions and implications are different. The last case – the endorsement of international accounting standards in the EU – builds on traditional elements, but embodies a more complex model. Section 4 presents an overall conclusion.

2. Public Law and Private Regulators in Domestic Legal Orders: the Conceptual Framework

2.1. The ‘Incorporation’ Model: State v. Crawford

In the domestic legal orders, the legal debate concerning reliance on private standard setting organizations can be dated back to the beginning of the last century, in the US.

In the town of Topeka, in Kansas, an inspection showed that the electric wiring of the town theatre was not enclosed in conduit or armored cable, infringing the provision of the Kansas Fire Prevention Act of 1915. Yet, this act did not itself establish such rule; on the contrary, it required all electrical wiring to be in accordance with the National Electrical Code, a set of rules about electrical wiring promulgated by the National Board of Fire Underwriters, a body composed by private individuals. The Kansas Fire Prevention Act was brought to the Supreme Court of Kansas, which stated that the Act was illegitimate because it constituted a delegation of legislative power to private actors.

According to the Court, «[T]he fallacy of such legislation in a free, enlightened and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities are unnecessary. If the Legislature desires to adopt a rule of the National Electrical Code as a law of this state, it should copy that rule, and give it a title and enacting clause, and pass it through the Senate and the House of representatives by a constitutional majority, and give

the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication».⁸

Thus, at the time no reference to standards elaborated by a private entity was admitted in public law; the only legitimate solution was the one of incorporating each provision in a law and have it approved through the legislative process.

The solution suggested in the US in the Crawford case is not isolated. The ‘incorporation’ model, through which norms (mostly technical ones) at first elaborated by private organizations were subsequently copied in specific provisions of a law and passed through the usual approval in the Parliament has been the most used one in Italy in the 50s and 60s, and some date it back to the end of the XIX century.⁹

Scholars as Vittorio Bachelet have explored the implications coming from the incorporation of private technical standards in public laws, arguing that, through incorporation, technical standards become part of the domestic legal system.¹⁰

If the main driver for this type of model comes originally from legitimacy concerns, as the decision of the Court of Kansas clearly shows, over time this technique has been challenged by the increasing gap opposing the continuous evolution of technology, on the one hand, and the lengthy legislative decision-making process, on the other hand.¹¹

2.2. *The ‘Reference’ to Private Standards*

In the Italian legal system, a flexible ‘reference’ (*rinvio ‘mobile’*) to private standards has been increasingly used in order to overcome the limits of the previous model. The first example can be found at the end of the 60s. The law 1 March 1968, n. 186 set an obligation to produce electrical materials and systems according to the best practices (*a regola d’arte*) and article 2 explains that

⁸ *State v. Crawford*, 177, p. 360-361 (Kansas 1919).

⁹ See E. Chiti, “La normalizzazione”, in S. Cassese (ed.), *Trattato di diritto amministrativo, Parte Speciale* (Giuffrè, Milano, 2003) p. 4003 et seq., at 4032.

¹⁰ See V. Bachelet, *L’attività tecnica nella pubblica amministrazione* (Giuffrè, Milano, 1967) at 87 – 91. For an opposite opinion, see A. de Valles, “Norme giuridiche e norme tecniche”, in Aa.Vv., *Raccolta di scritti in onore di Arturo Carlo Jemolo*, III (Giuffrè, Milano, 1963), p. 175 et seq., at 180 – 181.

¹¹ See Chiti, *supra* note 9, at 4033.

all systems built according to the technical standards coming from the *Comitato elettrotecnico italiano* (CEI), a private organization, were considered to be *a regola d'arte*.¹²

Italian legal scholars labeled this type of reference ‘dynamic reference’ (*rinvio ‘mobile’*), as opposed to *rinvio ‘fisso’* or ‘*recettizio*’. While the latter, being equivalent to the American ‘incorporation by reference’, refers to specific provisions and hence entails the same consequences (and limits) of incorporation, with the *rinvio mobile* what is referred to is not directly a text, but a source of law, and all the normative provisions coming from it.¹³

The main advantage of this model lies in the constant adaptation to technical progress it entails. Moreover, some have considered as a positive feature the clear distinction of technical standards from legal norms, coming from it.¹⁴ Shortcomings of this mechanism ground – with arguments which seem to echo the Court of Kansas – on the lack of legitimacy of the reference to standards established by private professionals and hence not subject to any democratic control.

The ways of coping with the lack of legitimacy of the private standard setting bodies are several. First, representatives of the Ministries take part in the private standard setters to which the law mentioned above is referring to (the CEI). Second, the *Consiglio Nazionale delle Ricerche* (CNR), a public body (*ente pubblico nazionale*) committed to carry out and promote research activities, is entitled to control the activity of the standard setters and to report to the competent Ministry. A function first established in the 40s and never actually carried on, it has been confirmed and strengthened in the 80s, under the influence of EU law.¹⁵ Third, a public financing method has been introduced.¹⁶ Hence, there are some structural connections between public authorities and private actors. Public regulators’ use of the norms coming from the private

¹² *Legge 1 marzo 1968, n. 186, Disposizioni concernenti la produzione di materiali, apparecchiature, macchinari, installazioni e impianti elettrici ed elettronici*, in O.J. 23 March 1968, n. 77.

¹³ For the consequences of such tool on the interactions between legal orders, S. Romano, *L’ordinamento giuridico*, III ed. (Sansoni, Firenze, 1977) at 183. See also, for a legal theory point of view, N. Bobbio, *Teoria dell’ordinamento giuridico* (Giappichelli, Torino, 1960) at 198 – 201.

¹⁴ See M. Gigante, “Effetti giuridici nel rapporto tra tecnica e diritto: il caso delle «norme armonizzate»”, in *Riv. it. dir. pubbl. comunit.* (1997) p. 313 et seq., at 321, and Id., “Norma tecnica”, in S. Cassese (ed.), *Dizionario di diritto pubblico* (Giuffrè, Milano, 2006) *ad vocem*, at 3809.

¹⁵ Art. 4, c. 2, *Legge 21 giugno 1986, n. 317, Attuazione della direttiva n. 83/189/CEE relativa alla procedura d’informazione nel settore delle norme e delle regolamentazioni tecniche*, in O.J. 2 July 1986, n. 151.

¹⁶ *Ibid.*, art. 8.

ones has been matched with an increasing web of connections among the two. On the other hand, though, in the Italian model of reference to technical standards stakeholders' participation in standard setting is still limited. Individuals that are not members of the CEI can be admitted to its technical committees' meetings on a case-by-case basis, while drafts of new standards are kept secret until their final approval.¹⁷ In the domestic legal models of connections between private standards and public law, legitimacy is pursued more through hierarchical means (the CNR influence over the CEI, even if seldom used) and structural connections (participation of Ministries in the private standard setting body and public financing of the latter) than through procedural ones. As it will be shown in the following pages (Section 3), within global regulatory regimes, the trend seems to be the opposite: procedural instruments are increasingly used, even though some attempts to build structural links among private actors and public authorities are emerging also at the global level (see Section 3.1. and 3.4.).

Lastly, it must be pointed out that practices similar to the Italian model of dynamic reference – albeit with some differences – can be found in other European countries.¹⁸ In Germany, hinge-clauses – such as the '*Stand der Wissenschaft und Technik*', or 'state of scientific and technical knowledge' (similar to the Italian '*a regola d'arte*') – are in place. The *Deutsche Institute für Normung* (DIN), the German private standard setter, has an obligation to observe the public interest in its activities, on the basis of a contract with the Federal Government. According to the majority of the commentators, only 'static' references – to specific and already existing standards – are admissible. According to others, though, the

¹⁷ See CEI, *Regolamento per gli organi tecnici*, available at www.ceiuni.it/struttura/body-associazione-cei.html, at 2-3.

¹⁸ In continental Europe, technical harmonization arrangements are less useful for purposes of this study, as the French *Association française de normalisation* (AFNOR) is subject to extensive government control and have been granted public law powers, and the Spanish *Instituto Nacional de Racionalización y Normalización* (IRANOR) follows closely the French example. On the opposite end, the British Standards Institute (BSI)'s standards are extensively used by the industry but have minimal legal recognition. For a discussion of these examples, see H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets* (Hart, Oxford, 2005) p.122-136.

existence of the framework contract between DIN and the Federal Government should provide a sufficient legal basis for the use of ‘dynamic’ references to DIN standards in federal law.¹⁹

2.3. *Mixed Models*

‘Incorporation’ and ‘reference’ are sometimes combined. Italian legal scholars labeled this a ‘mixed’ or ‘hybrid’ model.²⁰ One such example is the law 6 dicembre 1971, n. 1083,²¹ according to which materials and systems using natural gas built in accordance with technical standards coming from the *Ente nazionale di unificazione* (UNI), another private standard setter, are considered to be compliant with the law. Yet, such standards had also to be incorporated in decrees of the Ministry of Industry. Because of the combination of the two techniques, the result of this model is similar to the one coming from incorporation.

A combination of techniques, resulting in a particularly interesting and highly debated complex model, can be found in the EU New Approach to technical harmonization, emerged since the 80s as a new paradigm. Even though it draws on techniques well established in national legal orders,²² it ends up building a new model.

The New Approach, intended to ensure free movements of goods, is based on four main principles. First, directives provide only the ‘essential requirements’ imposed on products. Second, technical specifications are established by the recognized European standard setting bodies: the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI).²³ Third, technical specifications are not mandatory but voluntary.

¹⁹ M. Bothe, “Environmental Standards in German Law”, in N. Greco (ed.), *Crisi del diritto, produzione normativa e democrazia degli interessi* (Edistudio, Roma, 1999) p. 81 et seq., at 105.

²⁰ See Chiti, *supra* note 9, at 4034.

²¹ *Legge 6 dicembre 1971, n. 1083, Norme per la sicurezza dell'impiego del gas combustibile*, in O.J. 20 December 1971, n. 320.

²² See G. Vesperini, “Il controllo della «sicurezza» e della «qualità» dei prodotti industriali: due modelli a confronto”, in P. Andreini et al. (eds.), *La normativa tecnica industriale: amministrazione e privati nella normativa tecnica e nella certificazione dei prodotti industriali* (Il Mulino, Bologna, 1995) p. 125 et seq., at 126.

²³ See <http://www.cen.eu/cenorm/homepage.htm> and <http://www.cenelec.eu/Cenelec/Homepage.htm>.

Fourth, there is a presumption that goods produced in accordance with the technical specifications comply with the ‘essential requirements’ in the directives.²⁴

Several bodies take part in the process: the Commission approves the essential requirements and checks on the conformity of the technical specifications with such requirements; the private bodies CEN, CENELEC and ETSI establish the technical specifications; EU committees give their technical opinions to the Commission.²⁵

The procedure briefly sketched above is the one the Guidelines in the Annex to the Council Resolution of 7 May 1985 set forth. Yet, its actual features depend on the sector directives.²⁶ In the implementation, two trends affect the real impact of the New Approach Model. First, the essential requirements are commonly set forth in a very generic way. Second, even though technical specifications are not mandatory, economic operators perceive them as *de facto* binding because of the additional costs for testing products not complying with them.²⁷

Legitimacy critiques against the New Approach are several, as legal scholars have been questioning this model as a delegation of regulatory functions to private actors and standard setters have been accusing the European institutions of interventionism.²⁸ Such concerns have been dealt with through the introduction of procedural criteria of good governance. In turn, also this trend has been criticized, as it could lead to a juridification of the private bodies’ standard setting²⁹ and a political instrumentalisation of private rulemaking.³⁰

Lastly, it must be pointed out that the EU approach to technical harmonization has triggered a significant evolution also within national legal systems.³¹ For instance, because of the need to participate in the EU architecture the two afore mentioned Italian private standard setters,

²⁴ See Council Resolution of 7 May 1985 on a new approach to technical harmonization and standards, in O.J. C 136, 4 June 1985, 1-9.

²⁵ See Chiti, *supra* note 9, at 4033.

²⁶ See Vesperini, *supra* note 22, at 126.

²⁷ Schepel, *supra* note 18, at 226 and 233.

²⁸ See Joerges, H. Schepel, E. Vos, “The Law’s Problems with the Involvement of Non-Governmental Actors in Europe’s Legislative Processes: The Case of Standardization under the ‘New Approach’”, EUI Working Paper Law No. 99/9, at 9.

²⁹ Schepel, *supra* note 18, at 249.

³⁰ See Joerges *et al.*, *supra* note 28, at 27.

³¹ Chiti, *supra* note 9, at 4030.

the UNI and the CEI, have been first recognized as national organisms of normalization and, as mentioned above, a public financing method has been introduced.³² Hence, the EU new approach for technical harmonization influenced domestic legal systems, leading to the emergence of a more uniform model for technical harmonization, based on a tight mixture of public and private.

3. Public Law and Private Regulators in the Global Legal Arena: Four Case Studies

Techniques used to connect global public regulatory regimes and private ones can look similar to the ones well known in domestic legal systems. Accordingly, the same dilemmas the Court of Kansas was at first facing are currently at the heart of the execution of normative and regulatory functions by private actors in the global arena.³³ Since then though, the interrelationships between public law and private standards in the regulation of markets have become much more complex and techniques that appear to be similar entail different effects, while new models tend to emerge.

3.1. *The 'Incorporation' of IAS/IFRs and ISA in the FSB Compendium of Standards*

The Financial Stability Board (FSB), established after the G20 London Summit in April 2009 with many expectations³⁴, comes from the reorganization of a pre-existing body: the Financial Stability Forum (FSF), founded in 1999.³⁵

The Board is a global regulator, building a bridge among domestic authorities, international institutions and transnational ones. The FSF brought together national administrative authorities (such as central banks, supervisory authorities and treasury departments) from the G7 countries and Australia, The Netherlands, Hong Kong and Singapore. With the transformation of the FSF

³² Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations
OJ L 109, 26.4.1983, p. 8–12.

³³ For this perspective, see Schepel, *supra* note 18, at 1.

³⁴ See FSB, Press Release, *Financial Stability Forum re-established as the Financial Stability Board*, 2 April 2009, available at http://www.financialstabilityboard.org/press/pr_090402b.pdf.

³⁵ About the FSF, see R. Germain, *Global Financial Governance and the Problem of Inclusion*, in *Global Governance*, 2001, vol. 7, p. 411 et seq., at 411.

in FSB, its membership has been broadened to all G20 countries regulatory authorities (which is to say, to emerging countries such as Argentina, Brazil, China, India, Indonesia, Korea, Mexico, Russia, Saudi Arabia, South Africa and Turkey).³⁶ Alongside with domestic authorities, intergovernmental international organizations (such as the IMF, the World Bank, the OECD) and the banking, securities and insurance transnational regulators (the Basel Committee for Banking Supervision (BCBS),³⁷ the International Organization of Securities Commissioners (IOSCO)³⁸ and the International Association of Insurance Supervisors (IAIS),³⁹ respectively) take part in the Board.⁴⁰

The reorganization of the FSF in FSB brings with it a transformation and evolution in the tasks, objectives and functions of this body, which falls beyond the scope of this paper.⁴¹ Yet, the FSB endorsed one of the main initiatives of the FSF: the compilation of a ‘Compendium of Standards’. This lists the various economic and financial standards internationally accepted as “important for sound, stable and well-functioning financial systems” that have been developed by the financial standard-setting bodies represented on the FSB.⁴² In particular, it highlights twelve key standards, such as the IMF’s Code of Good Practices on Transparency in Monetary and Financial Policies, the Basel Core Principles for effective Banking supervision (CPBs) and the IOSCO Objectives and Principles of Securities Regulation.

Among the Compendium twelve key standards, also the International Accounting Standards (IAS/IFRs) and the International Standard for Auditing (ISA), developed by the International Accounting Standard Board (IASB) and by the International Federation Of Accountants (IFAC) respectively, are listed. It is worth mentioning that both the IASB and the

³⁶ See <www.financialstabilityboard.org/members/links.htm> and FSB, *supra* note 34.

³⁷ See <www.bis.org/bcbs/index.htm>.

³⁸ See <www.iosco.org>.

³⁹ About IAIS, see <www.iaisweb.org>.

⁴⁰ Also the Bank for International Settlements (BIS) together with its committees (the Committee on Payment and Settlement Systems (CPSS) and the Committee on the Global Financial System (CGFS)), and the ECB are represented.

⁴¹ For a general overview, see D.W. Arner and M. W. Taylor, “The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?”, June 1 2009, AIIFL Working Paper No. 6, available at SSRN: <ssrn.com/abstract=1427084>.

⁴² See <www.financialstabilityboard.org/cos/key_standards.htm>.

IFAC are two private organizations. Yet, while the first one takes part in the FSB, the latter does not.⁴³

At first sight, the technique used in compiling the Compendium is similar to the incorporation used in the domestic legal order. Yet, the main idea which was being argued by the Kansas Court, and underlying such mechanism within domestic legal order, was the one that a rule, to become law, had not only to be replicated in an act but to pass through the legislative process. At the global level, such process is obviously lacking. The FSB Compendium is merely listing the standards that it aims to highlight. The incorporation used at the global level works like a political endorsement and its distinction from a ‘reference’ is blurring.

Before turning to the ‘reference’ technique – the use of which in the global legal space will be examined in the following paragraphs –, a second consequence connected with the incorporation of IASB and IFAC standards within the Compendium must be pointed out and the tools intended to foster the accountability of these private standards must be examined.

The IMF and the World Bank use the twelve key standards in their Reports on the Observance of Standards and Codes (ROSCs), part of the Financial Sector Assessment Program (FSAP). These are reports on countries’ degree of compliance with some global financial standards, wholly coinciding with the 12 Key Standards. Even though these reports are voluntary (the IMF and the World Bank’s staff prepare the reports at the request of the State concerned), it has been claimed a refusal to undergo a FSAP would be negatively evaluated by the market.⁴⁴ In any case, both the IMF and the World Bank consider these instruments as a tool to strengthen compliance with standards. The FSB seems to share the same view.⁴⁵ Hence, in the global legal arena the incorporation of private standards in a document compiled by a global public regulator does not seem to pursue legitimacy concerns – which is the typical aim of this technique in the

⁴³ See <www.financialstabilityboard.org/members/links.htm>.

⁴⁴ FSF, *Report for the meeting of the FSF on 6/7 September 2001*, 6 September 2001, available at <www.financialstabilityboard.org/publications/r_0109a.html>, at 9, note 22.

⁴⁵ See FSB, *Improving financial regulation - Report by the FSB to G20 Leaders*, 25 September 2009, at 12; FSB, *Framework for Strengthening Adherence to International Standards*, 9 January 2010; FSB, Press Release, *FSB launches initiative to promote global adherence to cooperation and information exchange standards*, 10 March 2010.

national legal order –; on the contrary, it appears to be much more connected with the aim of fostering their implementation.

Different mechanisms have been put in place with the view of fostering IASB's and IFAC's accountability, such as the establishment, in the last years, of two monitoring bodies: the Public Interest Oversight Board (PIOB)⁴⁶, fulfilling an oversight role on IFAC's 'public interest' activities so that they are properly responsive to the public interest,⁴⁷ and the Monitoring Board (MB), aimed at fostering the 'public accountability' of the IASB.⁴⁸

According to the standard setters themselves, the purpose of these new bodies is to replicate, at the global level, the link between standard-setters and those public authorities that have generally overseen this type of activities within domestic legal orders.⁴⁹ This is obviously a challenging task, as there is no global government with which a link can be established.⁵⁰ Difficulties in identifying the appropriate public principals with which the connections should be established and in finding a proper balance among global (intergovernmental or transnational) and domestic public authorities emerge in the composition of the two bodies.

⁴⁶ IOSCO, Press Release, *International Regulators and Related Organizations Announce the Public Interest Oversight Board for the International Accounting Profession*, 2005, available at www.iosco.org/news/pdf/IOSCONEWS83.pdf.

⁴⁷ This oversight role comprises a number of powers. The PIOB can approve or reject nominations of members to all the bodies it oversees, and can request the removal of the chair if deemed necessary. Moreover, the PIOB evaluates the IFAC's committees due process procedures and suggests issues to be included in their work program.

⁴⁸ See *Memorandum of Understanding between the Monitoring Board and the IFRS Trustees*, April 2009, available at www.ifrs.org/The+organisation/Governance+and+accountability/Monitoring+Board.htm. The MB appoints the Trustees and reviews the fulfillment of their responsibilities.

⁴⁹ Constitution, para. 18-19.

⁵⁰ The difficulties in finding new models of accountability are clearly recognized in the proposals preceding the Constitution review: «the Trustees recognize the unique nature of the organization when compared with other international organizations and with national accounting standard-setters. Unlike traditional national standard-setting bodies, the IASB has no authority to impose its standards on countries and does not have a direct reporting mechanism to governments or other public officials. [...] The Trustees understand that the IASC Foundation's unique structure makes demonstrating public accountability more challenging than it would be for a national standard-setter, which normally reports to national regulators, governments, or parliaments»: see IASCF, "Proposals and Issues for the Constitution Review", available at [www.iasb.org/NR/rdonlyres/7FDD66A0-12CA-451D-91B4-89311597D41E/0/Proposals and Issues for Constitution Review.pdf](http://www.iasb.org/NR/rdonlyres/7FDD66A0-12CA-451D-91B4-89311597D41E/0/Proposals+and+Issues+for+Constitution+Review.pdf), para. 16.

The IOB – set in 2005 – includes ten members, nominated by the BCBS, the IOSCO, the IAIS, the World Bank and the European Commission.⁵¹ The more recent MB – established after the global financial crisis – includes only two representatives from a transnational public regulator (the IOSCO), while the majority of its members come from domestic authorities (the American Securities and Exchange Commission (SEC) and the Financial Services Agency of Japan (JFSA)) and from a supranational regional body (the EU Commission).⁵² When comparing the two bodies, two data must be pointed out. First, in none of the cases the FSB as such is linked with the standard setters. Yet, the FSB itself being a network of domestic, transnational and international regulators, many of its members are represented in the IOB and in the MB. Second, it is clear that composition of the IOB, established in a historical period when financial regulation was perceived as less controversial and in an area – auditing – considered to be less critical than accounting, is intended to guarantee ‘global’ public principals’ influence over the private standard setter (the EU is the only ‘regional’ institution represented in it, sharing this responsibility with transnational networks and global organizations). On the contrary, through the MB some domestic authorities can influence the IASB more than global ones.

The institution of monitoring bodies is a recent trend. A long-established tool enhancing the standard setters’ accountability is the adoption of due process requirements. Both private bodies develop their respective standards following a due process that recognizes the principles of transparency, accessibility, extensive consultation, responsiveness and accountability.⁵³ The broadening of such principles in IASB’s and IFAC’s activity took place in the past fifteen years, progressively. Drivers for such change are two. On the one hand, public authorities which emerged as particularly significant in the past years for the standard setters’ evolution forced them to open up their standard setting process. For example, during the 90s the IOSCO

⁵¹ See <www.ipiob.org/index.php>.

⁵² Constitution, para. 21. The two representatives of the IOSCO are the chair of its Emerging Markets Committee and the chair of its Technical Committee (the latter being the committee of advanced economies).

⁵³ See IASCF, *Due Process Handbook for the IASB*, 2008, available at <www.ifrs.org/How+we+develop+standards/How+we+develop+standards.htm>, and IFAC, *IFAC’s Standards-Setting Public Interest Activity Committees’ Due Process and Working Procedures*, March 2010, available at <www.ifac.org/Downloads/PIAC_Due_Process.pdf>.

effectively influenced IASB's predecessor, the IASC, under this regard.⁵⁴ IFAC's 2006 Handbook for due process was probably influenced by EU approach to auditing.⁵⁵ This shows that public authorities can ask private actors to adopt procedural principles in order to foster their legitimacy. Moreover, reminding which public authorities more effectively influenced global private standard setters in the past further confirms how difficult it is to identify the public principals best suited to play this role and shows they can rapidly evolve over time. On the other hand, though, global private standard setters tend to use due process to foster worldwide acceptance of standards and to enhance compliance.⁵⁶ Hence, participation in global private standard setting is two fold: it is a means to enhance legitimacy, often pushed by public authorities trying to influence private ones, but it is also a tool intended to strengthen the efficiency of the standards.

3.2. *The 'Reference' to International Standards in the WTO Agreements*

One of the most controversial, well known, and studied mechanisms of reference in the global legal order is the one used in several WTO agreements. References are shaped in different ways, can have different effects and do not take into account only private international standards. Hence, some distinctions must be drawn.

First, it must be pointed out that some WTO agreements use the 'reference' technique in a way which does not deviate significantly from the 'incorporation through reference' practices well known within domestic legal orders: for instance, the agreement on Trade-Related Aspects

⁵⁴ See IOSCO, *IASC Standards - Assessment Report, Report by the Technical Committee*, 2000, IOSCOPD109, available at www.iosco.org/library/index.cfm?CurrentPage=24§ion=pubdocs&criteria=none&year=none&rows=10, at 10. See also K.T. Hallström, *Organizing international standardization. ISO and the IASC in quest of authority* (Edgward Elgar Publishing, Cheltenham, UK – Northampton, MA, USA, 2004) at 94 – 95 and 120 – 121.

⁵⁵ In EU *Communication about Reinforcing the Statutory Audit in the EU*, 2003, the Commission, envisaging the use of ISAs as a requirement for all EU statutory audits from 2005 onwards, urged IFAC to guarantee the independence of its standard setting process.

⁵⁶ S. Battini, "Introduzione", in Id. (ed.), *La regolazione globale dei mercati finanziari* (Giuffrè, Milano, 2007) p. 1 et seq., at 12.

of Intellectual Property Rights (TRIPS)⁵⁷ and the Agreement on Agriculture⁵⁸ require compliance with some specific norms of other regulatory regimes. This hypothesis must be distinguished from the linkages used in other WTO agreements,⁵⁹ which resemble - as it will be argued in the following pages - to the 'flexible reference' model of linkage but are more nuanced both in their formulation and effects. In particular, the agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT), and in the General Agreement on Trade in Services (GATS) will now be examined.

A second *caveat* concerns the standard setters the WTO agreements refer to. The identification of the standard setters is uneven in the different areas: in some cases they are clearly specified, in others they must be inferred. The SPS agreement refers explicitly to the activity of three international organisations:⁶⁰ the Codex Alimentarius Commission,⁶¹ the International Office of Epizootics (IOE)⁶² and the International Plant Protection Convention (IPPC).⁶³ Given the intergovernmental nature of these organizations, the SPS is less relevant for purposes of connection between private regulators and public regulatory regimes. The status of private food standards for the purposes of the SPS agreement, albeit debated, is uncertain.⁶⁴ Yet,

⁵⁷ See art. 2.1 («In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)); art. 9 («Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto») and art. 35 («Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as "layout-designs") in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits»).

⁵⁸ Agreement on Agriculture, Art. 10.4 (b): [Members donors of international food aid shall ensure] «that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations", including, where appropriate, the system of Usual Marketing Requirements (UMRs)».

⁵⁹ Identifying such hypothesis as incorporation, as contrasted to different techniques, see S. Charnovitz, "International Standards and the WTO", The George Washington Law School Public Law and Legal Theory Working Paper No. 133, 29 March 2005, available at <ssrn.com/abstract=694346>, at 14-5.

⁶⁰ Annex A, art. 3 Sps.

⁶¹ See <www.codexalimentarius.net/web/index_en.jsp>.

⁶² See <www.oie.int/eng/en_index.htm>.

⁶³ See <www.ippc.int/IPP/En/default.jsp>.

⁶⁴ The issue whether a WTO Member could be responsible for private actors in its territory enforcing private food standards has been raised before the SPS Committee. Notwithstanding two years 'exploratory discussions' within such forum, a number of questions regarding the possibility of applying such regime to private food standards are still open: see D. Prévost, "Private sector food-safety standards and the SPS Agreement: Challenges and

as it will be shown, the comparison with this agreement helps identifying what is specific to the TBT model and illustrating the evolution of the WTO Dispute Settlement System (DSB)'s attitude in interpreting this type of reference.

The TBT agreement does not define explicitly the relevant standard setters, but they can be easily identified in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), both private organizations.

Given the wide scope of services, the identification of the standard setters relevant for the GATS is more troublesome. The International Telecommunication Union (ITU), the Universal Postal Union (UPU), the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO) establish principles for telecommunications, postal services, air and maritime transport respectively. For professional services, the International Bar Association (IBA) and the *Union Internationale des Architectes* (UIA) develop international standards for the legal and the architectural profession respectively, while standards for tourism and advertising services are set forth by several organizations.⁶⁵ For financial services, all the standard setters taking part in the FSB, mentioned above (Section 3.1.), could be considered, among which the two private organizations IASB and IFAC. Lastly, it is worth mentioning that the ISO has recently set forth rules applicable to services, such as the 9000 and 14000 series concerning quality and environmental management.⁶⁶ Hence, the GATS is relevant as an agreement coming from an international intergovernmental organizations which can refer to private standard setters. Yet, the high number of standard setters in the services area must be taken into account when examining the different formulation of the reference to international standards in the GATS.

possibilities”, in 33 *South African Yearbook of International Law* (2008) pp. 1-37, at 16 and 34-6, and D. Casey, “Private Food Safety And Quality Standards And The WTO”, in 65 *University College Dublin Law Review* (2007) p. 65 et seq., at 66 and 88.

⁶⁵ The World Tourism Organization, the ICAO, the International Air Transport Association, the Commission on Sustainable Development, the Convention on Biological Diversity and the World Travel and Tourism Council all set standards for tourism. The Code of Standards for Advertising Practice was set forth by the International Chamber of Commerce (ICC) in 1938, while the World Health Organization (WHO) and the FAO establish recommendations on the control of advertising of products affecting health and food security: see WTO Secretariat, “International Regulatory Initiatives in Services”, Background Note, at 14.

⁶⁶ See Hallström, *supra* note 54, at 4 -7.

According to the SPS and TBT agreements, Member States shall use the standards as a *basis* for their domestic regulation.⁶⁷ This is not an obligation, as Members can adopt measures that require a higher level of health protection than the one that would be guaranteed by the global standard (or technical standards which do not conform to the global ones).⁶⁸ If doing so, though, they must demonstrate that there is a scientific ground for this choice⁶⁹ and they must respect a detailed notice and comment procedure.⁷⁰ Moreover, there is a *presumption* that national norms conforming to international standards respect the obligations binding the States in consequence of their membership in the WTO⁷¹ – a presumption that can turn out to be extremely useful in defending national regulations challenged before the WTO dispute settlement system.⁷² Hence, even though Member States are not obliged to adopt laws that conform to international standards, there are strong incentives for them to do so.⁷³

Given the ambiguous formulation of the agreements, the impact of the reference to standards is widely determined by the interpretation of the WTO dispute settlement body (DSB). Few cases discussed the point. The two most relevant ones, *Hormones*⁷⁴ and *Sardines*,⁷⁵ show an evolution in the DSB, at first willing to protect the scope of States' right to regulate and later on moving to a more intrusive approach. In the *Hormones* case, the AB contrasts art. 3.2. of the SPS

⁶⁷ Art.2.4 TBT and 3.1 SPS.

⁶⁸ Art. 3.3. SPS; artt. 2.5 and 2.9 TBT.

⁶⁹ Art. 3.3. SPS (partially diverging from art. 2.5 TBT, which refers to the necessity of «explain the justification»). As the AB Report, *Japan-Measures Affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003, shows, it is not easy to prove the scientific justification behind the State's decision.

⁷⁰ Art. 2.9 TBT and Annex B, art. 5 SPS. On the impact of these provisions on domestic administrations, see S. Cassese, "Global Standards For National Administrative Procedure", 68 *Law & Contemp. Probs.* (2005) p. 109 et seq., at 113-6.

⁷¹ Art. 2.5 TBT and 3.2 SPS.

⁷² Underlines this problem and the cost of process within the WTO dispute settlement system, M.A. Livermore, "Authority and Legitimacy in Global Governance: Deliberation, Institutional Diffentiation, and the Codex Alimentarius", 81 *New York University Law Review* (2006) p. 766 et seq., at 776. See also H. Nordstrom, "The cost of WTO Litigation, Legal Aid and Small Claim Procedures", paper presented to the conference WTO Dispute Settlement and Developing Countries, University of Wisconsin – Madison, 5 June 2005, available at http://www.wage.wisc.edu/uploads/WTO%20Conference/nordstroem_update.pdf

⁷³ See S. Battini, "La globalizzazione del diritto pubblico", in *Riv. Trim. Dir. Pubbl.* (2006), p. 325 et seq., at 332.

⁷⁴ Appellate Body (AB), *EC Measures Concerning Meat and Meat Products (Hormones)* (WT/DS26/AB/R, WT/DS48/AB/R) 16 January 1998.

⁷⁵ AB, *European Communities-Trade Description of Sardines* (WT/DS231/AB/R) 23 October 2002.

agreement -- according to which national regulations which *conform* to international standards shall be presumed to be consistent with the agreement -- to art. 3.1 -- asking members to *base* their measures on international standards. In the AB's view, in order for a domestic regulation to be based on an international standard, it is sufficient for it to « adopt some, not necessarily all, of the elements of the international standard». ⁷⁶ The AB's point of view evolves in the Sardines case. According to the EU, appellee in the case, in order for a domestic regulation to be based on an international standard as provided in art. 2.4. TBT, a 'rational correlation' should be sufficient. ⁷⁷ The AB rejects this theory, arguing that there must be a «very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other». ⁷⁸ Accordingly, the AB concludes that an international standard has to be the "principal constituent", "fundamental principle", "main constituent" or "determining principle" of the domestic regulation. ⁷⁹

Some commentators have argued that the AB interpretation of the SPS and TBT provisions referring to international standards could lead to a strong differentiation of the two disciplines, the first being considered as a mere recommendation and the second one as a requirement to use standards. ⁸⁰ In the Sardines case, though, the AB continuously refers to analogies in the two agreements. Hence, the opinion according to which this decision can be considered as a conscious step forward from the Hormones case and could be extended to the area of sanitary measures in the future looks more convincing. Accordingly, the requirement to use international standards as a basis for national regulations has been considered to be a new legal instrument intended to «create international legal normativity». ⁸¹

⁷⁶ AB, *Hormones*, above n. 74, para. 76.

⁷⁷ AB, *Sardines*, above n. 75, para. 246.

⁷⁸ *Ibid.*, para. 245.

⁷⁹ *Ibid.*, para. 243.

⁸⁰ Charnovitz, *supra* note 59, at 15 - 16.

⁸¹ R. Howse, "A new device for creating international legal normativity: the WTO technical barriers to trade agreement and international standards", in C. Joerges and E. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing, Portland, Oregon, 2006) p. 383 et seq., at 3 - 11.

The reference to international standards that can be found in the GATS looks weaker than the one in the SPS and TBT. According to Article VI, paragraph 5(a), to determine whether a State is respecting its GATS obligations, account must be taken of that State's application of international standards.⁸² The absence in the GATS of a framework similar to that for sanitary measures and technical norms has led the WTO Secretariat to state that "The current provisions in the GATS do not go as far as the TBT agreement in laying down a general obligation on Members to use international standards when they are available, thereby establishing a rebuttable presumption that any measure which is consistent with international standards would be considered not to create an unnecessary obstacle to trade. Nevertheless, the GATS obligations in this area do seem to point in a similar direction".⁸³ Hence, GATS provision concerning international standards seeks the same goal as the more detailed law contained in the SPS and TBT agreements: harmonisation.⁸⁴ However, its impact is weaker and more uncertain.

Moreover, the provision mentioned above is intended to be transitional, applying until the entry into force of the domestic regulations.⁸⁵ These have to be set by a subsidiary body of the WTO, the Working Party on Domestic Regulation (WPDR), established in 1999.⁸⁶ The adoption

⁸² The fourth paragraph of Article VI, about Domestic Regulation, asks the Council for Trade in Services to establish disciplines for domestic regulation, in order to guarantee that national regulations in the area of "licensing and qualification requirements and technical standards" do not constitute an unnecessary obstacle to trade in services. According to Article VI, paragraph 5(a), until the disciplines enter into force, Member States must not apply national measures in the area of licenses and other technical norms in such a way as to violate the GATS criteria for the application of the necessity test and paragraph 5(b) specifies that, in this analysis, "account shall be taken of international standards of relevant international organizations applied by that Member."

⁸³ See WTO Secretariat, *The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI.4 of the General Agreement on Trade in Services (S/WPPS/W/9)* 11 September 1996, par. II (iii).

⁸⁴ About the principle of harmonization within the WTO, see D. Kalderimis, "Problems of WTO Harmonization and the Virtues of Shields over Swords", 13 *Minn. J. Global Trade* (2004) p. 305 et seq.; G. Mayeda, "Developing Disharmony? The SPS And TBT Agreements And The Impact Of Harmonisation On Developing Countries", 7 *Journal of International Economic Law* (2004) p. 737 et seq.; A. Reich, "The WTO as a Law-Harmonizing Institution", in 25 *U. Pa. J. Int'l Econ. L.* (2004) p. 321 et seq.; A.O. Sykes, "The (Limited) Role of Regulatory Harmonization in International Goods and Services Markets", 2 *Journal of International Economic Law* (1999) p. 49 et seq.; L.M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 *U. Kan. L. Rev.* (2001-2002) p. 823 et seq.

⁸⁵ See note 82.

⁸⁶ With the Decision on Professional Services, adopted on 4 April 1995, the Council for Trade in Services established the Working Party on Professional Services (WPPS), with the task of drafting the disciplines referred to

of a presumption of consistency with the agreement for trade in services of domestic regulations based on international standards, shaped on the model used in the SPS and TBT, was widely discussed in the WPDR. At first suggested by the WTO Secretariat⁸⁷ and further articulated in documents presented by Mexico⁸⁸ and Switzerland,⁸⁹ such proposal was abandoned in the most recent documents.⁹⁰

In SPS and TBT, the structure of the ‘reference’ is looser than the one that can be found in domestic public rules making use of private technical standard. Even in the latter, there is no straightforward requirement of accordance to the norms to which the reference is done. For example, Italian law requires that electrical materials be produced according to the ‘hinge clause’ *a regola d’arte* and states that systems built according to the standards coming from a specific standard setter ‘can be considered’ to be so. Public law has a tradition of avoiding clear-cut delegation to private actors. The SPS and TBT agreements are more cautious, but the combination of the incentives – constituted by the presumption of accordance with WTO obligations and the possibility of avoiding a strict necessity test – can attach to this type of reference consequences very similar to the ones coming from references in domestic legal orders. The interpretation of such mechanism the AB has suggested in the Sardines case goes further in this direction: because of the uncertainty in the interpretation of the presumption, the ‘reference’

under Article VI, para. 4. In 1999, the WPPS was renamed as Working Party on Domestic Regulation (WPDR), marking a broader mandate. About domestic regulation in the GATS, see L. Abugattas Majluf, “Domestic Regulation and the GATS: Challenges for Developing Countries”, draft paper, available at www.ictsd.org and A. Mattoo and P. Sauvé (eds.), *Domestic Regulation and Service Trade Liberalization* (World Bank and Oxford University Press, Washington, 2003).

⁸⁷ See WTO Secretariat, *Article VI:4 of the GATS: Disciplines of Domestic Regulation Applicable to all Services* (S/C/W/96) para. 35 - 42.

⁸⁸ WPDR, *Communication from Mexico. Mexico's Experience of Disciplines on Technical Standards and Regulations in Services* (S/WPDR/W/30), 24 September 2004, para. 15 (e).

⁸⁹ WPDR, *Communication from Switzerland. Proposal for Disciplines on Technical Standards in Services* (S/WPDR/W/32) 1 February 2005.

⁹⁰ While the «presumption of consistency with the disciplines if in compliance with international standards» is explicitly mentioned between the elements to be included in the disciplines in the *Illustrative List of Possible Elements for Article VI:4 Disciplines*, para. 5 (attached to WPDR, *Domestic Regulation: Preparation for the Sixth Ministerial Conference*. Note by the Chairman (JOB(05)/260) 25 October 2005), in the last version of such document international standards are mentioned merely as an element Member States should take into account when formulating their own standards (WPDR, *Chair's Work in Progress Document - Domestic Regulation GATS*, 21 February 2007, available at www.tradeobservatory.org/library.cfm?refID=97441), para. 4).

to international standards in these accords can end up in an obligation to comply with such norms that, albeit the different formulation, is almost equivalent in the impact to the more straightforward 'reference' used in the domestic context. The outcome of such reference has been qualified as «sanction linkage» and « regime borrowing »: in other words, a link between two different regulatory regimes might be established so that one of them can obtain the procedural and institutional benefits of the other, among which stronger sanctions.⁹¹

Given the likely impact - notwithstanding their loose formulation - of the references to international standards in WTO agreements, also the problems of legitimacy they raise do not seem to be weaker than those raising from reference to private regimes in the domestic context.

An echo of the legitimacy concerns coming from such references can be found in the agreements themselves. Both the SPS and the TBT require State representatives to participate in the preparation of standards by the relevant international organisations.⁹² Notwithstanding the 'weak reference' to international standards, also the GATS aims at strengthening participation in standard setting.⁹³ The objective of these provisions is the one of triggering a stronger participation in the standard setting process, so that the norms to comply with would not be the result of a decision-making process in which the States did not take part and hence the legitimacy concerns concerning such norms would result diminished. The extremely high number of standard setters for services (and hence the difficulties in effectively influencing the decision-making process of all of them) can help explaining the looser formulation of the reference in the GATS, compared to the one in the SPS and TBT, and Member States' resistance against its review in the disciplines on domestic regulation.⁹⁴

⁹¹ See Leebron, *supra* note 7, at 14. Yet, Leebron points out such result can come from the use of a wide typology of linkages, among which membership linkage and incorporation. See also S. Battini, "Il sistema istituzionale internazionale dalla frammentazione alla connessione", in *Riv. It. Dir. Pubbl. Com.* (2002) p. 969 et seq.

⁹² Art. 2.6 TBT, 3.4 and 3.5 SPS.

⁹³ Article VII, paragraph 5 specifies that the Member States "shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions."

⁹⁴ On this point, see M. De Bellis and E. Morlino, "Harmonisation and Mutual Recognition in the General Agreement on Trade in Services", in S. Battini, G. Vesperini (eds.), *Global and European Constraints Upon*

Consistently with the stronger reference in the SPS and TBT agreements, also participation in the standard setters is more articulated in these areas, than in the services one. Notwithstanding the similar formulation of the relevant provisions in the agreements, some initiatives coming from subsidiary bodies mark a significant gap in the different areas.

In 2000, the Committee on Technical Barriers to Trade adopted the decision Principles for the Development of International Standards, Guides and Recommendations, aimed at influencing international standard setters.⁹⁵ According to this document, the standard setting process must enact the principles of impartiality, transparency and participation. Moreover, some basic due process requirements are set forth.⁹⁶ Lastly, participation to these organizations must be open to all the Members of the WTO, in a non-discriminatory manner.⁹⁷

However, the impact of this document is uncertain.⁹⁸ Decisions of subsidiary committees of the WTO are not considered to be legally binding, even though at least one Panel suggested using the decision as an integrative tool of interpretation.⁹⁹ Both the ISO and the IEC sent a letter to the TBT Committee after the approval of the decision, claiming their compliance with the

National Right to Regulate: the Service Sector, 29 February 2008, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1099844, p. 137 et seq., at 142-7.

⁹⁵ TBT Committee, *Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, Annex 4 to Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade del Committee on Technical Barriers to Trade (G/TBT/9)* 13 November 2000.

⁹⁶ *Ibid.*, para. 4: «In providing the essential information, the transparency procedures should, at a minimum, include: the publication of a notice at an early appropriate stage [...]; the notification of other communication through established mechanisms to members of the international standardizing body, providing a brief description of the scope of the draft standard, including its objective and rationale [...]; the provision of an adequate period of time for interested parties in the territories of at least all members of the international standardizing body to make comments in writing and take these written comments into account in the further consideration of the standard; the prompt publication of a standard upon adoption; and to publish periodically a work programme containing information on the standards currently being prepared and adopted».

⁹⁷ *Ibid.*, para. 6.

⁹⁸ On the legal status of rules coming from subsidiary bodies of International administrations, see S. Cassese, above n. 70, at 121-3.

⁹⁹ See AB, *European Communities – Antidumping Duties on Malleable Cast Iron Tube and Pipe Fittings from Brazil*, (WT/DS219/R) 7 March 2003, para. 7.321. See R. Howse, above n. 81, at 14.

principles¹⁰⁰ and even arguing that only standard setters complying with such rules should be recognized as relevant in WTO accords.¹⁰¹

3.3. *The ‘Reference’ To The Activity Of A Global Private Regulator: Credit Ratings in Basel Capital Accord*

The second example of ‘reference’ in the global legal order that will be analyzed – concerning the use of ratings in Basel Capital Accord – is more similar, in the structure, to the references frequently used in domestic legal system, than the ones in the WTO accords.

The Basel Committee on Banking Supervision (Basel Committee or BCBS) was established in 1974 by the G10 central bank governors.¹⁰² Recently, it broadened its membership so as to include representatives from the G20 countries.¹⁰³ The BCBS sets standards for banking supervision and is considered to be the most powerful transgovernmental regulatory network.¹⁰⁴

Basel Committee’s rules concerning banks’ capital requirements date back to 1988, when the first Basle Capital Accord was published.¹⁰⁵ It was substituted in 2004 by the *International Convergence of Capital Measurement and Capital Standards: a Revised Framework* (so called

¹⁰⁰ TBT Committee, *WTO/TBT Agreement and Technical Standards, Communication from the IEC and ISO (G/TBT/W/131)* 29 March 2000, and TBT Committee, *Developments within the International Organization for Standardization (ISO) that are related to the Second Triennial Review of the Tbt Agreement, Communication from the ISO (G/TBT/W/158)* 18 May 2001.

¹⁰¹ TBT Committee, *WTO/TBT Agreement and Technical Standards*, above n. 100, para. 11 and 14.

¹⁰² About BCBS’s history, structure and activity, see D. Wood, *Governing Global Banking. The Basel Committee and the Politics of Financial Globalization* (Ashgate Publishing, Aldershot, 2005).

¹⁰³ Central bank governors and heads of supervision from Argentina, Indonesia, Saudi Arabia, South Africa and Turkey, together with Hong Kong and Singapore are now members of the Committee: see BCBS, *Basel Committee Broadens its Membership*, Press Release, 10 June 2009, <http://www.bis.org/press/p090610.htm>.

¹⁰⁴ For a broad discussion on transnational regulatory networks, their role and significance, A.M. Slaughter, *A New World Order* (Princeton University Press, Princeton, 2004). See also, for a discussion of the consequences of this model of global administration on State’s sovereignty, S. Battini, *Amministrazioni senza Stato. Profili di diritto amministrativo internazionale* (Giuffrè, Milano, 2003) at p. 207 et seq.

¹⁰⁵ The first version of Basel II was published in 2004; in November 2005, the Committee issued an updated version of the revised Framework incorporating the additional guidance set forth in the Committee's paper *The Application of Basel II to Trading Activities and the Treatment of Double Default Effects*, while on 4 July 2006, the Committee issued a comprehensive version of the Basel II Framework: for the different versions of the document, see <http://www.bis.org/publ/bcbsca.htm>. About the innovative consultation process the BCBS adopted, see M.S. Barr, G.P. Miller, “Global Administrative Law: The View From Basel”, in 17 *European Journal of International Law*, (2006), p. 15 et seq.

Basel II), extensively criticized and reviewed in the aftermath of the global financial crisis. The review, although currently labeled Basel III, did not produce a comprehensive new accord, but focused on a number of relevant amendments.¹⁰⁶ For purposes of this study, problems connected with the efficacy of the accord as a regulatory tool and concerning its accountability will not be discussed. On the contrary, the focus of the analysis is the ‘reference’ technique being used in it, which was already in place in Basel II and was not modified.

Basel II introduced two methodologies for calculating the capital requirements for credit risks, between which banks can choose: the ‘standardized’ approach (according to which risk weights - and, consequently, the capital requirements that a bank has to respect - depend on the issuer’s rating released by credit rating agencies (CRAs)) and the ‘internal ratings-based’ approach (IRB, according to which qualifying banks can use their own estimates to quantify their exposure). Basel III, focusing on the quality of capital and introducing new buffers, does not change risk-weighting methodologies – a choice which has been strongly criticized.¹⁰⁷

One of the main features of this accord is the reference to ratings. With the standardized approach, the capital requirements depend on an external evaluation, the rating, which is the product of a private entity’s activity.

Credit rating agencies, such as Standard & Poor’s, Moody’s and Fitch, are private firms that supply an independent evaluation (the rating) of an issuer’s credit-worthiness. A credit rating is an assessment of how likely an issuer is to make timely payments on a financial obligation. Ratings have letter designations such as AAA, B, CC; descending in the ranking, the risk of defaulting on a loan increases. CRAs offer credit ratings to any kind of issuers: companies and banks, but also national or regional governments. Credit rating agencies’ assessments and opinions play an important role in capital markets, providing information and enhancing transparency.

¹⁰⁶ See BCBS, *Compilation of documents that form “Basel III”*, available at <www.bis.org/list/basel3/index.htm>.

¹⁰⁷ See A. Blinder, “Two cheers for the New Bank Capital Standards”, *Wall Street Journal*, 30 September 2010; F. Salmon, “Grading Basel III”, *Reuters*, 1 October 2010; “Basel III: Third Time’s the Charm?”, *The Economist*, 13 September 2010; A. Blundell-Wignall and P. Atkinson, “Thinking Beyond Basel III: Necessary Solutions for Capital and Liquidity”, May 2010, in *OECD Journal: Financial Market Trends*, 2010, available at <www.oecd.org/dataoecd/42/58/45314422.pdf>, p. 16-7 e 21.

The rating, which constitutes the most visible product of the agencies' activities, is, at the same time, the final stage in an evaluation process in which the standards created by the agency itself are used. Agencies use specific criteria when carrying out such an evaluation and, with every rating, provide a brief note giving reasons for that specific assessment. Moreover, agencies periodically publish the criteria that they take into consideration during the rating process. From this point of view, therefore, rating agencies are genuine private financial standard-setting bodies.¹⁰⁸

Through Basel capital accord reference to ratings, a global public regulator refers to the result of a private actor's activity (the rating) for regulatory purposes; in doing so, it endorses the activity behind such evaluation and the criteria on which it relies upon.

This technique is not typical of the global context. Even if it has been first adopted at the global level with Basel II, it has been used at the national level for a long time. The Securities and Exchange Commission (SEC) started using ratings for regulatory purposes at the beginning of the 70s.¹⁰⁹

This reference raises a number of concerns, which became even stronger after the global financial crisis. Reference to ratings for regulatory purposes raises demand for high ratings, increasing the risks of conflict of interests entailed in the activity of the agencies.¹¹⁰ According to others, the regulatory reference to ratings does not simply enhance existing conflicts: it is the reason why accountability problems in the activity of these entities raise.¹¹¹

At the global level, Basel II intended to take into account accountability concerns providing for certain criteria that CRAs must meet, in order for their assessments to be used for regulatory purposes: these include objectivity and independence of the assessments; access to the

¹⁰⁸ See D. Kerwer, "Standardising as Governance: the Case of Credit Rating Agencies", in A. Heritier (ed.), *Common Goods: Reinventing European and International Governance* (Rowman & Littlefield Publishers, Lanham, UK, 2002) p. 3 et seq., at 13.

¹⁰⁹ See R. Cantor, F. Packer, "The Credit Rating Industry", in *Federal Reserve Bank of New York Quarterly Review* (1994) p. 1 et seq., at 2.

¹¹⁰ See H.E. Jackson, "The Role of Credit Rating Agencies in the Establishment of Capital Standards for Financial Institutions in a Global Economy", 2000, available at <ssrn.com/abstract=250166>, at 17.

¹¹¹ See Kerwer, *supra* note 108, at 295 and 307.

assessments to both domestic and foreign institutions; disclosure of the methodology; sufficient resources to carry out high quality credit assessments; credibility (para. 90 e 91). Similar criteria have been established in the European Capital Requirement Directive, comprising Directive 2006/48/EC and 2006/49/EC (albeit amended several times after the crisis, the part of the directive concerning CRAs was not changed).¹¹²

Such method of fostering CRAs' accountability clearly proved to be insufficient and the accountability conundrum of the agencies is still an open question. As mentioned above, Basel III did not change the current risk-weighting methods nor the provisions concerning specifically the criteria for CRAs. Some changes could come from means different than the capital accord revision. The SEC started removing regulatory references to ratings in its rules in 2009¹¹³ and the Dodd-Frank Act mandated the competent regulatory authorities to further pursue this direction.¹¹⁴ Moreover, the FSB recently published the Principles for Reducing Reliance on CRA Ratings.¹¹⁵ In the area of credit ratings, public law reference to private actors activities triggers the emergence of such a complex accountability dilemma (not to mention problems concerning the decrease in the quality of ratings) that the solution global and national regulators are now favorable to is not the setting of new (structural or procedural) requirements for the agencies, but, first of all, diminishing public law reliance on private actors.

3.4. *The Endorsement of International Accounting Standards in the EU*

Starting with the Communication of the Commission *Accounting Harmonisation: A New Strategy vis à vis International Harmonisation*, in 1995,¹¹⁶ EU strategy in the accounting sector

¹¹² The part the text is referring to (the criteria CRAs must meet) can be found in Directive 2006/48/EC, Annex VI, Part II.

¹¹³ See "SEC rules take aim at credit rating agencies", Reuters, 17 September 2009, available at <http://www.reuters.com/article/idUSTRE58G76Q20090918>.

¹¹⁴ Dodd Frank Act, Title IX, Subtitle C, Sec. 939.

¹¹⁵ FSB, *Principles for Reducing Reliance on CRA Ratings*, 27 October 2010, available at http://www.financialstabilityboard.org/list/fsb_publications/from_01012009/index.htm.

¹¹⁶ See EU Commission, *Communication on Accounting Harmonisation: A New Strategy vis à vis International Harmonisation* (COM 95(508)) November 1995, available at http://europa.eu.int/comm/internal_market/accounting/docs/com-95-508/com-95-508_en.pdf.

has changed steadily. The problem to be addressed was that accounts prepared by European companies were no longer accepted for international capital market purposes.¹¹⁷ The Commission decided to move from the previous approach based on the accounting directives – as their update was too time-consuming –, and profit of standards produced by a private regulator, which are, in contrast, extremely flexible.¹¹⁸

EU Regulation n. 1606/2002¹¹⁹ requires all publicly traded EU companies to prepare their consolidated accounts using IAS/IFRS, set by the IASB, since 2005.¹²⁰ In this way, global accounting standards, first established by private entities, gain binding force through European recognition. Nevertheless, Regulation CE n. 1606/2002 does not require EU companies to use IFRS as such, but provides an extremely complex endorsement procedure. According to IAS Regulation, when deciding on the applicability of IAS/IFRS, the European Commission must evaluate if the international standards meet the criteria set out in the Regulation itself. IAS/IFRS can be endorsed only if they meet the criteria of understandability, relevance, reliability and comparability and if they are conducive to the European public good.¹²¹

When deciding on the adoption of the standards, the European Commission is assisted by two committees: a comitology committee, made up of Member States representatives (the Accounting Regulatory Committee (ARC)),¹²² and an experts committee, the European Financial Reporting Advisory Group (EFRAG).¹²³ This brings together representatives from the private

¹¹⁷ See *Ibid.*, para. 3.3, and EU Commission, Communication on *EU Financial Reporting Strategy: the way forward* (COM (2000) 359), 13 June 2000, available at europa.eu.int/lex/lex/LexUriServ/site/en/com/2000/com2000_0359en01.pdf, para. 10 and 11. For an international political economy perspective on European approach on accounting, see P. Leblond, “The International Dimension of the Harmonization of Accounting Standards in the EU”, Eusa, Ninth Biannual International Conference, March 31st - April 2nd, 2005, Austin, Texas, available at aei.pitt.edu/2998/.

¹¹⁸ See EU Commission, above n. 116, para. 4.5. and 5.1.

¹¹⁹ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, OJ L 243, 11/09/2002, p. 1-4.

¹²⁰ Regulation CE n. 1606/2002, art. 4.

¹²¹ Regulation CE n. 1606/2002, art. 3.2.

¹²² About the ARC, see ec.europa.eu/internal_market/accounting/committees_en.htm#arc.

¹²³ See www.efrag.org/content/default.asp?id=4103.

sectors of several Member States¹²⁴. EFRAG's functions are identified in the *Working Arrangement* between the European Commission and this committee.¹²⁵ As the EFRAG is a private body, the Standards Advice Review Group (SARG) – intended to advise the Commission on the objectivity and neutrality of EFRAG's opinions - has been established.¹²⁶ The goal is the one of fostering the transparency and credibility of the endorsement process. When the SARG identifies a particular concern in EFRAG opinions, its chairman shall enter into a dialog with EFRAG with a view to resolve the matter, before the group issues its final advice.¹²⁷

The endorsement procedure is the most complex model examined so far. On the one hand, it uses the incorporation and the reference techniques: once endorsed, the IAS/IFRs are copied and translated in the annexes to the relevant regulations; the IAS Regulation, requiring European companies to prepare accounts according to IAS/IFRs as endorsed in the EU, puts in place a sort of 'programmatic reference' to IASB work. Traditional instruments are incorporated and adapted, but the endorsement procedure is very distant from the functioning of those instruments. Also the hybridation is more complex than in any other examined case: not only the technical standards come from a private body, but also a crucial role in the endorsement procedure is played by a private expert group, the EFRAG, so that a working arrangement between it and the Commission has been formalized and even a group with the institutional task of checking on the credibility and independence of EFRAG's opinions has been put in place.

The aim of the procedure, as stated clearly in the EU Communication of 2000, is the one of avoiding that a delegation of the normative function in the accounting area takes place.¹²⁸ Hence, on the one hand the incorporation of the international standards is subject to the previous

¹²⁴ Such as the European Federation of Accountants (FEE), the European Insurance Organisation (CEA), the European Banking Federation (EBF), the European Association of Craft Small- and Medium-sized Enterprises (UEAPME), the European Federation of Accountants and Auditor (EFAA).

¹²⁵ Working Arrangement between European Commission and EFRAG, available at www.efrag.org/images/Efrag/EFRAG-EC%20Working%20Arrangement.pdf.

¹²⁶ EU Commission, Decision 2006/505/EC of 14 July 2006, *setting up a Standards Advice Review Group to advise the Commission on the objectivity and neutrality of the European Financial Reporting Advisory Group's (EFRAG's) opinions*, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006D0505:EN:NOT.

¹²⁷ *Ibid.*, art. 4.6.

¹²⁸ EU Commission, above n. 117, para. 19.

evaluation of the Commission, assisted by the comitology committee and the private one. On the other hand, the aim of influencing the global standard setter is stated clearly in a number of EU documents.¹²⁹ But do these methods succeed? Can they effectively ensure the accountability of the EU strategy for accounting?

First, it must be pointed out the Commission refused the endorsement of certain IAS and IFRS in a very limited, but extremely significant, number of cases (concerning IAS 32, IAS 39 and IFRIC 3). A first exception was made when IAS39 was endorsed with two ‘carve out’, eliminating some controversial provisions concerning the fair value principle.¹³⁰ Hence, this experience seems to show that the EU endorsement can act as a filter. At the same time, though, this opting out has been highly criticized and seems to prove that the decision of not endorsing a standard can be rather costly for the EU.¹³¹

With the global financial crisis, critiques concerning the fair value principle used in IAS/IFRS became even more significant.¹³² After the US suspended the mark-to-market, equivalent to fair value,¹³³ the EU asked the IASB to amend IAS39, in order to avoid European banks to be in a competitive disadvantage.¹³⁴ The IASB answered to such request approving in one week, with an exception to its usual due process, some partial amendments to be used under

¹²⁹ EU Commission, above n. 116, para. 5.4.

¹³⁰ About the endorsement of IAS 39, see EFRAG, *Adoption of the Amended IAS 39*, 8 July 2004; ARC, *Opinion on IAS 39*, 5 October 2004, and Commission Regulation (EC) no. 2086/2004 of 19 November 2004, *Amending Regulation (EC) 1725/2003 Adopting Certain International Accounting Standards in Accordance with Regulation (EC) 1606/2002 of the European Parliament and of the Council as regards the Insertion of Ias 39*, in O. J. L 363, 9 December 2004, p. 1 et seq. For a comment, see R.K.Larson, D. Street, “The Roadmap to Global Accounting Convergence. Europe introduces ‘speed bumps’”, in CPA Journal, October 2006.

¹³¹ For a critical point of view, see D. Simonds, “Speaking in tongues. Dragging America down the rocky road to a set of global accounting rules”, *The Economist*, May 17th 2007.

¹³² See C. Laux and C. Leuz, “Did Fair-Value Accounting Contribute to the Financial Crisis?”, Chicago Booth Working Paper 41, October 2009, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=1487905>, at 4.

¹³³ See SEC – FASB, *Clarifications on Fair Value Accounting*, 30 September 2008, available at <www.sec.gov/news/press/2008/2008-234.htm>. Later on, Section 132 of the *Emergency Economic Stabilization Act*, 3 October 2008, gave the Sec the power of suspending mark to market.

¹³⁴ See 2894th Economic and Financial affairs Council meeting, 7 October 2008, No.: 13784/08, p. 8.

rare circumstances.¹³⁵ The new standard has been endorsed in EU Regulation n. 1004/2008 of 15 October 2008.¹³⁶

Such amendment can be seen as an example of success of the endorsement procedure, which worked with the flexibility the 1995 Communication was expecting (even though such speed was at the expenses of participation, as not only the IASB, but also EFRAG didn't follow its own due process).¹³⁷ Moreover, in this case the EU effectively succeeded in influencing the IASB.

The EU revision of accounting standards, though, was not concluded with Regulation no. 1004/2008. On the contrary, the EU Commission asked the IASB to revise IAS 39 broadening exceptions to fair value.¹³⁸ At first, the IASB refused such requests but a general review process of IAS39 is currently going on, in the context of a strong cooperation between the global private standard setter and the American one, the FASB.¹³⁹

The implementation of the endorsement procedure shows mixed evidence. Such procedure can effectively work as a filter, but the pressure of economic interests towards harmonization is very high. Under certain circumstances, the EU succeeded in influencing the IASB; yet, the very strong cooperation now in place between the global standard setter and the American one risks to nullify EU efforts.

The panoply of instruments the EU put in place to foster the accountability of the new approach for accounting is impressive, ranging from a complex and balanced structure involved in the endorsement procedure (maybe even too complex), to an extensive use of participation and

¹³⁵ See IASB, *IASB announces next steps in response to credit crisis*, 3 October 2008, available at <http://www.iasb.org/News/Press+Releases/IASB+announces+next+steps+in+response+to+credit+crisis.htm>.

¹³⁶ Commission Regulation (EC) N° 1004/2008 of 15 October 2008 amending Regulation (EC) N° 1725/2003 adopting certain international accounting standards in accordance with Regulation (EC) N° 1606/2002 of the European Parliament and of the Council as regards International Accounting Standard (IAS) 39 and International Financial Reporting Standard (IFRS) 7, OJ L 275, 16 October 2008.

¹³⁷ See EFRAG, *The Amendment to IAS 39 and IFRS 7 "Reclassification of Financial Assets"*, 14 October 2008, available at <ec.europa.eu/internal_market/accounting/ias_en.htm#arc-endorsements>.

¹³⁸ See EU, *Letter from the Commission Services to the IASB about further issues related to IAS 39*, 27 October 2008, available at <ec.europa.eu/internal_market/accounting/news/index_en.htm>.

¹³⁹ See <www.iasb.org/Current+Projects/IASB+Projects/Financial+Instruments+A+Replacement+of+IAS+39+Financial+Instruments+Recognitio/Financial+Instruments+Replacement+of+IAS+39.htm>.

notice and comment within the procedure and involving both public and private committees. Yet, the imbalance which is the main feature of this strategy – which aims at using rules which should be recognized as best practices worldwide, only if the same rules are conducive to the public good of the EU – puts the system under a continuous tension and seems difficult to overcome.

4. Concluding Remarks

Public regulators have been using norms coming from private bodies and have been connecting with private regulatory regimes for a century. A practice first observed at the national level, it is now widespread at the global one.

Mechanisms of connections elaborated by domestic regulators, such as the incorporation of or the reference to private standards in public rules, can now be found in international treaties, decisions of subsidiary bodies of intergovernmental organizations and accords coming from transnational or hybrid networks. The analysis shows that old tools are surprisingly resilient. In some cases, though, new mechanisms look similar to traditional techniques, but are put in place for different purposes; in other cases, new models emerge.

The reference to credit rating agencies in Basel II comes from the US domestic tradition: hence, it seems to be the global linkage which does not innovate from the domestic tradition, but simply transplant a tool well known domestically.

The ‘incorporation’ of international accounting standards in the FSB Compendium, albeit at first sight similar to the technique used at the domestic level, proves to be different in its implications: it does not entail a democratic approval, as it is within domestic legal orders, because no such approval would be possible within a hybrid network like the FSB. Rather, this ‘incorporation’ works like a political endorsement. Moreover, given the use the World Bank and the IMF make of the FSB Compendium in order to foster the implementation of standards, instead of being intended to preserve the democratic process and enhance legitimacy, it aims at promoting compliance with standards.

In the WTO there are several type of references. The ones that can be found in the TRIPS and in the Agreement on Agriculture transplant at the global level the ‘incorporation by

reference' ('rinvio fisso') model. The provisions of the TBT are more similar to the 'flexible reference' ('rinvio mobile') model: even though their formulation is more nuanced than the technique used in the domestic context, the AB attitude in interpreting it make the functioning of this reference more and more similar to it.

Lastly, the EU endorsement of accounting standards ends up in incorporating the endorsed IAS/IFRs in EU regulations, but the procedure which leads to this result and the structure entitled to carry it on enact a much more complex model.

Problems raising from these practices – concerning the legitimacy of the public endorsement of rules first established by private actors – have been observed already at the beginning of the last century. In domestic legal orders, 'incorporation' was long preferred to other mechanisms because the approval of private norms through the legislative process guarantees the legitimacy of rulemaking. When alternative tools, such as the 'dynamic reference' to private standards were adopted, different ways to enhance legitimacy were looked for. Within domestic legal systems, legitimacy seems to have been pursued first through structural connections between public authorities and private standard setters (participation of Ministries in the competent private standard setting body and public financing of the latter are a case in point). Mixed models – and especially the EU New approach to technical harmonization – started using procedural tools extensively. However, there is no general agreement upon the most suitable solution and mix of tools, as some commentators have criticized excessive politicization of the private standard setting process (above, Section 2.3.).

Within global regulatory regimes, an opposite tendency can be registered. The main instruments used to cope with accountability concerns are transparency, notice and comment and participation in the decision making process of private bodies. As mentioned above, the WTO TBT Council established principles the standard setters (to whose standards the TBT refers to) should comply with. The EU endorsement procedure provides several due process rights in the European endorsement procedure and aims at fostering participation in the IASB standard setting process. Recently, though, some structural linkages among private actors and public authorities have been built also at the global level. The PIOB and the MB, bringing together public

regulators and exercising an oversight function over private bodies such as the IFAC and the IASB, are a case in point.

There are some contradictions in this process. First, tools addressing legitimacy concerns – especially procedural ones – seem sometimes to be more developed in the global context than in national ones. In these cases, supranational and global regulatory regimes enhance participation at the national level¹⁴⁰. Second, in some cases international administrations that are not transparent themselves try to impose such principles to standard setting bodies: this is the case of the WTO¹⁴¹. Third, not necessarily more efficacy in enhancing accountability comes with the development in the number of these tools. Even efforts to enhance participation through a plethora of organizational and procedural tools (such as in the EU endorsement of IAS/IFRs) can prove ineffective, because of an imminent contradiction between a domestic (or regional, in the case of the EU) interest and an activity (accounting) that needs internationally harmonized rules and because of the competing role of other powerful actors (such as the US FASB). Lastly, the transplantation of techniques from the national to the global level often makes the search for tools capable of ensuring accountability extremely arduous, as the controversial composition of the two bodies – the PIOB and the MB – overseeing the global standard setters for accounting and auditing clearly shows. The lack of a global government¹⁴² impairs the simple replication of the solutions used at the national level. The high number of public principals intervening in the global arena¹⁴³ makes the shaping of the most suitable institutional patterns and the appropriate mix of global and national public authorities involved the next challenge to legal scholars.

¹⁴⁰ See Cassese, *supra* note 70, at 116, and Id., “A Global Due Process?”, Paper presented at New York University Hauser Colloquium On Globalization And Its Discontents, 13 September 2006, available at <www.iilj.org/courses/documents/Cassese.AGlobalDueProcess.pdf>.

¹⁴¹ See R. B. Stewart and M. Rattón Sanchez Badin, “The World Trade Organization and Global Administrative Law” (December 4, 2009) NYU School of Law, Public Law Research Paper No. 09-71, available at <ssrn.com/abstract=1518606>.

¹⁴² See S. Cassese, “Global Administrative Law: An Introduction”, paper for the NYU Law School «Global Administrative Law Conference», April 22-23 2005, available at <www.iilj.org/global_adlaw/documents/CassesePaper.pdf> (also as “Il diritto amministrativo globale: una introduzione”, in Riv. trim. dir. pubbl. (2005) p. 331 et seq.), at 36.

¹⁴³ See W. Mattli and T. Büthe, “Global Private Governance: Lessons from a National Model of Setting Standards in Accounting”, in *68 Law & Contemporary Problems* (2005), p. 225 et seq., at 252.