



Introduction

Global sporting events such as the Olympics have for a long time replicated political, cultural and social developments. The Olympic Movement, for example, preceded the establishment of most intergovernmental organisations; during the Cold War the Olympics were one of many areas where the two blocs carried out their conflicts, and in 2018 we witnessed Olympic diplomacy between North Korea and South Korea.¹ In a different field – that of technical standard-setting – we can observe the rise of standard-setters such as the ISO, becoming powerful ‘new global rulers’.² Linked to these developments, we find a growing number of private actors which are actively engaged in transnational regulatory processes. In parallel, we can also detect increasing connections between these regulators and existing public national and international regulatory structures. Less prominently located on the public radar, these often-cooperative initiatives are crucial in understanding a changing transnational order. Yet, even though regulatory interactions have ‘long fascinated scholars of transnational law, . . . transnational legal theorists’ accounts of such interactions are for the most part tentative, incomplete and unsystematic’.³

This book endeavours to bring more clarity to this tentative and incomplete picture by examining regulatory cooperation between international organisations and privately incorporated regulators. It looks at the multi-level effects of such cooperation, particularly its extension at the state and local levels. Two research questions are at the centre of this work: (1) Why

¹ P de Coubertin, T J Philimon, N G Politis & C Anninos, *Die Olympischen Spiele*, 776 v. Chr. – 1896 n. Chr., *Zweiter Theil, Die Olympischen Spiele im Jahre 1896* (Verlag von Carl Beck, 1897); A Guttmann, ‘The Cold War and the Olympics’, 43 *International Journal* (1988) 554; E Talmadge, ‘Koreas Try Out Olympic Diplomacy at North Korean Ski Resort’, *Washington Post* (28 January 2018).

² T Büthe & W Mattli, *The New Global Rulers – The Privatisation of Regulation in the World Economy* (Princeton University Press, 2011).

³ S Wood, et al., ‘The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory’, 6 *Transnational Legal Theory* (2015) 333.

regulators cooperate with each other? (2) What this means for our understanding of the broader legal and political framework in the transnational realm, particularly in cases where cooperation takes the form of a network that has certain stabilisation effects in or across issue areas?

Regarding the first question, we must understand the emergence of cooperation between international organisations and private actors in the context of at least two decades of considerable economic, social and cultural globalisation. The interconnection between markets and societies, the spread and expansion of businesses and trade around the globe, as well as the functional differentiation of society have presented traditional regulators with challenges that are impossible to address through isolated action. To elaborate, on the one hand, we have witnessed the rise of public actors exercising governance activities with global, regional or cross-border effects. On the other hand, there has been a noticeable increase in private regulation made and adopted by both commercial entities and civil society actors. Much has been written regarding these developments, and there is also a significant body of literature on the transformation of law and the global legal order more generally.⁴ The book adopts a broad understanding of a pluralistic landscape made up of different types of regulators performing a variety of activities in distinct geographical and thematic areas.

The focus here is on cooperation which creates linkages between these distinct areas. Cooperation is thereby defined as a joint activity between two or more parties that is voluntary and intentionally entered into in order to achieve a common goal. Cooperation also provides a venue for deliberation and the alignment of internal values. Using cooperation as the central focus provides a unique approach, as it is the venue through which actors can meet, at least formally, on equal footing. Despite this formal equality, however, capture and hegemony are inherent possibilities of any cooperative process. Thus, cooperation is the moment where one must question seemingly existing patterns of hierarchy and reassess relationships between actors considering their relative power and

⁴ See e.g. B Kingsbury, N Krisch & R B Stewart, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005) 15, at 20. R B Hall & T J Biersteker, 'The Emergence of Private Authority in the International System', in: R B Hall & T J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002) 3, and the different contributions in this edited volume; F Cafaggi, 'New Foundations of Transnational Private Regulation', 38 *Journal of Law and Society* (2011) 20 ff.

legitimacy.⁵ The main underlying argument is that authority is not equally distributed between the different types of actors in the global realm. This is true for functionally specified entities (such as public international organisations and private regulators), but also for state actors traditionally understood as holding comprehensive authority (at least in a defined territory). Moreover, this proliferation of authority is unstable. An actor considered authoritative today may see its authority challenged tomorrow. In this context, cooperation functions as a means to gain access to ‘authority resources’ necessary to achieve regulatory goals. Furthermore, it can also operate as a venue to stabilise authority and make it more robust against internal or external challenges. As new challenges emerge, these processes tend to be recursive over time.

Related to the issue of stabilisation, the second research question seeks to examine how regulatory cooperation is framed and to assess the structures within which it develops. It is argued that regulatory cooperation can lead to more integrated network structures. Such structures are relevant from a legal perspective for a variety of reasons. From a legal-theoretical point of view, networks raise questions as to how to understand the global legal order. In general terms, some commentators have argued that there exist factors that point towards the development of a more integrated global sphere, governed by universal principles such as human rights. Others deny this development and see instead a fragmentation of society into different, functionally separated units. The book argues that a network approach can move beyond this dichotomy and provide a better understanding of the transnational legal order. Networks are spaces in which independent regimes achieve a certain level of stability and uniformity in terms of normative values and structure – a development that in this book is termed ‘constitutionalisation effects’.

The goal of this book is to provide a better account of aspects of regulatory interactions in the transnational context by combining insights from law and political science. Its analysis is driven by two qualitative empirical case studies: one on sports and environment, and the other on technical standard setting and social responsibility regulation. The objective of the case studies is to first point out the shortcomings of conventional understandings of law and regulation beyond the nation state, for which they were constructed. Second, the case studies explain and map novel transnational forms of regulation such as

⁵ A more detailed definition is provided in Chapter 1, Section 1.3.

cooperative approaches and multilevel regulatory networks. The findings of this exercise in turn help reconstruct a more rigorous conception of regulation, law and the overarching frameworks of the transnational sphere. The book is structured as follows.

Chapter 1 depicts changes in the general global framework that have led to the emergence of increased regulatory cooperation. It looks at literature on globalisation and the transformation of the nation state. The second part of the chapter develops a definition of cooperation. However, rather than providing a fixed account, the chapter draws out different contexts in which these terms emerge and are applied, and links it to existing streams within the literature. This offers a set of preliminary clarifications that will facilitate analysis in the following chapters.

Chapter 2 deals with the ‘why’ question introduced above. Thus, it inquires why cooperation takes place and why it emerges between formally distinct actors. The main claim made in this chapter is that organisations cooperate because in the fragmented, pluralistic context they each hold incomplete authority. Cooperation becomes necessary for regulators to gain the authority to effectively regulate. In addition to giving a general account of authority in the transnational context, Chapter 2 looks in particular at the various regulatory competences that actors exchange in the course of the cooperative processes. This is termed ‘regulatory resources exchange’. Chapter 2 also focuses on how various understandings of legitimacy affect the relationships between different types of actors and their targeted communities. It is argued that, in particular, origin- and tradition-based rationales and considerations play an important role in the determination of the legitimacy of transnational actors and their regulation. For this reason, states and international organisations have an advantageous position from which to lend their legitimacy to cooperative projects. Chapter 2 also examines the rise of epistemic authority and how the increase in expertise-driven governance transforms private actors into important partners in regulatory processes.

Chapter 3 focuses on the ‘how’ question, relating to the structures created by regulatory cooperation. It argues that regulatory cooperation can develop into network structures, which are in general terms more integrated forms of cooperation. Networks are often discussed in relation to two other forms of organisation: markets and hierarchies. In an idealised understanding, a market structure is characterised by individual transactions governed by contracts without any further relationship existing between the participants. In the hierarchical setting, all transactions take place under the umbrella of one entity that is characterised by

central organisation.⁶ Transposed to the political and legal spheres, networks constitute more consolidated structures which nevertheless do not fit into traditional hierarchical models. This chapter seeks to go beyond a narrow focus on regulatory networks and to ask a broader question, namely what can the development of regulatory networks tell us about our understanding of the global legal order. Chapter 3 does not simply take regulatory networks as evidence for a network structure in the global legal realm. Rather, it engages in a translation exercise. First, it shows how cooperative networks create spaces wherein independent regimes deliberate over content relevant for their cooperative activities and goals. This then may cause stabilisation and harmonisation of internal normative values and structural settings in the network. As a result, participants are faced with increasing demands to justify contrary positions, a development which is described as ‘constitutionalisation effects’. Regarding the general debate on the transnational legal order, the book joins the chorus of those arguing for a third way beyond a rather far-reaching conception of pluralism and an all-embracing universalism. A network approach is based on a pluralist understanding of the transnational realm, but also acknowledges the connections between independent orders and spaces of harmonisation and integration.

Chapter 4 contains the first case study of the book. It examines the cooperation between three international organizations (the ILO, UN and OECD) and ISO in the ISO 26000 process. ISO 26000 is a management guidance standard in the area of social responsibility regulation. This area is highly fragmented, with several dozen initiatives addressing one or several aspects of social responsibility such as labour rights or environmental protection. Considering the many public policy questions the standard had to deal with, and given that ISO is a technical, mainly industry-based standard-setter, it needed the legitimacy and expertise of the international organisations engaged in the field. Cooperation was a venue for ISO to access both. International organisations, on the other hand, saw an opportunity to benefit from the special ties ISO had with the industry to further spread not only their own instruments but also the message of responsible business behaviour more generally. The chapter argues that another goal international organisations pursued was to harmonise existing regulatory frameworks and create a consistent message which would lead to path dependency effects within the business community.

⁶ Cf. W W Powell, ‘Neither Market nor Hierarchy: Network Forms of Organization’, 12 *Research in Organizational Behavior* (1990) 295ff; and O E Williamson, *The Economic Institutions of Capitalism* (Free Press, 1985).

Chapter 5 provides the second case study and focuses on environmental protection in the sports realm. It concentrates specifically on the cooperation between the IOC and UNEP. The study, however, expands beyond these two organisations and looks at the broader network that was established between the sports sector and public actors. This case study shows how the initial collaborative project over time led to more stabilised structures through which environmental protection requirements were fostered. Focus in the study is put on the interplay between the transnational level and the regional or national one. The book uses social science literature on ‘mega-events’ to depict how political and cultural transformations are inspired and accelerated by an event such as the Olympic Games. Commitments by the local organisers as formalised in host city contracts often require (legal) transformations and significant investment in environmental-related (infrastructural) projects. As such, the Games can function as a catalyst for increased environmental protection. On the other hand, transformations can also take place at the transnational level, inspired by the local developments. The chapter pays significant attention to this interplay.

Chapter 6 revisits the central arguments developed in Chapters 2 and 3, in light of the case studies of Chapters 4 and 5. The goal of the concluding chapter is to further develop the framework introduced in the preceding parts of the book. It revisits the scope conditions for the emergence of regulatory cooperation outlined in Chapter 2 and compares them with alternative accounts for their success or failure. The chapter addresses the possibility for (hegemonic) capture and non-realisation of projected outcomes. Finally, towards the end of the chapter, mechanisms put in place to prevent such failures are discussed. This part also links back to organisational practice and scholarship and provides suggestions for future research.

Regulatory interactions, and especially regulatory cooperation, are important and frequently utilised venues through which transnational actors fulfil their mandates and which in turn restructure the transnational political and legal order. In its analysis, the book will take an interdisciplinary, empirically driven approach. Building on legal and political science literature, as well as on insights from organisational theory, it will incrementally develop the cooperative dimension. The case studies are crucial in this exercise, as they depict the approach taken in regulatory practice. They are based on an in-depth analysis of organisational documents, as well as interviews, to better understand the reasons to engage in cooperation vis-à-vis taking a conflicting or autonomous position.

Setting the Scene

1.1 Introduction

The present chapter sets the scene for the subsequent analysis of regulatory cooperation in a transnational context. Transformations of global legal and political structures occur more rapidly than ever, making it difficult to follow them in detail. Nonetheless, through the right angle, it is possible to observe certain patterns and tendencies which can guide an analysis of regulatory or legal phenomena in the transnational arena. A core inspiration for this work was the empirical observation that throughout the last decades there has been a significant increase in cooperation between international organisations and private actors. While controversial, the term ‘globalisation’ is most commonly used when describing the changes towards more cross-border integration, which have taken place since the end of the Cold War. These include economic, cultural and social transformations, which have had (and continue to have) a significant impact on the regulatory state and our preconceptions of the law.

The first part of this chapter, therefore, engages with the extensive literature on this issue and subsequently investigates the changing role of the nation state. The second part of the chapter examines the responses given to address these challenges in legal and regulatory literature. It depicts how in particular international law scholarship is only slowly adapting to these transformations, as nation states remain the focal point. However, elsewhere we can find more comprehensive accounts which aspire to an understanding of law and regulation that considers the increasing plurality of actors. Most noteworthy in this regard are recent approaches focussing on regulatory interactions. Situated in this field, the current chapter introduces one specific form of interaction – cooperation. It will provide a definition of cooperation that guides the reader throughout the book and depicts its application in regulatory practice.

1.2 The Context: Globalisation and the Transformation of the Nation State

1.2.1 Globalisation

Any assessment of transnational regulatory phenomena can be understood only within the context of the broader framework within which it is taking place. As such, it is necessary to shed some light on the phenomenon so ambitiously coined ‘globalisation’.¹ Literature on this topic is both vast and diverse and contains widely different assessments and predictions.² Despite this diversity, there is general agreement that globalisation is not a predominantly legal or even political phenomenon. Rather, it is a ‘multifaceted phenomenon containing economic, social, political, cultural, religious and legal dimensions’.³ Those dimensions are characterised by increasing complexity, fluidity and elusiveness;⁴ or, in other words, by a ‘time–space compression’.⁵ A comprehensive overview of the different theoretical approaches and categorisations of the myriad aspects of globalisation is beyond the scope of this chapter, which will instead focus on identifying the most prominent transformations and those most relevant for the issue at stake, namely regulatory cooperation.

In this regard, we must look first to the major transformations of the global economy – triggered by technical innovation in production processes – and the resulting rapid increase in global trade.⁶

¹ Globalisation as elaborated in the following is what is usually referred to as contemporary globalisation. This term includes predominantly the post–Cold War period, but acknowledges that there have been different historical époques characterized by different waves of globalisation; see F Mégret, ‘Globalization’, in: *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2009), available at: <http://opil.ouplaw.com/home/epil> (last accessed 19 January 2018), para. 3.

² B de Sousa Santos, ‘The Process of Globalisation’, *Eurozine* (22 August 2002), available at: www.eurozine.com/articles/2002-08-22-santos-en.html (last accessed 19 January 2018) at 1, lists a few different perspectives taken to describe enhanced global interaction, such as ‘globalisation, global formation, global culture, global system, global modernity, global process, globalisation cultures or global cities’. See, furthermore, S Huntington, ‘The Clash of Civilization’, 72 (3) *Foreign Affairs* (1993) 22; F Fukuyama, *The End of History and the Last Man* (The Free Press, 1992).

³ De Sousa Santos, *supra* note 2, at 2.

⁴ W Twining, *Globalization & Legal Theory* (Butterworths, 2000), at 196.

⁵ See D Harvey, *The Conditions of Postmodernity: An Inquiry into the Origins of Cultural Change* (Blackwell, 1990), chapter 17, at 284.

⁶ R J Gilson, C F Sabel & R E Scott, ‘Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration’, 109 *Columbia Law Review* (2009) 431 ff.; Mégret, *supra* note 1, para. 9.

Progressively interlinked transnational supply chains have effectively globalised production. International trade has expanded, accompanied by increased and enhanced international capital flows, growing financial markets and foreign investment.⁷ All of this is fuelled by the development and expansion of the internet and associated advanced communication technologies.⁸ Technical and factual changes in economic processes were accompanied by a particular *political* agenda, the so-called Washington Consensus,⁹ or neo-liberal economic consensus.¹⁰ Emerging during the early post-Cold War period, it calls for the creation and proliferation of international economic organisations and institutions as a means to respond to the economic developments and the policies pursued to achieve them. Particularly important institutions in this regard are the World Bank, the International Monetary Fund, the World Trade Organization, regional trade organisations and the International Centre for Settlement of Investment Disputes (ICSID). At the same time, and very relevant for the present work, there has also been an increase of less formal, and in some cases privately incorporated institutions such as the International Organization of Securities Commissions (IOSCO), the Basel Committee or Credit Rating Agencies. Most of these institutions adopt a policy that supports or even requires countries to open their national economies to the world market, engage in privatisation and deregulation, ensure strong protection of foreign investment, and implement strict fiscal policies. Initially, little attention was paid to the deep impacts those policies and developments have had on social and national political realms.¹¹

When assessing the broader impacts of these economic and political processes, we can observe diverse effects and a number of different agendas in response. Boaventura de Sousa Santos has grouped those impacts and responses in what he describes as four forms of

⁷ See Mégret, *supra* note 1, para. 10.

⁸ *Ibid.* para. 11.

⁹ Referring to the support by US politics and multilateral agencies seated in Washington such as the World Bank and the IMF; J Williamson, *The Political Economy of Policy Reform* (Institute for International Economics, 1994) at 17; W Twining, *General Jurisprudence, Understanding Law from a Global Perspective* (Cambridge University Press, 2009) at 13 and 336 ff.

¹⁰ De Sousa Santos, *supra* note 2, at 5.

¹¹ *Ibid.*

globalisation: globalised localism, localised globalism, cosmopolitanism and the common inheritance of humanity.¹² The first form refers to a scenario in which a local phenomenon is globally adapted. Examples of this include fast food and the English language as well as the spread of intellectual property laws. In contrast, localised globalism refers to the impact of global events on local structures. These are, for instance, changes imposed on local economic relations ('elimination of neighbouring commerce'¹³) or the opening of cultural resources to tourism. Unsurprisingly such developments can also be observed regarding regulation or law. In fact, we will be able to observe both forms of globalisation in later chapters of this book when either local forms of regulation inspire global actors and global regulatory developments, or when globally operating entities impose their standards locally.¹⁴ Since the developments just described are often accused of causing new social inequalities and unequal distribution of wealth, they have inspired numerous anti-globalisation and global justice movements, some of which will also be addressed in the case studies.¹⁵ As a result, the two final expressions of globalisation that de Sousa Santos coined capture responses to the negative externalities of globalised localism and localised globalism. The first, cosmopolitanism stands for forms of organised resistance of nation states, regions and social groups against the developments described earlier. The venues used for this resistance are those created through globalisation, such as technology and advancements in communications. The last form of globalisation is the idea of a common heritage of humanity and reflects 'transnational struggles to protect and decommmodify resources, entities, artefacts and environments considered essential for the dignified survival of humanity, whose sustainability can only be guaranteed on a planetary scale'.¹⁶ Again, both facets can be observed in the case studies provided in Chapters 4 and 5.

¹² Ibid at 25 ff.; B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995) at 262 ff.; See also W Twining, *supra* note 4, at 221 ff.

¹³ De Sousa Santos, *supra* note 2, at 26.

¹⁴ See particularly Chapter 5.

¹⁵ De Sousa Santos, *supra* note 2, at 5, who provides references to further studies on the topic.

¹⁶ Ibid at 28.