Corporate Codes of Conduct and their Implementation: The Question of Legitimacy

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A. Introduction

The process of globalisation has come with fundamental challenges for the effective and legitimate governance of transboundary affairs. On the one hand, the transnational nature of many contemporary policy issues exceeds the regulatory capacities of territorially defined national regulation; on the other, the traditional mode of ordering global affairs through classic international 'hard law' faces the inherent limitations of achieving the necessary political consensus. On the national level, economic developments in the 1980s seemingly have diminished the role of the state as the guardian of the public commons. It is against this background that, in the context of global capitalism, the issue of the regulation of transnational corporations (TNCs) in advancing corporate responsibility must be seen.

In order to avoid being subject to the law of the jungle, capitalism requires the establishment of certain rules of the game. Following only partially successful attempts in the 1970s to regulate corporate activity through *intergovernmental* codes, the 1990s saw a remarkable increase of interest in regulating corporate performance. In response to mounting pressures for increased corporate accountability (from consumer groups and other NGOs, and from potential public regulation, litigation or prosecution), voluntary private self-regulation was seen as a possible new way of filling the regulatory void opened up by globalisation. Indeed, the 1990s saw a proliferation of corporate codes of conduct and an increased emphasis on corporate responsibility. Recent developments in promoting corporate accountability involve new types of regulatory institutions – so-called multistakeholder initiatives (MSIs) – that attempt to address some of the limitations of corporate self-regulation. The proliferation of voluntary codes has led to a bewildering plurality of often competing standards, resulting in a regulatory system that is fundamentally *fragmentary* in character.

In the 1980s, Maitland stressed the "lasting appeal" of the "idea that we would be better off if we could rely on the promptings of a corporate 'conscience' to regulate corporate behaviour instead of the heavy hand of government regulation."[1] This paper sets out to explore the question of whether voluntary codes indeed serve as effective and legitimate tools for promoting corporate accountability. Owing to the very diversity of the subject matter, assessments are inevitably ambivalent. It does not seek to provide a new study next to the prolific writings related to codes of conduct of other authors, rather it should be seen as an analysis and compilation of findings in light of the more specific topic of 'legitimacy'.

B. Concept of Codes of Conduct

Codes of conduct do not have any authorized definition. At a very basic level, they all aim to define standards and principles that ought to guide the behaviour of the addressee in a particular way. As such, they are *regulatory* instruments.

[1] Ian Maitland, The Limits of Business Self-Regulation, in: California Management Review 27:3 (1985), 132.

They are not of recent vintage, yet it was not until the second half of the twentieth century, i.e. in the context of globalisation[2], that they rose to prominence as regulatory responses to the challenges posed by the globalisation of the world economy.[3]

They may respond to a broad range of regulatory concerns and be established at the initiative of governments, international organizations, individuals, and private organizations (NGOs, business entities). A distinguishing feature of codes of conduct is that they are voluntary in nature[4] rather than legally binding, and thus not legally enforceable. To the extent that they are issued by states, international organizations, non-governmental organizations (NGOs) and the International Chamber of Commerce, codes of conduct fall into the broad normative realm of *soft law*.[5]

While codes may be directed at states, a salient feature is their aim to regulate the *transnational* activities of *non-state actors*.[6] Indeed, the modern issue of codes of conduct is the question of how to effectively enhance the accountability of transnational corporations (TNCs[7]) in the international marketplace.

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[2] Broadly speaking, globalisation may be defined as the shrinkage of distance on a world scale through the emergence and thickening of networks of interconnections – cutting across the political, cultural, social and economic fields; narrowly defined in an *economic* sense, we may refer by it to the globalisation of markets and the worldwide economic integration, (*see*, e.g., David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, Global Transformations: Politics, Economics and Culture (1999); Robert Keohane and Joseph Nye, Power and Interdependence, 3rd ed., New York (2001)).

[3] Historically, codes of conduct "have been formulated with a view to guiding the behaviour of individuals, groups, organizations, governments, societies, and, most, recently, corporations." (Wesley Cragg, Multinational Corporation, Globalisation, and the Challenge of Self-Regulation, in: John Kirton/Michael Trebilcock (eds.): Hard Choices, Soft Law (2004), 213).

[4] However, some trade and industry organizations make adoption of a code a precondition for company membership.

[5] For a detailed and extensive discussion on the phenomenon of soft law, *see* Dinah Shelton (ed.), Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System (2000) [hereinafter Dinah Shelton (ed.), Commitment and Compliance]; Daniel Thürer, Soft Law, in: Rudolf Bernhardt (ed.), Encylopedia of Public International Law, vol. IV (2000), 452–460.

[6] Peter Willets, Transnational Actors and International Organizations in Global Politics, in: John Baylis/Steve Smith (eds.): The Globalisation of World Politics. An Introduction to International Relations (2001), 357–383; Jan Aart Scholte, Global Civil Society, in: Ngaire Woods (ed.): The Political Economy of Globalisation (2000), 173–201; Thomas Risse, Transnational Actors and World Politics, in: Walter Carlsnaes/Thomas Risse/Beth Simmons (eds.): Handbook of International Relations, London (2002), 255–274.

[7] There are variants to this term, such as multinational corporation (MNC) or multinational enterprise (MNE); a MNE has been characterized as "any corporation which owns (in whole or in part), controls and manages income generating assets outside its home country. […] Thus, the MNE is a firm that engages in direct investment outside its home country." (Peter Muchlinski, Multinational Enterprises and the Law (1995), 12) or as an enterprise that is directed from its country of origin (or home country) and engages in economically significant activities within other states, known as host countries. What distinguishes it from other business enterprises is its "ability to exercise market power and influence in host countries by what may be

Codes of (corporate) conduct can be broadly defined as "commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace"[8]. They purport to shape corporate conduct in a certain way – through a catalogue of principles that define a set of relationships between the company and its stakeholders on a range of topics.

The introduction of private voluntary codes of (corporate) conduct can be seen as corporate and civil society attempts to fill in some of the international regulatory voids that opened up in the wake of neoliberalism. Voluntary codes have the advantage of transcending territorial confines, extending the application of prescriptive standards of socially accountable TNC behaviour overseas, to the operations of suppliers, subcontractors and other business partners where standards may be non-existent, incomplete, unenforced or ignored. In this sense, codes of conduct form part of an emerging *transnational normative regime*. Since private codes of corporate conduct are developed not by the national legislative in its formal position as lawmaker but by private, non-state actors, they constitute *informal* instruments, which, nevertheless, perform a *public* function, i.e. the protection and enhancement of social and ecological values. In this sense, they are *hybrid* norms.

C. The Evolution of Codes of Conduct

I. The Rise of Codes of Conduct on the International Scene

1. Historical Outline

The early history of codes of conduct may be traced back to the nascent field of international humanitarian law. A pioneering role in issuing (self-regulatory) codes for business conduct was undertaken by the International Chamber of Commerce (ICC) with its *Code of Standards of Advertising Practice* (1931), which was accompanied by a number of other marketing-related codes.[9]

It is not until the 1970s, however, amid a climate of adversarial relations between TNCs and national governments, particularly those of developing countries, that codes of conduct gained major attention as regulatory responses to the negative

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termed remote control." (Hans Baade, The Legal Effects of Codes of Conduct for Multinational Enterprises, in: Norbert Horn (ed.), Legal Problems of Codes of Conduct for Multinational Enterprises (1980), 4). UN parlance, however, distinguishes between *multinational* and *transnational*, the former term referring to enterprises owned and controlled by entities or persons from one country but operating across national borders, the latter to those owned and controlled by entities or persons from more than one country.

[8] OECD, Codes of Corporate Conduct: An Inventory, Working Party on the Trade Committee, TD/TC/WP(98)74/Final, Paris (1999).

[9] Among the other ICC codes figure: the International Code of Sales Promotion (1987), the International Code of Environmental Advertising (1991), the International Code on Sponsorship (1992), the International Code of Marketing and Social Research Practice (1995), the International Code of Advertising Practice (1997), the International Code of Practice on Direct Marketing (1998), the Guidelines on Marketing and Advertising on the Internet (1998), and the International Code of Direct Selling (1999).

impact of the increasing power and influence of TNCs. After the initial, post-World War II period in which many developing countries welcomed foreign direct investment (FDI), attitudes changed in the late 1960s as developing countries became increasingly critical of TNCs for their failure to operate in harmony with local economic, social and political objectives. Specifically, developing states perceived the growth of corporate power and influence as a threat to their sovereignty, which relates to the political climate of that time, i.e. the Third World demands for a New Economic International Order seeking to change the international economic system, seen to disfavour the fledgling, post-colonial states striving for political and economic independence. The ITTC scandal[10] in Chile was a defining incident in focusing international attention on the activities of TNCs in developing countries, giving rise to concerted calls for TNC regulation, which eventually led to the birth of the United Nations Centre on Transnational Corporations (1977) and its work on a comprehensive UN Draft Code of Conduct for TNCs.[11] While, owing to differences of interest between developed and developing countries, the drafting process eventually had to be discontinued in the early 1990s, other attempts at regulating TNCs that sought to establish more specific voluntary standards of socially responsible conduct for TNCs met with more success.

In 1976, the OECD issued the Guidelines for Multinational Enterprises[12] (MNCs) as part of a broader Declaration on International Investment and Multinational Enterprises; the ILO Tripartite Declaration on MNCs[13] was adopted the next year, establishing voluntary guidelines covering employment, training, working conditions and industrial relations. As international instruments of corporate social responsibility, they have been of limited effect; yet, they stand at the centre of the universe of corporate responsibility codes, at once establishing a comprehensive framework of aspirational standards of good corporate practice that serve as benchmarks, and laying the groundwork for future efforts. The 1970s not only saw the emergence of *intergovernmental* corporate regulation, but also the birth of the modern idea of *private self-regulation*, which is typically retraced to the 'Sullivan Principles'[14] (1977), a privately initiated set of standards designed to guide companies operating in South Africa with a view to employing business leverage to effectively change apartheid practices.

In the following years, further public initiatives emerged from within the UN family, such as the so-called *Set of Multilaterally Agreed Equitable Principles*

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[10] *Infra* note 25.

[11] At the national level, some 22 developing countries passed legislation controlling TNC activities in the late 1960s and 1970s, *see* Bob Hepple, A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct, in: Comparative Labour Law and Policy Journal 20 (1999), 347–363.

[12] *Infra* note 39. The OECD Guidelines cover the range of MNE activities, dealing general policies, information disclosure, competition, financing, taxation, employment and industrial relations, the environment, and science and technology.

[13] *Infra* note 36.

[14] *Infra* note18.

and Rules for the Control of Restrictive Business Practices, adopted by the UN general assembly in 1980.[15] Efforts were also made under the auspices of the United Nations Conference on Trade and Development (UNCTAD) to elaborate an *International Code of Conduct on Transfer of Technology*.[16] While adoption of the latter never came about, a more successful example is the WHO/UNICEF International Code of Marketing of Breast-milk Substitutes, which the World Health Assembly adopted in 1981.[17]

Apart from these initiatives, general interest in codes of conduct began to wither away in the 1980s, which coincided with the shift in governmental attitudes toward TNCs in the context of the neo-liberal doctrine of non-intervention, increased liberalisation and *deregulation* of business. In keeping with the "free market" philosophy, corporate self-regulation, i.e. the notion that the onus for regulating TNCs should rest with the companies themselves, gained momentum, and a plethora of company-written codes of conduct emerged in the 1990s.

2. Codes of Conduct Illustrated

a) Sullivan Principles

The so-called "Sullivan Principles"[18] stand for long-running private external efforts to promote socially responsible conduct of multinational corporations. They were introduced in 1977 by Reverend Leon Sullivan, a board member of General Motors and an anti-apartheid activist, to remedy social and economic injustices within the international business community in South Africa, with hopes that corporations would use their influence and channel their resources towards changing the apartheid system from within. Its six principles (amplified in 1978) urged companies to adhere to non-discriminatory labour practices in the areas of wages, housing, health, transportation, and managerial training, aiming at providing a

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[15] G.A. Res. 35/63, U.N. GAOR Supp. (No. 48) at 123, U.N. Doc. A/35/48 (1980), *reprinted in* 19 I.L.M. 813 (1980), *available at* http://r0.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm. One of the objectives of this code is the creation, encouragement and protection of competition. Compliance by member countries, however, is voluntary; *see* Joel Davidow, The Implementation of International Antitrust Principles, in: Rubin Seymour / Gary Hufbauer (eds.), Emerging Standards of International Trade and Investment (1983), 119; Joel Davidow / Lisa Chiles, The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices, in: American Journal of International Law 72 (1978), 247–271.

[16] On the issue of technology transfer *see* Andrés Guadamuz, The Future of Technology Transfer in the Global Village, in: Journal of World Intellectual Property 3:4 (2000), 589–602.

[17] *See* Kathryn Sikkink, Codes of Conduct for Transnational Companies: The Case of WHO/UNICEF Code, International Organization 40:4, 815–840 (1986). The WHO/UNICEF International Code of Marketing of Breast-milk Substitutes, which was adopted by the World Health Assembly in 1981, bans all promotion of bottle-feeding and sets out requirements for labelling and information on infant feeding. *See* WHA Res. 34/22 (1981), *available at* http://www.who.int/nut/documents/code_english.pdf.

[18] *See* The Sullivan Statement of Principles (4th amplification), Nov. 8, 1984, 24 I.L.M. 1496 (1985); *see also* Leon H. Sullivan, Moving Mountains: The Principles and Purposes of Leon Sullivan (1998), 193–96.

catalyst for the dismantling of discriminatory practices in the larger society. By 1986, up to 150 corporations have taken the pledge to abide by them.[19]
While, in the end, reality failed to live up to the envisioned goals of the Sullivan Principles, they were nevertheless an important contribution to the ultimately successful movement against apartheid, and demonstrated the worth of enlisting companies as agents of change. The specific importance of the Sullivan Principles, then, lies not so much in the historical contingencies, but in shaping the debate if, and to what extent, the business community should be accountable not only to their shareholders, but to the communities in which they operate at large.[20]
Since the 1970s, several other privately initiated codes of conduct have been created to set standards for corporations' behaviour when operating in foreign legislative environments that do not uphold the same labour practices as the host state. For instance, the MacBride Principles, introduced in 1984, apply to U.S. corporations conducting business in Northern Ireland with the goal of providing non-discrimination protections for the Catholic workers in the Protestant-dominated society.[21]
The initial Sullivan Principles[22] spawned a more general code in 1999, known as the Global Sullivan Principles of Social Responsibility[23], which purport to be " a catalyst and compass for corporate responsibility and accountability."[24]

b) UN Draft Code on Transnational Corporations

On the international stage, the United Nations, or its specialized agencies, has been a principal actor in the creation of codes of conduct. After an initial period in the 1960s, when developing countries welcomed foreign direct investment,

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[19] While the Principles did not single-handedly end apartheid, they did aid in desegregating many companies. Of the 150 signatories, approximately 95% ended segregation within their workplaces. These signatories also accounted for 95% of the blacks employed by U.S. corporations in South Africa. In addition, more than two-thirds of the signatories offered scholarships to nonwhites and nonwhite managers increased by thirty percent. *See* Jorge F. Perez-Lopez, Promoting International Respect for Workers Rights through Business Codes of Conduct, Fordham International Law Journal 17 (1993), 42–43.

[20] In that, the Sullivan Principles marked a turning point in societal expectations of corporate behaviour, *see* Prakash Sethi/Oliver F. Williams, Creating and Implementing Global Codes of Conduct: An Assessment of the Sullivan Principles as a Role Model for Developing International Codes of Conduct – Lessons Learned and Unlearned, in: Business and Society Review 105:2 (2000), 169–200.

[21] Other examples are the Slepak Principles, the Miller Principles, and the Maquiladora Standards of Conduct. Although labour standards were instrumental to these codes, they dealt with broader sets of issues. *See, e.g.,* Lance Compa/Hinchliffe-Darricare, Private Labour Rights Enforcement Through Corporate Codes of Conduct, in: Lance Compa/Stephen Diamond (eds.), Human Rights, Labour Rights, and International Trade (1996), 181–198.

[22] For an analysis of the Sullivan Principles and their success, see Prakash Sethi, Setting Global Standards. Guidelines for Creating Codes of Conduct in Multinational Corporations (2003), 95–109 (2003); Sethi/Williams, *supra* note 20.

[23] Global Sullivan Principles of Social Responsibility (1999), *available at* http ://www.global sullivanprinciples.org/principles.htm.

[24] Quoted from http://www.thesullivanfoundation.org/gsp.

concerns over the social and economic impact, not least political interventionism of transnational corporations, increasingly mounted. Sparked by the "ITTC"-case,[25] concerns for TNC regulation were taken up at the United Nations in the early 1970s, leading to the establishment of a UN commission and a UN centre on transnational corporations, which were mandated with drafting a comprehensive code of conduct for TNCs. Over the course of nearly two decades, considerable time and resources were expended on efforts to develop a broad code of conduct for TNCs, with the latest draft produced in 1990. [26] The latter aimed at being an essential element in the strengthening of international economic and social cooperation"[27] and an instrument "to maximize the contributions of transnational corporations to economic development and growth and to minimize the negative effects of the activities of these corporations".[28]

Under the 1990 Draft Code, TNCs are required to respect local laws and cultural traditions, to respect human rights and to avoid corruption. It further imposes broad duties relating to ownership and control, compliance with national economic and developmental objectives, restrictive business practices, taxation, and transfer pricing.[29] In addition, TNCs must disclose corporate information, including financial data, to the public of the host country.[30]

Notwithstanding the great investment made into it, the draft process was eventually discontinued in 1993 due to failure to produce agreement on an acceptable code. In the end, while it did not itself achieve a UN imprimatur, the draft code resulted in a "springboard effect", providing a template for codes that followed.

c) ILO Tripartite Declaration

Given the failure of the UN efforts to promulgate a *broad* code of conduct for TNCs, other codes that pursued standards in specific fields contrastingly met with more success, such as with respect to international human rights law, international health law and international labour law. A prime role in promoting good social business practice with regard to labour issues is played by the International Labour Organization (ILO). The ILO has undertaken extensive standard setting, primarily in the form of binding conventions. Some of them touch upon basic la-

[25] At the 1972 meeting of the United Nations Economic and Social Council (ECOSOC), Mr. Santa Cruz, the representative of Chile, formally denounced the US International Telephone and Telegraph Company (ITTC) for its interference in Chilean internal politics and called for a study of TNCs' activities. Subsequently, the ECOSOC passed a resolution directing the Secretary-General to appoint a group of eminent persons to study the impact of TNCs. The group recommended that ECOSOC establish an institution to study TNCs. In 1974, ECOSOC adopted resolutions to establish both a UN intergovernmental commission and a UN centre on transnational corporations, with a mandate to negotiate a code of conduct for TNCs.

[26] Proposed Text of the Draft Code of Conduct on Transnational Corporations, U.N. E.C.O.S.O.C., 2d Sess., Annex, U.N. Doc. E/1990/94 (1990) [hereinafter UN Draft Code of Conduct].

[27] Id.

[28] Id.

[29] *Id.* § 14, 21–34.

[30] *Id.*, at 44–46.

bour rights and are thus termed fundamental: Freedom of Association and Protection of the Right to Organise (C87);[31] Right to Organise and Collective Bargaining (C98);[32] Elimination of Forced Labour (C29/105);[33] Abolition of Child Labour (C138/182);[34] and Elimination of Discrimination in respect of Employment and Occupation (C100/111).[35]

In 1977, however, the Governing Body of the ILO adopted a code of conduct, entitled "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy".[36] In his preface to the first edition, the Director-General of the ILO stated that: "The Guidelines should serve to enhance the positive contribution which multinational enterprises can make to economic and social progress to reducing or resolving the difficulties to which their operations may give rise." The Declaration is the combined work of governments, labour organizations and employer groups and draws its strength from this tripartite partnership. It contains extensive regulations in the field of social policy, covering such areas as employment, training, conditions of work and life, and industrial relations. It calls for TNCs to pursue policies that promote equal opportunity, security, collective bargaining in employment, and policies that preclude arbitrary dismissal, strike-breaking, and other unfair practices.

The Declaration stipulates not only respect for national laws and local practices, but also for the International Bill of Rights and, particularly, the ILO Constitution[37] and a wide variety of ILO Conventions and Recommendations.[38] Importantly, it extends its reach to transnational parent companies, affiliates and business partners.

While the Declaration is not subject to the reporting and monitoring systems of ILO Conventions and Recommendations, there is a procedure requiring governments to reply to queries regarding implementation of the Declaration. A sum-

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[31] ILO Convention (No. 87) concerning the Freedom of Association and Protection of the Right to Organise, 1948, 68 U.N.T.S. 17 (1950), entered into force July 4, 1950.

[32] ILO Convention (No. 98) concerning the Right to Organise and Collective Bargaining, 1949, 96 U.N.T.S. 257 (1951), entered into force July 18, 1951.

[33] ILO Convention (No. 29) concerning Forced or Compulsory Labour, 1930, 39 U.N.T.S. 55 (2000), entered into force May 1, 2000; ILO Convention (No. 105) concerning the Abolition of Forced Labour, 1957, 320 U.N.T.S. 291 (1959), entered into force January 17, 1959.

[34] ILO Convention (No. 138) concerning Minimum Age for Admission to Employment, 1973, 1015 U.N.T.S. 297 (1976), entered into force June 19, 1976; ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 38 I.L.M. 1207 (1999), entered into force November 19, 2000.

[35] ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Equal Value, 165 U.N.T.S. 303 (1953), entered into force May 23, 1953; ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (1960), entered into force June 15, 1960.

[36] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Nov. 16, 1977, 17 I.L.M. 422 (1978) [hereinafter ILO Tripartite Declaration], available at http://www.ilo.org/public/english/ employment/multi/download/english.pdf.

[37] Constitution of the ILO, Oct. 9, 1946, 62 Stat. 3485, 15 U.N.T.S. 35.

[38] A list of such conventions and recommendations is appended to the Declaration.

mary and an analysis of the replies are submitted to the ILO Governing Body. In the event of disagreement over the application of the Declaration, the parties may submit a request to the ILO for an interpretation of its provisions.

d) OECD Guidelines for MNEs

The Organization for Economic Co-operation and Development (OECD) is the major economic policy-formulating body for the developed nations. Early on in 1976 it became involved in the development of a code of conduct for TNCs, that is to say, with the adoption of a declaration on international investment and multinational enterprises (MNEs), which contained a set of guidelines for MNEs.[39] These Guidelines basically established recommended standards for good practice for all MNEs operating in or from OECD countries. As a general policy, MNEs should take full account of countries' general objectives, co-operate with local community and business interests and refrain from bribery and improper political activities. The specific guideline chapters cover the range of corporate activities, including practices relating to taxation, financing, and information disclosure. The chapter on "employment and industrial relations" prohibits discrimination in the employment or promotion of personnel, establishing a general standard that MNEs should "respect the right of their employees to be represented by trade unions", and containing other protections for labourers. With respect to environmental protection, the guidelines state that MNEs should "take due account of the need to protect the environment and avoid creating environmentally related health problems". The most recent revision of the Guideline, adopted in 2000, further includes a new general policy stating that MNEs should "[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments." Furthermore, the 2000 guidelines address the problem of corporate structure by calling on MNEs to "[e]ncourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the guidelines." Moreover, new recommendations are added on the elimination of child labour and forced labour and on improving internal environmental management and contingency planning for environmental impacts, and the sections on disclosure and transparency have been updated in line with enhanced social and environmental accountability. Finally, the 2000 guidelines add new sections on combating corruption and on consumer protection.

As stressed in the introduction, the Guidelines are voluntary and, consequently, not legally enforceable. However, they carry the weight of a joint political commitment on the part of the OECD governments that represents their firm expecta-

[39] OECD, Guidelines for Multinational Enterprises, 15 I.L.M. 969 (1976); for the 2000 revision of the Guidelines, *see* OECD, The OECD Guidelines for Multinational Enterprises: Review 2000 [hereinafter OECD Guidelines], *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

tion of good corporate conduct, reflecting the values and aspirations of OECD members.[40]

II. Private Voluntary Codes

1. Corporate Self-Regulation

There was an astounding upsurge of private codes of conduct in the field of corporate responsibility in the late 1980s and particularly the 1990s. The emergence of these codes is reflective of the economic developments in the 1980s that saw a major shift in state policy attitudes toward TNCs – away from so-called state-led "command and control" regulation of TNCs to an emphasis on deregulatory, market-driven policies as dictated by the new ideological wave of neoliberalism.[41] As a result of *deregulation* and the more general challenges of the globalisation of economic activity, states have arguably been weakened both in their will and capacity to perform regulatory functions in the pursuit of common or public goods. Against this structural background, along with the limited effectiveness of aforegoing international regulatory initiatives,[42] the notion of improving corporate responsibility through *private* voluntary initiatives gained ground as a possible means to fill in the emerging *regulatory void*. Particularly, multinational companies were urged to assume regulatory responsibilities on their own behalf, and corporations have had an instrumental interest in voluntarily adopting codes of conduct as a way to ease concerns regarding concerning industry practices and pre-empt external regulation.

The ethical background accounting for this development was provided by the global discourse on corporate social responsibility[43] and citizenship[44] in the con-

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[40] For an appraisal, *see* Sean Murphy, Taking Multinational Corporate Codes of Conduct to the Next Level, in: Columbia Journal of Trans-national Law 43 (2005), 410–411.

[41] "The emphasis on monetarist policies and increased integration of international markets […] and the shift in developing countries to trade liberalization and export promotion […] served to redefine the economic role of the state" whose governmental policies towards TNCs "shifted dramatically from regulation of their activities to intense competition to attract FDI." (Rhys Jenkins/Ruth Pearson/Gill Seyfang, Introduction. The Rise of Voluntary Codes of Conduct, in: Jenkins, Rhys/Pearson, Ruth/Seyfang, Gill (eds.): Corporate Responsibility andlabor Rights: Codes of Conduct in the Global Economy (2002), 2).

[42] See OECD Guidelines, *supra* note 39 and ILO Tripartite Declaration, *supra* note36.

[43] Corporate social responsibility can be broadly defined as the notion that companies are responsible not only to their shareholders, but also bear ethical responsibilities towards a broader set of stakeholders and society at large. It recognizes that, beyond the shareholder community, multiple stakeholders too have a legitimate "stake" in the activities and performance of business which, hence, needs to be responsive to their concerns, *see, e.g.,* Corporate Social Responsibility, Labour Education, Labour Education 2003/1, No. 1 (2003), *available at* http://www.ilo.org/public/english/dialogue/actrav/publ/130/130.pdf.

[44] The notion of "corporate citizenship" provides the philosophical underpinning of the corporate social responsibility movement, connoting as it does an analogy to the domestic social contract theory between individuals and the state in which each had certain rights and responsibilities. It holds that the increasing freedoms enjoyed by business in the context of liberalization

text of economic globalisation. A crucial factor has been the growth of global "value chains" through which Northern-based corporations control a web of suppliers in the South and which has led to calls for the former not only to take responsibility for commodity aspects such as quality standards and delivery dates, but also for the conditions under which subcontractors operate. At the same time, as corporate reputation become increasingly important in influencing company sales and value, large corporations found themselves particularly vulnerable to negative publicity, thus leading them to take a proactive stance in demonstrating corporate ethics.

Initially, private voluntary initiatives focused on *corporate self-regulation* involving companies unilaterally designing and implementing their own codes of conduct. While the initial focus of the new wave of codes in the early 1990s rested primarily on labour conditions, this was soon juxtaposed against the promotion of the case for sustainable development of business. As with the first wave in the 1970s, the new trend for companies to adopt codes was fuelled by scandals about corporate practices. In addition to company codes of conduct, business or industry associations developed their own industry-wide codes.

Over time, self-regulatory initiatives met with increasing criticism that they were essentially public relations charades. The anxiety voiced by NGOs and trade union communities centred on numerous codes of conduct that sprang up but were not seen to be of significance in improving the environmental and – particularly – the social performance of companies. Rather, company and industry codes were seen to be guided by business interests merely in order to deflect criticism, in a bid to protect brand image and/or pre-empt governmental regulation. Codes thus became an "attempt to deceive the public into believing in the responsibility of an irresponsible industry"[45] – a cynicism for which in environmental respects the term "greenwash"[46] was coined. With regard to the criticism levelled against the discrepancies between what companies and business or industry associations preached, and what was in fact practiced, a central concern focused on the lack of independent monitoring and verification procedures.

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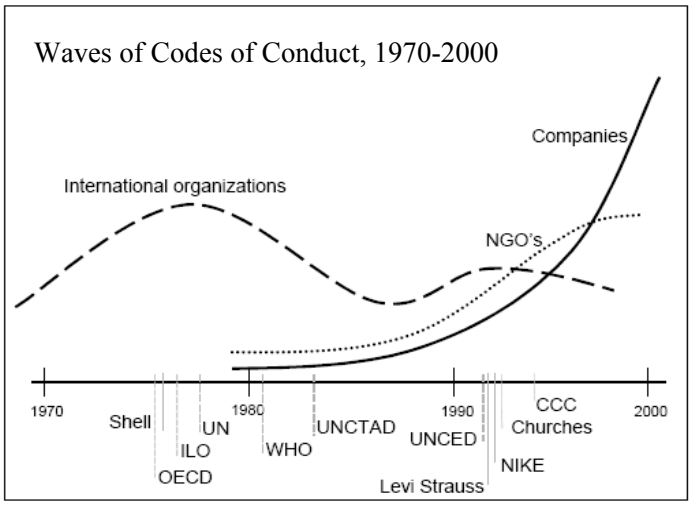
need to be countervailed by increasing responsibility for the social and environmental impacts of business activities.

[45] John Braithwaite, Responsive Regulation in Australia, in: Grabowsky/Braithwaite (eds.), Business Regulation and Australia's Future (1993), 91.

[46] The Oxford English Dictionary defines it as "disinformation disseminated by an organization so as to present an environmentally responsible image." (The Concise Oxford English Dictionary (1999)).



Source: Ans Kolk, Rob van Tulder, International Codes of Conduct. Trends, Sectors, Issues and Effectiveness, Rotterdam (2002), 2.

2. Multistakeholder Initiatives

With mounting NGO and consumer pressure on business during the 1990s, the perceived limitations of self-regulatory initiatives led to a conceptual rethinking of how to more effectively design and implement social and environmental regulatory norms. This involved a redirection of the regulatory process from corporate self-regulation towards civil regulation, a development that is essentially linked to the rebalance of social forces associated with the growth of transnational civil society organizations and networks. Moreover, notions of 'good governance' that stress the importance of multistakeholder collaboration and dialogue and the merits of 'social learning' gained in popularity.

Civil society and business groups – with or without some governmental input – have attempted to design more coordinated mechanisms to respond more sensibly to the challenges of promoting socially and environmentally responsible corporate conduct across borders. By the late 1990s, then, new regulatory approaches – so-called *multistakeholder initiatives* (MSIs) – became the "plat du jour"[47]. These draw on the participation of multiple stakeholders – including companies or industry associations, NGOs, trade unions and, on occasion, governmental bodies – and involve standard-setting, stakeholder dialogue, social and environmental management systems, and, significantly, certification and monitoring mechanisms related to social and environmental issues. MSIs mark an attempt to overcome the limitations of unilaterally designed company codes and respond more sensibly to advancing the social responsibility cause. Importantly, the inclusion of

[47] Désirée Abrahams, Regulating Corporations. A Resource Guide (2004), 3.

often-divergent interests in the drafting process "leads to a level of credibility not necessarily found in other codes."[48] Here the third party participation goes beyond simple advisory services, resulting in a joint responsibility for the actual drawing up and conclusion of the codes; those civil society organizations see themselves in the role of a custodian of public interest, which in their eyes gives them legitimacy.

Two noteworthy examples of MSI are the Ethical Trading Initiative (ETI) and Social Accountability 8000 (SA8000). Others include the Clean Clothes Campaign, the Ethical Trading Initiative, the Fair Labor Association, the Forest Stewardship Council, the Global Alliance, the Global Sullivan Principles, the Global Compact,[49] the Global Reporting Initiative, ISO 14001, SA8000, WRAP, and the Workers Rights Consortium.

The multitude of existing voluntary codes and initiatives has contributed to a bewildering pluralism of approaches that differ significantly in terms of their origin, degree of institutionalization, scope, purpose, underlying incentives, and monitoring mechanisms. With such a broad array of approaches, a crucial question is raised as to the effectiveness and legitimacy of codes of conduct.

3. UN Sub-Commission Draft Norms on Human Rights

The untempered actuality of human rights issues related to corporate activity prompted the UN Sub-Commission on the Promotion and Protection of Human Rights to further standard-setting efforts in this regard, resulting in the 2003 adoption of a code on the human rights obligations and responsibilities of TNCs.[50]

The code recognizes that the primary responsibility for the promotion and protection of human rights rests with the state, but also asserts that TNCs, as organs of society, have such obligations as well.[51] Importantly, the enormous economic po-

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[48] Ivanka Mamic, Implementing Codes of Conduct. How Businesses Manage Social Performance in Global Supply Chains (2004), 43.

[49] It is worth noting that the Global Compact carries the cachet of the United Nations and is therefore a voluntary *public* initiative that brings together corporations, UN agencies and civil society organizations in support of good corporate practices set out in ten general principles (*see* page 44 f. of this paper).

[50] UN Office of the High Commissioner for Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (2003) [hereinafter Sub-Commission Draft Norms on Human Rights]; *see* Karsten Nowrot, Die UN-Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. Gelungener Beitrag zur transnationalen Rechtsverwirklichung oder das Ende des Global Compact?, in: Beiträge zum Transnationalen Wirtschaftsrecht 21 (2003), 1–37; David Weissbrodt/Maria Kruger, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, in: American Journal of International Law 97:4 (2003), 901–922; Detlev Vagts, The UN Norms for Transnational Corporations, in: Leiden Journal of International Law 16 (2003), 795–802.

[51] Sub-Commission Draft Norms on Human Rights, para. 1.

tential of TNCs translates into a positive duty to "use their influence to help promote and ensure respect for human rights."[52] After an opening describing the general obligations of TNCs with regard to human rights, the code sets forth six types of rights or obligations that TNCs must observe: (1) the right to equal opportunity and non-discriminatory treatment; (2) the right to security of persons; (3) the rights of workers, such as rights against forced or child labour, to remuneration that ensures an adequate standard of living, and to collective bargaining; (4) respect for national sovereignty (e.g., refraining from bribery) and human rights (e.g. right to food and drinking water); (5) obligations with regard to consumer protection; and (6) obligations with regard to environmental protection, such as complying with relevant national and international laws.

The code extends beyond pure voluntarism to include mechanisms for implementation: TNCs "shall adopt […] internal rules of operation in compliance" with the code, shall periodically report on implementation, and shall incorporate the code into their contracts with suppliers, distributors, licensees, and others.[53] Further, the code states that TNCs shall be subject to transparent and independent monitoring and verification by the United Nations and "other international and national mechanisms already in existence or yet to be created"[54] and that states "should" establish the legal framework necessary for implementing the code.[55] Moreover, TNCs "shall provide prompt effective and adequate reparation to those persons" adversely affected by failure to comply with the norms.

Initial enthusiasm among supporters of the code,[56] who had hailed it as a "landmark step" and even as the "first nonvoluntary initiative accepted at the international level"[57], were muted, i.a., by major business organizations criticizing the code as an "inappropriate effort to 'privatize' vague human rights standards in a manner that will invite 'highly subjective, politicized claims."[58] In a joint statement, the International Organization of Employers (IOE) and the International

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[52] *See* Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003), para. 1; *see also* Sub-Commission Draft Norms on Human Rights, para. 12 ("Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights *and contribute to their realization*, […].") (emphasis added)

[53] Sub-Commission Draft Norms on Human Rights, pt. H, para. 15.

[54] Id., para. 16.

[55] Id., para. 17.

[56] *See* Rodrigo Osorio, The 60th Commission on Human Rights: Norms on the Responsibilities of Trans-national Corporations and Other Business Enterprises with Regard to Human Rights, Geneva, 15 March-23 April 2004, 1 ("[T]he Norms constitute a useful legal instrument, providing clarity, legitimacy (as a product of a formal and wide consultation process within the United Nations), and effectiveness to the field of international corporate accountability.").

[57] Weissbrodt/Kruger, *supra* note 50, 903.

[58] *See* S. Murphy, *supra* note 40, 408 (citing International Chamber of Commerce, Joint Views of the IOE and ICC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/NGO/44 (2003) [hereinafter Joint Views of the IOE and ICC]).

Chamber of Commerce (ICC) declare: "The IOE and the ICC remain convinced that the overall approach taken by the Working Group would not constitute a positive contribution to either the encouragement of responsible business conduct or to the promotion or to the promotion and protection of human rights."[59]
Most importantly, however, the Commission on Human Rights, to which the Sub-Commission Draft Norms on Human Rights was referred for final adoption, affirmed in its recommendation to the UN Economic and Social Council that the code "has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard."[60]

D. Typology of Codes of Conduct

I. Relevant Parameters

1. Actors

There is great variance among codes of corporate conduct in form and origin, involving a wide range of actors at the global, regional and national levels. A categorization of voluntary codes may depart from a preliminary distinction between public and private codes. Public codes are drafted under the auspices of governments or by government representatives working through international organizations. The great range of corporate responsibility initiatives, however, has been developed by private actors. While in some cases codes have been developed at the initiative of individuals, codes of conduct have traditionally proliferated within the corporate sector; in addition, a growing number of codes are being developed by interest groups, including trade unions as well as labour, environmental and human rights organizations.
The vast majority of codes can be divided into the following categories:
Company codes refer to those voluntary codes adopted unilaterally by individual corporations. Typically developed without any outside participation, they either relate to the companies' own operations or are applied specifically to their suppliers. Codes have also been drawn up by business associations representing particular industries (i.e. for a class of companies in a particular field) or as joint undertakings by corporate entities. An example of an *industry code* is the international chemical industry's 'Responsible Care' program. Such an industry-wide code bears the advantage of being competitively neutral, as all the enterprises that are otherwise competitors are subject to the same standards of conduct. In addition, sometimes the relevant association is entrusted with certain control functions. The latest developments involve the emergence of the above-mentioned *multi-stakeholder initiatives*, which have the advantage of wider public credibility.

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[59] Joint Views of the IOE and ICC, *supra* note 58.
[60] Responsibilities of transnational corporations and related business enterprises with regard to human rights, Office of the High Commissioner for Human Rights, 60th Sess., 56th mtg., UN Doc. E/CN.4/DEC/2004/116 (2004).

An OECD survey of 246 codes of conduct has shown a clear preponderance of codes issued by individual firms (118 codes) and by business/industry associations (92 codes), compared to multistakeholder initiatives (32 codes) and intergovernmental codes (4).[61]

2. Addressees

Codes of conduct have arisen essentially in response to public outcry against socially irresponsible behaviour of TNCs. Functionally, thus, codes purport to be instruments of accountability for TNCs. A key question in the codes debate, therefore, is to what extent the codes do in fact serve this function in relation to the various stakeholders involved. Taking this wider view into account, a code of conduct should address the corporation's functional relationship and responsibilities toward outside constituency groups, not just the narrow focus of internal employees.

The primary audience for many codes, however, remains the company itself, namely its business units, managers, employees, and shareholders. Some companies may adopt a code to signal sound business practices to current or potential host governments, thereby maintaining or enhancing the company's license to operate. In other cases, codes may aim to broadcast a company's involvement with the communities in which it operates. Importantly, codes are also targeted at a corporation's customers or suppliers, with a view to enhancing brand image and being applied along the supply chain.

To be sure, codes must account for the complexities prevalent in a global economy, where the tangled web of TNC activity draws workers (especially those from the developing world) into the intricate process of cross-border production. Much labour-intensive export production is located in developing countries, where labour is relatively cheaper than in the North and regulation of employment is usually less stringent. The challenge is to ensure that corporate codes also apply to distant suppliers and subcontractors. That challenge is increased by the fact that the consumer community has only a certain amount of commercial leverage.

On the international level, the 2000 revision of the OECD Guidelines extends beyond the individual companies to include a company's suppliers and subcontractors. Many codes adopted by northern-based companies have been developed to apply along their value chains. According to the OECD research, over 40% of the codes surveyed covering labour issues placed obligations on suppliers, particularly in the apparel industry, where 26 out of 32 company codes surveyed were addressed to suppliers and contractors.

The value chains through which codes apply can be quite complex, with many suppliers applying codes at different points of the chain. Conversely, "a single supplier could be producing for a number of global buyers, and be subject to a

[61] OECD, Codes of Corporate Conduct – Expanded Review of their Contents, Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers On International Investment, No. 2001/6, Paris (May 2001), 5, available at <http://www.oecd.org/dataocd/57/24/1922656.pdf>.

range of codes. The extent to which and how suppliers implement and comply with different codes will depend on a wide range of factors, including their location, size and employment conditions, but a crucial factor is also their position within the value chain."[62]

3. Substance

a) General Information

Codes of conduct vary significantly in terms of breadth and detail of content coverage. Reflective of the underlying diversity of the issuing organizations, partnerships and the differing motivational underpinnings, code content may be wide and aspirational or detailed and operational.[63]

Some codes, such as the International Code of Ethics for Canadian Business and the OECD Guidelines for Multinational Enterprises, set forth principles that are comprehensive in nature and designed to cover commercial activities across a broad range of issues. Some focus on the environment (the CERES Principles, the UNEP Financial Statement) or labour (SA8000, ICFTU Code of Labour Practice, the ILO Tripartite Declaration on Multinational Enterprises, the Fair Labour Association Workplace Code of Conduct, the Ethical Trading Initiative Base Code), while others cover a variety of issues. [64]

Codes are innovative instruments that address a wide range of regulatory issues, notably in relation to human and labour rights and environmental standards. According to an OECD report based on a survey of 246 codes, environmental stewardship (145 codes) and labour standards (148 codes) have been most commonly referenced among the variable code commitments,[65] and in many cases either issue area may be the exclusive focus of so-called "single issue" codes. [66] The report mentions that the codes that have been developed within the apparel industry evidence a consensus that has been formed around a narrow range of labour issues, such as child labor, bonded labour, working environment and compensation. In addition to labour standards and environmental stewardship, 'social accountability' concerns may also extend beyond labour and environmental issues to the

[62] Stephanie Barrientos, Mapping Codes Through the Value Chain: From Researcher to Detective, in: Rhys Jenkins/Ruth Pearson/Gill Seyfang (eds.): Corporate Responsibility and Labor Rights: Codes of Conduct in the Global Economy (2002), 61–76.

[63] Some codes incorporate specific action statements. The codes of Reebok and Levi Strauss alike, e.g., direct the respective MNE to withdraw operations in countries that violate human rights. Levi Strauss took this course of action with respect to China and Burma, *see* John Christopher Anderson, Respecting Human Rights: Multinational Corporations Strike Out, in: University of Pennsylvania, Journal of Labour and Employment Law 2 (2000), 485–486.

[64] E.g., the United States Model Business Practices address labour and the environment; the UN Global Compact relates to labour, human rights and the environment.

[65] Kathryn Gordon/Maiko Miyake, Deciphering Codes of Corporate Conduct: A Review of their Contents, OECD Working Papers on International Investment (1999/2) [hereinafter Gordon/Miyake, Deciphering Codes of Corporate Conduct], 12.

[66] Of the 246 codes surveyed, 24 codes are dedicated exclusively to environmental issues and 36 to labour standards.

enhancement of the economic and social well-being of the host country and local population (corporate citizenship).

While aspects of social responsibility figure most prominently among codes, they may address a number of other issues related to corporate governance, such as fair business practices, questions of internal financial control and protection of shareholder value[67], and litigation risks. There is widespread agreement on the values and principles that should guide corporations beyond social and environmental aspects in dealing with their shareholders, consumers, suppliers and other stakeholders. The principles set out typically call for respect for the values of honesty, fairness, due diligence and observance of the law. Consumer protection and avoidance of bribery and corruption, to be sure, have received particular attention by codes, in addition to labour and environmental standards.

b) Labour Standards

Labour standards have been set out in international conventions drafted by the ILO and were extensively explored in the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO 1977). As regards the substantive content of voluntary codes of conduct related to labour, there is general agreement among NGOs, unions and human rights groups on the importance for codes to incorporate, at a minimum, provisions based on core labour standards that ought to serve as benchmarks for the legitimacy of the respective code. Core labour standards have been defined in a number of ILO conventions relating to child[68] and forced labour[69], freedom of association[70] and collective bargaining[71] and discrimination issues[72]; the ILO Declaration on Fundamental Principles and Rights at Work (adopted 1998) incorporates the core labour standards in a single normative framework that is binding on all ILO member countries (to date: 178). The ILO conventions conveys a high degree of legitimacy, as they are directly derived from the founding principles of the ILO that bind all members.

Qualitatively, the nature of codes can be assessed by the extent to which they incorporate or even surpass ILO's core labour standards. While the data of the OECD survey on the coverage of core labour issues does not differentiate be-

[67] E.g. no insider trading, the need to safeguard proprietary information, the importance of maintaining accurate financial accounts.

[68] ILO Convention (No. 138) concerning Minimum Age for Admission to Employment and ILO Convention (No. 182) concerning Worst Forms of Child Labour Convention, *supra* note 34.

[69] ILO Convention (No. 29) concerning Forced or Compulsory Labour and ILO Convention (No. 105) concerning the Abolition of Forced Labour, *supra* note 33.

[70] ILO Convention (No. 87) concerning the Freedom of Association Convention and Protection of the Right to Organize, *supra* note 31.

[71] ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *supra* note 32.

[72] ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Equal Value and ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, *supra* note 35.

tween the various types of codes, such a compilation has been undertaken by Jenkins (reproduced in the table below), on the basis of 153 codes related to labour relations. From it we see that a far higher percentage of multistakeholder initiatives than company and business association codes incorporate ILO's core labour standards. As far as freedom of association and collective bargaining is concerned, these are the most frequently mentioned core labour standards in multistakeholder codes (95%), while least frequently referenced in both company and business association codes. This finding reflects the importance that non-corporate stakeholders attribute to the function of codes as a basis for workers' self-organization. As can be inferred from the table below, company codes are much more likely (roughly at a proportion of 2:1) to include core labour standards as compared to business association codes – a finding that may be accounted for by the consideration that business association codes tend to be weaker than company codes because they need to be acceptable to most companies within the respective organization and hence must accommodate the interests of smaller companies, which are less exposed to public scrutiny and pressure.

Proportion of codes referring to core labour standards

Attribute	Company codes (%)	Business associations (%)	Multistakeholder codes (%)	Total* (%)
No forced labour	41.6	20.0	65.0	39.9
No child labour	46.5	23.3	70.0	44.4
No discrimination/ harassment	67.3	30.0	75.0	61.4
Freedom of association and collective bargaining	23.8	13.3	95.0	32.0
ILO codes mentioned	3.0	6.7	60.0	11.8
Total number of codes	101	30	20	153

* Includes two inter-governmental codes

Source: Rhys Jenkins, The Political Economy of Codes of Conduct, in: Jenkins, Rhys/Pearson, Ruth/Seyfang, Gill (eds.): Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy (2002), 19 [Table 2.1].

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Comment: Manuell eingeschoben, da sonst Formatierungsveränderungen am Dokument

In addition to core Labour standards, a code might include a number of other aspects of labour conditions, e.g. provisions on health and safety, maximum hours of work, wages/compensation, compliance with local laws and human rights. From the compilation of non-core labour standards covered in the different code types (see below), it follows that the most heavily referenced non-core labour standards relate to reasonable working environment, compliance with local laws and compensation.

Proportion of non-core labour standards covered in codes				
Attribute	Company codes (%)	Business associations (%)	Multistakeholder codes (%)	Total* (%)
Reasonable working environment	76.2	80.0	75.0	76.5
Compliance with laws	69.3	53.3	70.0	66.7
Compensation	51.5	16.7	70.0	47.1
Working hours	35.6	13.3	60.0	34.0
Provision of training	29.7	30.0	40.0	32.0
Human rights	22.8	26.7	30.0	24.8

* Includes two inter-governmental codes

Source: Rhys Jenkins, The Political Economy of Codes of Conduct, in: Jenkins, Rhys/Pearson, Ruth/Seyfang, Gill (eds.): Corporate Responsibility an Labour Rights: Codes of Conduct in the Global Economy (2002), 21 [Table 2.2].

4. Compliance Mechanism

Central to the debate around voluntary codes of conduct is the compliance issue. The effectiveness of voluntary codes hinges on their capacity to translate into practice, i.e. the extent to which they are taken seriously as shown through compliance. If a code is to be worth more than the paper it is printed on, it is crucial that effective compliance mechanisms are in place.

Questions such as who performs the monitoring task, whether the workforce is involved, if monitoring extends to the supply chains, how the monitoring exercise is conducted and the transparency of the findings, are of crucial importance for judging the value of the respective compliance mechanisms. A key issue relates to the independence of the individual or entity undertaking verification of a corporation's code compliance.

Monitoring mechanisms can take various forms.[73] An inherent conflict of interest is involved when the corporation itself does the monitoring. In contrast to such *internal monitoring*, the credibility of the monitoring exercise and hence the legitimacy of the code will be heightened by external mechanisms. *External monitoring* involves the on-site inspection by a third-party, i.e. an external auditing firm hired by the corporation, to which the auditor reports. In contrast, *independent monitoring* is done by monitors who enjoy financial independence from the company in question.[74] Of these three types, independent monitoring is best

[73] *See* Ruth Rosenbaum, In Whose Interest? A Global Code of Conduct for Corporations, in: Oliver Williams (ed.), Global Codes of Conduct. An Idea Whose Time Has Come (2000), 211–220.

[74] David Schilling, Making Codes of Conduct Credible. The Role of Independent Monitoring, in: Oliver Williams (ed.), Global Codes of Conduct. An Idea Whose Time Has Come (2000), 227–231.

suited to provide public credibility on code compliance. The trend now is to verify code compliance altogether externally through auditing firms.
According to the OECD survey (2001), only 32% of all the company codes discussed implementation issues,[75] and only a quarter of all the codes sampled specifically addressed labour monitoring at all.[76] Monitoring issues are far more likely to be discussed with multi-stakeholder codes, while they receive the least attention in the case of business associations. The most common form of labour monitoring among the company codes involves the monitoring of suppliers, rather than the company's own activities. Other studies also observed very loose compliance mechanisms. A survey of 132 codes by Kolk, for instance, found that 41% of the codes did not specifically mention monitoring and that where monitoring systems indeed had been in place, in 44% they relied on internal monitoring.[77] As for cases of non-compliance, often no clear sanctions are defined. Approximately 60% of the company and business association codes in the OECD inventory do not specify any penalties for non-compliance.

II. Codes of Conduct and Soft Law

In the traditional view, states are both the architects and addressees of international law. Codes of conduct, however, are neither exclusively produced by nor addressed to states as the primary subjects of international rule making. In fact, a distinguishing feature of codes is their development and implementation by private, i.e. non-state actors. In addition, codes are not designed to be legally binding, but rather rely on voluntary compliance. Because of these features, codes do not fit into the traditional sources of international law as listed in Art. 38 of the Statute of the International Court of Justice.[78] While codes of conduct do not qualify as 'hard law', a promising attempt at their normative categorization is to depart from the binary view of international law as of necessity either falling,into the realm of binding law or, otherwise, that of non-binding 'soft law'.
Soft law is a generic term referring to a category of social norms that are not legally binding per se as a matter of 'law' but which nevertheless have a certain legal relevance in influencing the conduct and decisions of state and non-state

[75] OECD, Corporate Responsibility: Results of a Fact-Finding Mission on Private Initiatives, Directorate for Financial, Fiscal and Enterprise Affairs, no. 2, Paris (2001), 10.
[76] OECD, Codes of Corporate Conduct – Expanded Review of their Contents, Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers On International Investment, No. 2001/6, Paris (2001) [hereinafter OECD, Expanded Review], 10; *see also* Rhys Jenkins, The Political Economy of Codes of Conduct, in: Jenkins, Rhys/Pearson, Ruth/Seyfang, Gill (eds.): Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy (2002), 22.
[77] Ans Kolk/Rob van Tulder/Carlijn Welters, International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?, in: Transnational Corporations, 8:1 (1999) [hereinafter Kolk et al., International Codes of Conduct], 168.
[78] For a treatment on the rigidity of the traditional sources triad in international law, *see, e.g.,* Eibe Riedel, Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?, in: European Journal of International Law 2 (1991), 58–84.

actors.[79]Soft law has long existed in international public life, yet it is in the context of new global governance challenges that soft law arrangements have gained specific salience and flourished across the international stage. Acting in their own right or through intergovernmental organizations, national governments have turned to soft law solutions, yet a prominent feature of soft law instruments is the involvement of non-state actors. Today, the international system is no longer determined only by states but also influenced by a number of non-state actors. Departing from the traditional state-centred approach to public international law, soft law is not to be understood as being developed exclusively by states. Importantly, soft law accords a role to non-state actors, particularly NGOs, that is only rarely possible in traditional law-making processes.[80] However, do normative arrangements that are exclusively developed by private actors still qualify as soft law?

'Soft law' is a very vague concept, rooted in international law theory. Drawing on the conceptual dichotomy between hard and soft law, one might conceive of soft law as a normative realm encompassing everything that is not hard law, or apply it with a more bounded degree of definitional freedom. For many codes of conduct soft law is a fitting concept. The most straightforward examples in this regard are provided by the codes issued by international organizations. However, what is one to make of the Sullivan Principles[81], and what of the company/industry code and multistakeholder initiatives? Where are the definitional boundaries to be drawn?

For the sake of simplicity and to avoid semantic hair splitting, it is reasonable to employ 'soft law' as an inclusive, expansive and flexible category. However, it shall be clear that not all instruments that do not belong to the formal sources of international law[82] can be subsumed under soft law, for the contrary would mean an overstretching of the ways the term 'soft law' has been traditionally understood. Therefore, one is arguably to exclude from the definitional scope of 'soft law' the codes that are drawn up by *corporate actors*. Soft law, in many ways, is

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[79] *See* Thürer, *supra* note 5, 452–453; on the concept of soft law in general and on its various meanings: Richard Baxter, International Law in "Her Infinite Variety", International and Comparative Law Quarterly 29 (1980), 549–566; for a terse review of soft law *see* Christine Chinkin, Normative Development in the International Legal System, in: Dinah Shelton (ed.), Commitment and Compliance, *supra* note 5, 21 f.

[80] Dinah Shelton, Introduction, in: Dinah Shelton (ed.), Commitment and Compliance, *supra* note 5; *see* also Juliane Kokott, Soft Law Standards under Public International Law, in: Peter Nobel (ed.), International Standards and the Law (2005), 21.

[81] *See* Christopher McCrudden, Human Rights Codes for Transnational Corporations: The McBride and Sullivan Principles, in: Dinah Shelton (ed.), Commitment and Compliance, *supra* note 5, #.

[82] In this regard, the concept of soft law as used by Fastenrath appears too wide, i.e. all-encompassing, *see* Ulrich Fastenrath, Relative Normativity in International Law, in: European Journal of International Law 4 (1993), 305, note 2 ("The concept of "soft law", as employed in the following, denotes instruments which do *not* belong to the formal sources of international law." [emphasis added]).

an appropriate notion in the context of codes of conduct, yet it falls short of encompassing phenomenon of the code of conduct in its entirety.

III. Variety of Codes of Conduct: Illustrative Examples

1. Intergovernmental Codes of Conduct

The need for standard setting to regulate TNC conduct has given rise to code creation driven by international organizations, which notably has led to the adoption of the OECD Guidelines and the ILO Tripartite Declaration. Within the UN family, the UN General Assembly endorsed a code on restrictive business practices, whereas efforts concerning the adoption of the UN Code of Conduct for TNCs and an International Code of Conduct on Transfer of Technology were unsuccessful.

Over the last few years, voluntary environmental codes of conduct have come to the fore as new and promising tools to raise awareness of environmental issues and improve behaviour and practices. UNEP has been a principal agent in the development of environmental codes of conduct. To implement Agenda 21,[83] UNEP has not only become increasingly involved in strengthening voluntary environmental initiatives through developing guidelines[84] and cooperation with stakeholders, but has also been active in the development of global voluntary initiatives by industry sector.[85] UNEP has also developed cross-sector voluntary initiatives to promote cleaner production and ozone protection.

The latest example of an international code of conduct constitutes the UN Sub-Commission's "Draft Norms on the Responsibilities of TNCs and other Business Enterprises with regard to Human Rights".[86]

2. Private Sector Codes

a) Industry/Business Associations' Codes

Responsible Care (RC) is an initiative of the global chemical industry, a voluntary programme that helps to raise industry standards and win greater trust from the public. It constitutes one of the most encompassing and globally accepted codes for an industrial sector. It was first conceived in 1985 by the Canadian chemical industry to address and deflect growing public concerns relating to its environmental performance, with a view to forestalling public regulation. It demonstrates the commitment of chemical companies, represented by their respective national association, to work together to continuously improve their environmental, health, and safety performance in a manner that is responsive to public

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[83] Chapter 30 of Agenda 21 encourages business and industry "to adopt and report on the implementation of codes of conduct promoting best environmental practice".

[84] UNEP has developed guidelines for voluntary initiatives in general, and, more specifically, for the tourism industry and for reducing greenhouse gases.

[85] Starting with finance and insurance sectors (1992/1995), tourism in 1999 and more recently, gold mining, telecommunications, automotive and advertising industries.

[86] *See supra C II 3.*

concerns, and so to contribute to the sustainable development of local communities and of society as a whole.
Member companies are obliged to comply with a base code of ten "Guiding Principles" that calls on companies to prioritize environmental, health and safety concerns, work towards the diminution of environmental impact, show responsiveness to citizen concerns and to report swiftly on health and environmental hazards. In addition, the initiative includes a code of management practice that encompasses detailed obligations in establishing certain procedures within facilities regarding hazardous chemicals.
While the base code and the management practice apply in the same manner for each country, the national chemical associations differ greatly in how they go about the monitoring and enforcement of the RC standards. In general, RC brings accountability through its requirement that national associations develop credible processes to verify that member companies are meeting RC expectations.
Caux Principles for Business: The Caux Round Table is an international network of "principled business leaders working to promote a moral capitalism".The Caux Round Table promotes the application of Caux Round Table Principles for Business at the company level "as the cornerstone of principled business leadership". The objective of the principles is to establish a world standard against which business behaviour can be measured. Participating companies can make use of a specially designed process (consisting of a Self-Assessment and Improvement Process) intended to incorporate the CRT principles into the company culture. The principles aim to bring together the ethical ideal of *kyosei*, a Japanese term for the concept of working together for the common good, and human dignity which stresses the value of each person as an end in his-or herself.
CERES Principles: CERES (the Coalition for Environmentally Responsible Economies) announced the creation of the Principles (initially named Valdez Principles, later renamed CERES principles) in 1989. They constitute a ten-point code of corporate environmental conduct to be publicly endorsed by companies as an environmental mission statement or ethic. Today, over 65 companies have endorsed the principles and committed to a concurrent process of continuous learning and systematic public reporting. Endorsing companies can benefit from having access to a diverse array of experts in the network, covering a wide range of organizational and environmental issues.

b) Multistakeholder Initiatives

Accountability 1000 (AA1000) is a tool and standard for social and ethical accounting, auditing and reporting. The AA1000 Framework was established in 1999 by the UK-based Institute of Social and Ethical Accountability to provide guidance on how an organization can improve its accountability and establish effective stakeholder engagement. Learning through stakeholder engagement is a cornerstone of this management standard. Through training and dialogue, companies are encouraged to define goals and targets, measure their progress against these targets, audit and report on performance, and develop feedback mecha-

nisms. The AA1000 Framework was extended in 2002 to include additional components and is now known as the AA1000 Series.

Clean Clothes Campaign (CCC) is an international campaign and network of NGOs, trade unions and other organizations that seek to raiselabor standards in the supply chains of European garment and sportswear retailers, and to promote independent verification to ensure compliance with the CCC Code of Labour Practices, adopted in 1998. CCC organizations in France, the Netherlands, Sweden and Switzerland are currently working with 15 European retailers in pilot schemes that test code implementation, monitoring and verification procedures.

ETI (Ethical Trading Initiative), established in 1998, is an alliance comprising companies, NGOs and trade unions working to identify and promote good corporate practices in the global supply chains that produce goods for the UK market. A key dimension of this initiative is securing implementation of the labour standards set out in the ETI Base Code. ETI does not certify performance or conduct audits itself; rather, it focuses on information exchange and related learning processes concerning the experiences of companies in promoting socially responsible corporate conduct along the diverse supply chains.

FairLabour Association (FLA) was established in the United States in 1998 as a successor body to the White House Apparel Industry Partnership. It is a non-profit organization based in the USA, combining the efforts of industry, non-governmental organizations (NGOs), colleges and universities to promote adherence to international labour standards and improve working conditions worldwide. The FLA conducts independent monitoring and verification to ensure that the FLA's Workplace Standards are upheld where FLA company products are produced. Through public reporting, the FLA provides consumers and shareholders with credible information to make responsible buying decisions. Its Code of Conduct condemns forced labour, child labour, harassment and abuse, and calls for non-discrimination, health and safety procedures, and freedom of association among other rights.

Global Reporting Initiative (GRI) is an independent multi-stakeholder institution whose mission is to develop and disseminate globally applicable Sustainability Reporting Guidelines. These Guidelines are for voluntary use by organizations to report on the economic, environmental, and social dimensions of their activities, products, and services. The GRI incorporates the active participation of representatives from business, accountancy, investment, environmental, human rights, research and labour organizations from around the world. Started in 1997, GRI became independent in 2002, and is an official collaborating centre of the United Nations Environment Programme (UNEP), and works in cooperation with UN Secretary-General Kofi Annan's Global Compact.

Social Accountability 8000 (SA8000), established in 1997 by the US-based Council on Economic Priorities and Accreditation Agency (CEPAA), now known as Social Accountability International (SAI), represents one of the most rigorous voluntary codes of conduct yet crafted. It is a cross-industry standard for workplace conditions and a verification and certification system, which draws heavily

on the ILO Conventions and other key human rights instruments. SAI accredits monitors to audit factories and certify their compliance with the SA8000 standard.

Worker Rights Consortium (WRC) was established in 2000 on the initiative of the United Students Against Sweatshops (USAS). It aims to improve labour conditions in the factories that form part of the supply chain of companies that produce sportswear goods under license for US colleges and universities. The WRC conducts factory audits and provides a system for verification of compliance with standards contained in the WRC Code of Conduct.

E. The Legitimacy Dilemma

'Legitimacy' is an elusive concept. As a study object, one might – in some ways – term it holographic, since depending on the perspective from which one approaches it, it shines in different colours. The variance in theoretical stances corresponds to different epistemological premises that underlie the many probings of issues of legitimacy. One may understand legitimacy as an *empirical*, social-scientific concept, or employ it in a *normative* sense. Political theory and sociology have long recognized legitimacy as a cardinal element in national political and governance regimes, focusing, respectively, on societal acceptance of regimes and institutions and their ability to exercise power and authority effectively.

Legitimacy, however, is hard to measure, since – domestically at least – it regularly appears fused with coercive power. From an empirical viewpoint, then, the international system presents a formidable laboratory for examining the legitimacy issue, precisely because of the absence of a central political enforcement agency.[87] Normative political and legal theory, however, likewise claims its share in the international legitimacy debate. The only common denominator is that of exploring the normative conditions of the exercise of authority beyond the state, in prescriptive or descriptive terms respectively.

While Franck seemed to ask fundamental questions about legitimacy in the international system in 1990, recent years have seen a remarkable increase in academic interest in this issue.[88] With regard to international legitimacy, the following approaches can be distinguished. A first strand of theory seeks to answer the question under which conditions governance (global/transnational governance) deserves to be called legitimate, employing a concept of legitimacy that draws on

[87] Thomas Franck, The Power of Legitimacy Among Nations (1990), 20.

[88] "Currently there is hardly an essay on international or global governance that does not at least mention the issue of legitimacy." (Jens Steffek, Why IR Need Legitimacy: A Rejoinder, in: European Journal of International Relations 10:3 (2004), 485–490.

normative theories of democracy.[89] Other literature is more empirically oriented and falls into the domains of both international relations[90] and international law.[91] As an object of scientific study, 'legitimacy' has long left behind its traditional domain of political science and philosophy to transcend to the realm of international law. This chapter intends to give an outline of the common legitimacy theory in international law with a view to conceptualizing the legitimacy of codes of conduct.

I. Legitimacy in International Law in a Nutshell

The Westphalian conception of international law was succinctly put forward by the Permanent Court of Justice in the Lotus case, holding that "[I]nternational law governs the relations between independent States. The rules binding upon States emanate from their own free will as expressed in conventions or by usages […] in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."[92] State sovereignty, in this view, serves as the defining organizational principle of the international system. In keeping with this principle, states may accordingly only incur international obligations to the extent they submit to them by virtue of consent. From the finding that the international legal order is premised on state consent, which in turn is a sovereign act, it follows that state sovereignty constitutes the traditional basis of international legitimacy.

This depiction of international law as based purely on state consent, however, no longer adequately portrays the actuality of contemporary international law. The expanding global agenda of common aims in the course of globalisation, i.e. the need for instruments to address the pressing challenges of the world, has seen the proliferation of international institutions and regimes, paralleled by an increasing role of non-state actors on the international legal plane. The global governance debate has drawn public attention to the fact that states are ceding more and more competences to international organizations, and in turn have become dependent upon their rules and decisions. Importantly, however, the gravitation of decision-making authority from the national to the international level has been followed by a gradual erosion of the consensual underpinnings of international institutions.

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[89] David Held, The Transformation of Political Community: Rethinking Democracy in the Context of Globalisation, in: Ian Shapiro/Casiano Hacker-Cordon (eds.), Democracy's Edges (1999), 84–111.

[90] Harold Koh, Review Essay: Why Do Nations Obey International Law?, in: Yale Law Journal 106:8 (1997), 2599–2659; Ian Hurd, Legitimacy and Authority in International Politics, in: International Organization 53:2 (1999), 379–408; Jens Steffek, The Legitimation of International Governance: A Discourse Approach, in: European Journal of International Relations 9:2, 249–275; Ian Clark, Legitimacy in Global Order, in: Review of International Studies 29 (2003), 75–95; Ian Clark, Legitimacy in International Society, Oxford (2005).

[91] Franck, *supra* note 87; Daniel Bodansky, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, in: American Journal of International Law 93:3, 596–624.

[92] The SS. ‚Lotus' (Fr. v. Tur.), 1927 PCIJ, (ser. A) No. 10, 18.

The decoupling of state consent from international legal processes has given rise to questions of legitimacy that particularly hover about the so-called democratic deficit[93] of international institutions. The resulting strain on national political authority has been referred to as a crisis of governance, or a legitimacy crisis.[94] It appears, "the system of legitimation at the international level has not kept pace with perceived changes in the operation or location of political authority."[95]
Proposed solutions to enhance the perceived lack of international legitimacy draw heavily on domestic notions of democratic legitimacy.

1. The Unitarian Model of Legitimation[96]

In essence, international law continues to be a system of rules that rest on the consent of the very states to which they apply. To the extent that international law is founded on state consent, then, the latter legitimizes the former. With regard to democratically organized states, a conceptual shift in the location of legitimacy may be assumed. As in these states all public acts ought to be retraceable to the democratic will of the people ("chain of democratic legitimation"[97]), a two-level consent for international norms can be pictured: directly , through the role of states in the context of international norm creation (international legitimacy); indirectly, through the legitimizing effect of the state's popular will as warranted by the democratic principle (domestic legitimacy).
In this way, a correlation between state sovereignty and domestic legitimacy is established. Whereas states remain at the basis of the international system, the notion of democratic will, it has been claimed, is now the basis for legitimacy in international law.[98] In this view, the democratic legitimacy of international law can be enhanced by improving domestic democratic accountability – through better parliamentary control over the executive or referenda.
On the international level, democratic accountability may be enhanced through the establishment of international institutions of a parliamentary nature. However, as Franck notes, "[…] global forums and institutions, despite [the] evident 'democratic deficit', remain almost exclusively the domain of states attest to the continuing potency of the Vattelian idea. […] A textbook solution to this would be

[93] Acknowledged democratic deficits include the inscrutability of international decision-making, lack of stakeholder participation and accountability.
[94] *See e.g.* Jürgen Habermas, Legitimationsprobleme im Spätkapitalismus (1973) and William Connolly, Introduction: Legitimacy and Modernity, in: William Connolly (ed.), Legitimacy and the State, (1984), 1–19.
[95] Steven Bernstein, The Elusive Basis of Legitimacy in Global Governance: Three Conceptions, in: The Institute on Globalisation and the Human Condition, Working Paper Series, GHC 04/2 (2004), 1.
[96] Armin von Bogdandy, Globalisation and Europe: How to Square Democracy, Globalisation, and International Law, in: European Journal of International Law 15:5 (2004), 902.
[97] Ernst-Wolfgang Böckenförde, Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie, in: G. Müller et al. (eds.), Staatsorganization und Staatsfunktionen im Wandel. Festschrift für Kurt Eichenberger zum 60. Geburtstag, Frankfurt/M. (1982), 301–328.
[98] Thomas Franck, The Emerging Right to Democratic Governance, in: American Journal of International Law 86 (1992), 46–49.

world governance through directly elected representatives. Since this is not to happen, a second best approach is to ensure that those who speak in global discourse themselves represent democratically elected governments."[99]
The above solutions depart from the notion that international law is ultimately legitimized by the democratic will of the national electorate; accordingly, international legitimacy may be enhanced through a 'chain of democratic legitimation' that may transcend the domestic to reach the international level. The emphasis lies on the institutional realization of the democratic principle through elected bodies, and bestowing public decision-making with an "aura of legitimacy"[100] through lines of accountability.

2. The Pluralist Model of Legitimation[101]

In contrast with an understanding that ultimately credits the national *demos* with legitimizing international law, another way of enhancing international democratic legitimacy is to focus on the direct participation of those affected or of other civil actors in international law- or decision-making processes. Such borrowing of notions of public participation in democratic states, going beyond elections and referenda, responds both to the realization of the democratic principle and the detachment of international processes from national parliamentary control. Public participation, it is posited, can contribute to international legitimacy by giving stakeholders a sense of ownership in international legal and decision-making processes and thereby prove a measure of accountability. In this view, the participation of NGOs, as exponents of international civil society, represents a prime strategy for furthering the democratic principle on the international level.

3. Deliberative Democracy[102]

The legitimacy of international decision-making processes not only depends on their inclusiveness, but also on the quality of the mode by which decisions are achieved among the various actors. Rather than relying on bargaining and coercive means, reaching a reasoned consensus through deliberation ("discursive ra-

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[99] Thomas Franck, The Empowered Self: Law and Society in the Age of Individualism (1999).
[100] David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (1995), 1.
[101] von Bogdandy, *supra* note 96, 903.
[102] A leading proponent of generating procedural legitimacy through deliberation based on „discursive rationality" is Habermas, according to whose discourse theory legitimacy rests on institutionalized procedures for open communication and collective reflection. In his view, the "procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimation is based. The idea of an agreement that comes to pass among all parties, as free and equal, determines the procedural type of legitimacy in modern times." (Jürgen Habermas, Communication and the Evolution of Society (1979), 185); *see* Held, *supra* note 100; James Bohman and William Regh, Deliberative Democracy. Essays on Reason and Politics (1997); Jon Elster, Deliberative Democracy (1998); Klaus Dieter Wolf, Die neue Staatsräson – Zwischenstaatliche Kooperation als Demokratieproblem in der Weltgesellschaft (2000); Thomas Risse, Global Governance and Communicative Action, in: Government and Opposition 39:2 (2004), 288–313.

tionality") takes centre stage with proponents of deliberative democracy. The central concept of this theory is about involving the various stakeholders in a deliberative process of arguing and mutual persuasion about the normative validity of particular norms and standards. Importing notions of deliberative democracy to the international level, it is argued, constitutes a significant instrument for enhancing the democratic legitimacy of international decision-making processes.

4. Right Process

A somewhat different approach in defining legitimacy in terms of procedures is adopted by Franck's notion of right process, in his influential book "The Power of Legitimacy Among Nations".[103] In his definition, legitimacy is "the property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of *right process*."[104] Franck has identified four factors that combine together to influence a rule's perceived legitimacy: determinacy, symbolic validation, coherence and adherence of a rule to right process, i.e. its relation to a hierarchy of validating secondary rules governing the creation, interpretation and application of primary rules.[105]

II. Deficiencies of the Common Legitimacy Theory for Codes of Conduct

In their function as arbiters of standards, codes of conduct represent social steering mechanisms and thus purportedly fulfil a governance function. Legitimacy is a necessity for the viability of any governance scheme. Traditional forms of international governance are state-based, relying on hard law regimes and multilateral institutions. These regimes and institutions depend on the political authority of the consenting member states for their legitimacy. Codes of conduct, however, are non-binding instruments developed outside of formal, state-centric processes of international rule-making and thus do not fall under the traditionally accepted sources in international law doctrine.

Both international public and private codes are established in the absence of democratic mechanisms of parliamentary consent. They are decoupled from direct state authority and thus lack the legitimacy offered by hard law. Intergovernmental codes like the OECD Guidelines and the ILO Tripartite Declaration, while voluntary and non-binding, nonetheless assume a measure of political authority derived from the indirect endorsement of the governments of the respective international organization's member states in the drafting process – thus reflecting the latter's expectations and values. The particular authority of the ILO Tripartite

[103] Franck, *supra* note 87 (emphasis in the orginal).
[104] Id., 24.
[105] Id, 183–194. Bodansky criticizes Franck's approach, arguing that „[d]espite initially defining legitimacy in terms of "right process", virtually none of his analysis focuses on such procedural issues such as transparency, deliberation, elections, voting and so forth." (Daniel Bodansky, The Legitimacy in International Governance: A Challenge for International Environmental Law?, in: The American Journal of International Law 93:3 (1999), 601.

Declaration stems not only from the near universality of ILO state membership, but also from the fact of its tripartite elaboration, combining the interests of the governments, labour and employer organizations.
The legitimacy question gains particular salience with private codes of conduct, where governmental involvement is virtually non-existent. In the absence of state-based consensual underpinnings, notions of political legitimacy rooted in democratic theory, as elaborated above in the context of the *unitarian model of legitimation*, are of no use when attempting to legitimatize private codes of conduct. Other sources of legitimation need to be explored.

F. Specific Legitimacy Approach for Codes of Conduct

I. Governance Beyond the State

1. The Governance Challenge

"Governance", as we may understand it very broadly, relates to any form of creating and maintaining political order and providing common goods to a respective constituency.[106] The proper design of such governance within the framework of the nation-state, i.e. the establishment of a legitimate political order within a community, falls into the classic domain of political philosophy. With the rise of the nation-state, governance has traditionally been viewed as the vested right and responsibility of the constituted political authority within the respective territorial confines. Contrastingly, the regulation of matters within the political space *beyond* the state was thought of falling within the incumbency of international law, the traditional conception of which was that of a body of rules primarily designed to guide the conduct of states *inter se*.
This construction of international law, however, gradually proved too narrow to infuse a modicum of order into the increasing complexities of modern life, but it was not until the second half of the last century, propelled by a profoundly changed political landscape after World War II and the forces of globalisation, that it underwent an extraordinary evolutionary process. The emergence of new regulatory issues led to an expansion in the functional scope of international law, which, in turn, meant a broadening of its original conception to successively encompass international institutions and even individuals. The evolution of the international human rights regime is a notable example of the expanded functional role of international law; more specifically, it stands as an early revelation *pars pro toto* of the invigorated role of international law as a governance device called on against the background of the limitations of national regulation. The limitation of domestic regulatory power became all the more evident as the agenda of global challenges grew, owing in large part to the proliferation of interdependencies

[106] Oliver Williamson, Markets and Hierarchies: Analysis and Anti-Trust (1975).

with the onset of modern globalisation.[107] From the environment to terrorism, from financial risk to local conflict, the 'global agenda' raises a vital question: how can the "authority of governance"[108] be brought to bear on these challenges? Particularly, the integration of the values of economic growth, environmental stewardship and the protection of the social realms has become ever more pressing.

2. Codes of Conduct as a New Governance Mode

The need for accommodating regulatory exigencies, therefore, has led to much dynamism on the intergovernmental level, resulting in the establishment of international institutions and a sharp increase in the number of international regimes[109], i.e. "social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas".[110] *Global governance*[111], the generic term used to describe the governance of global affairs, thus refers to institutional and normative arrangements that reach beyond the state as the traditional regulating structure into the international arena. In this sense, it is "governance beyond the state"; in reference to the specific characteristics of the international structure it operates in, that is, the absence of a central political authority/government with a legitimate power monopoly, it may be termed "governance without government"[112].

Speaking of global governance usually brings to mind large intergovernmental institutions such as the World Trade Organization (WTO), the International Monetary Fund (IMF) and the United Nations and its affiliated agencies. These institutions and their attendant regimes are established by states to solve collective action problems and manage interdependence, and for the most part rely ul-

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[107] The regulatory problematic faced by states amid a globalizing world is captured in what is commonly referred to as "denationalisation", a term meant to denote the emergence of an increasing incongruence between the trans-national nature of regulatory problems and the limited reach of national governmental authority; *see* Michael Zürn, Regieren jenseits des Nationalstaates. Globalisierung und Denationalisierung als Chance (1998) and Marianne Beisheim/Sabine Dreher/Gregor Walter/Bernhard Zangl/Michael Zürn, Im Zeitalter der Globalisierung? Thesen und Daten zur gesellschaftlichen und politischen Denationalisierung (1999).

[108] James Rosenau, Governance in a New Global Order, in: David Held/Anthony McGrew (eds.): Governing Globalisation. Power, Authority and Global Governance, Oxford (2002), 70.

[109] *See* Robert Keohane, International Institutions and State Power (1989).

[110] Marc Levy/Oran Young/Michael Zürn, The Study of International Regimes, in: European Journal of International Relations 1:3 (1995), 267–330.

[111] General treatments include: James Rosenau, Governance in the Twenty-First Century, in: Global Governance 1:1 (1995), 13–43; Ernst-Otto Czempiel/James Rosenau, Governance Without Government: Order and Change in World Politics (1992); Craig Murphy, Global Governance: Poorly Done and Poorly Understood, in: International Affairs 76, 789–803; Franz Nuscheler, Global Governance, Development, and Peace, in: Paul Kennedy, Dirk Messner, and Franz Nuscheler (eds.): Global Trends and Global Governance, London (2002), 156–183; *see also* Robert Keohane and Joseph Nye, Governance in a Globalizing World, in: Robert Keohane (ed.), Power and Governance in a Partially Globalized World (2002), 193–218; Rosenau, *supra* note 108, 70–86.

[112] Czempiel/Rosenau, *supra* note 111.

timately on the authority of their state members. Other regimes partaking in global governance include the Nuclear Non-Proliferation regime, the regime to prevent global climate change, and the various treaties of the international human rights architecture. They all form part of global "governance without government".

Significant objections, however, may be raised against this traditional mode of ordering global affairs. On the one hand, an often-voiced critique is aimed at the perceived lack of democratic legitimacy of international institutions and interstate agreements. On the other hand, one might challenge the capacity of heavily legalised, intergovernmental institutions and hard law interstate agreements to effectively address global problems.[113] Indeed, the inherited intergovernmental regime, normatively rigid and substantively fragmented, seems improperly designed to produce sustainable solutions to cope with the pressing needs of today's fast-paced, increasingly complex world – a world that is shaped not only by states, but also by non-state actors.

In view of the shortcomings of hard law regulations, new forms of rule setting have emerged that seek to more appropriately address the social and environmental challenges posed by economic globalisation. The issue of TNC regulation serves as an illustration. Given the fact that TNCs lack international personality and thus are a priori excluded from being direct rule addressees by international law, in the 1970s governments 'discovered' a new type of international instrument: voluntary codes of conduct setting out ethical standards of corporate practices, which, in a departure from traditional state-centric soft law, shifted the spotlight of attention from the state to the international business community.

The international codes of conduct that were developed, i.e. the OECD Guidelines[114] and the ILO Tripartite Declaration,[115], however, met with only partial success. On the national level as well, the regulation of national and international commercial activity is fraught with difficulties. Policies of deregulation and non-intervention, regulatory competition and the impact of international agreements designed to ensure the free flow of goods and services, not least the transnational nature of commercial activity itself, have seemingly worked to diminish the capacity and willingness of national governments to regulate commercial activity, nationally and internationally, in the pursuit of the public good.

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[113] David Held, Cosmopolitanism: Ideas, Realities and Deficits, in: David Held/Anthony McGrew (eds.): Governing Globalisation. Power, Authority and Global Governance, (2002), 305–324; James Caporaso, Democracy, Accountability, and Rights in Supranational Governance, in: Miles Kahler/David Lake (eds.): Governance in a Global Economy. Political Authority in Transition (2003), 361–385; Robert Keohane/Joseph Nye, Jar., Redefining Accountability for Global Governance, in: Miles Kahler/David Lake (eds.): Governance in a Global Economy. Political Authority in Transition (2003), 386–411; Joseph S. Nye, Globalisation's Democratic Deficit: How to Make International Institutions More Accountable, in: Foreign Affairs 80:4 (2001), 2–6.

[114] *Supra* note 39.

[115] *Supra* note 36.

With the difficulty in effective regulation in the international arena, and the shift in the regulatory role of the public sector, *private* codes of conduct, taking the form of corporate self-regulation and more recently of multistakeholder initiatives, have emerged as *transnational regulatory norms*. Though of an informal, private nature, they perform a public function and thus can be classified as hybrid norms. The introduction of codes of conduct can be perceived of as a new, informal rule-setting phenomenon that, potentially, may provide meaningful contributions to *transnational governance*.

3. Specifics of Governance Beyond the State

In the international arena, therefore, there exists no supranational type of a "shadow of hierarchy" comparable to that within the nation-state. There is no global sovereign in the sense of a (world) state or other political institution above the state with a legitimate monopoly over the use of force and the capacity of authoritative rule enforcement. This implies that in the context of governance beyond the state, governance must primarily rely on non-hierarchical forms of steering. Global governance thus can be characterized by the "*horizontal* mode of political consensus-seeking negotiation and deliberation instead of hierarchical subordination."[116] Given the weakness of the enforcement mechanisms of public international law, in the international context the distinction between binding and non-binding norms is considerably attenuated. Besides, there is no world constituency, that is a global *demos,* in whose name governance could take place. At best, governance beyond the state relies on a rather thin layer of collective cosmopolitan population of self-defined "world citizens". Rather, what we observe in the international sphere are primarily *functional* constituencies, the composition of which varies according to how affected their members are by specific issues.

From the above it follows that the non-bindingness of codes of conduct, in so far as they form part of trans-national governance, loses importance in the transnational context; in any case, both global governance arrangements and codes of conduct depend on their acceptance by the addressees and constituencies concerned.

II. Legitimacy of Private Actor Arrangements

As has been elaborated, the issue concerning the regulation of international business conduct is spearheaded by voluntary codes of conduct developed by non-state actors and thus outside the conventional realm of international state relations. Private and non-binding as they are, these codes nevertheless perform a public function in putting forth ethical claims of good corporate practices. Nor-

[116] Klaus Dieter Wolf, Contextualizing Normative Standards for Legitimate Governance beyond the State, in: Jürgen Grote/Bernard Gbikpi (eds.): Participatory Governance. Political and Societal Implications (2002), 37; Renate Mayntz, Common Goods and Governance, in: Adrienne Heartier (ed.): Common Goods. Reinventing European and International Governance (2002), 15–27.

matively, codes make a claim to authority. This raises the question of legitimacy, as according to the traditional argument of political theory every claim to authority needs to be justified as legitimate. But what are the normative criteria for the legitimation of private self-regulation?

A natural starting point to explore this normative criteria is to examine the legitimacy question on the traditional terrain of political science. It should be noted, however, that legitimacy has a dual dimension. In a socio-empirical sense, legitimacy concerns the relationship between a regime's or institution's authority and those – individuals or states – subject to it, questioning whether the latter accepts the former. As a normative concept, legitimacy relates to the justifications of regime or institutional governance authority. The latter is of present interest.

At the national level, democratically constituted governments may lend legitimacy to private actors by authorizing them and their actions. In the case of private transnational governance, the central role of the state is asserted in the argument that private authority only exists in so far as private sector actors are "empowered either explicitly or implicitly by governments and international organizations with the right to make decisions for others."[117] Public-policy scholars likewise uphold the centrality of the state in legitimating private authority. In a thorough review of the complex range of policy instruments at the disposal of policymakers, Howlett likewise asserts that the state retains ultimate authority. While acknowledging that "[T]ruly voluntary instruments are totally devoid of state involvement"[118], he views them as a corollary of negative public-policy decisions by which governments consciously choose to rely on these measures. In any case, besides aspects of political feasibility, delegating authority to private actors at the international level is a questionable undertaking, in view of the fact that international agreements themselves suffer from a democratic deficit. Further, there exists "no supranational authority that could delegate some of its power to private actors and oversee the functioning of self-regulation."[119]

Rather than adamantly relying on state authority, a shift in perspective is useful, in the sense that self-governance is not "a favour handed down by public authorities", but instead "an inherent societal quality that greatly contributes to the gov-

[117] Claire Cutler/Virginia Haufler/Tony Porter, Private Authority and International Affairs, in: C. Cutler/V. Haufler/T. Porter (eds.): Private Authority in International Politics, 1999, 19 [hereinafter Cutler/Virginia/Porter, Private Authority and International Affairs].

[118] Benjamin Cashore, Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority, in: Governance: An International Journal of Policy, Administration, and Institution 15:4 (2002), 514 (quoting Michael Howlett, Complex Network Management and the Paradox of Modern Governance: A Taxonomy and Model of Procedural Policy Instrument Choice. Paper read at annual meeting of the Canadian Political Science Association, 6 June, University of Sheerbrooke, Sheerbrooke, PQ).

[119] Thomas Conzelmann, The Potential and Limits of Governance by Private Codes of Conduct, Paper for Presentation at the ISA Annual Convention, Hawaii, 1-5 March 2005.

ernability of modern societies".[120] While formal authorization by way of delegation of competencies by the state or by interstate agreements is not feasible or is at least cast into serious doubt, what other normative criteria exist for the legitimation of private self-regulatory regimes?

One way of conceptualizing the legitimacy of private self-regulation is to focus on certain qualifications of the involved private actors themselves.[121] In this regard, drawing on the legitimacy theory propounded by organizational legitimacy is helpful. According to a much-cited definition by Suchman, organizational legitimacy "is a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."[122] In this view, legitimacy is socially constructed in that it reflects a congruence between the social values associated with or implied by organizational activities and the shared (or assumedly shared) normative beliefs of some collective audience. Underlying organizational legitimacy is a "process, legitimation, by which an organization seeks approval (or avoidance of sanction) from groups in society."[123] Legitimacy, in this respect, is an "operational resource […] that organizations extract – often competitively – from their cultural environments and that they employ in pursuit of their goals."[124]

Moral legitimacy, or substantial authority, is accorded to an organization (e.g. corporation, NGO) by external audiences when its behaviour reflects socially acceptable norms, standards and values.[125] In so far as a participant in private self-governance shows a credible commitment to generally accepted norms, its moral authority serves as a source of legitimation for the latter. The adoption of a (private) code of conduct, in this respect, signals a prima facie commitment of a company to adhere to commonly shared norms and values of ethical business conduct in the larger social environment in which it operates; from a managerial perspective, thus, codes of conduct contribute to a corporation's strategic quest for societal legitimation. Naturally, what is crucial in the final analysis, is not the code, but the conduct. The legitimacy of private self-governance may also result from the recognition of the expertise and problem-solving capacity of a private actor.

On the normative level, the legitimacy of private governance may be considered to rest on two pillars: 'input' and 'output' legitimacy.[126] Input legitimacy, for present purposes, we may generally define as the participatory quality of private governance. It implies that those concerned, i.e. the stakeholders, ought to have

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[120] Jan Kooiman, Governance. A Social-Political Perspective, in: Jürgen Grote/Bernard Gbikpi (eds.): Participatory Governance. Political and Societal Implications (2002), 83.

[121] Cutler/Virginia/Porter, Private Authority and International Affairs, *supra* note117, 18.

[122] Mark Suchman, Managing Legitimacy: Strategic and Institutional Approaches. Academy of Management Review 20 (1995), 574 [hereinafter Suchman, Managing Legitimacy].

[123] Steve Kaplan/Robert Ruland, Positive Theory, Rationality and Accounting Regulation, in: Critical Perspectives on Accounting 2:4 (1991), 361–374.

[124] Suchman, Managing Legitimacy, *supra* note 122, 576.

[125] Id., 579-582.

[126] *See* Fritz Scharpf, Regieren in Europa, 1999.

an input in the drafting processes leading to the adoption of a code of conduct. Output legitimacy refers to questions of effectiveness and efficiency.

But how can private transnational governance arrangements solve the dual problems of ensuring "input" legitimacy" through participation of those concerned by the governance arrangements and of "output legitimacy" through effective and enhanced problem solving?

This debate has a long history, "starting with the first liberal thinkers on transnational relations for whom trans-border interactions were an unproblematic ingredient of liberal democracy and a guarantee for peaceful international relations."[127] Insofar, however, as transnational governance structures involve private, i.e. non-state actors, this poses a problem in terms of democratic accountability: claims by these actors to act on behalf of the "common good" are to be taken with a "grain of salt" when it comes to democratic accountability and participation.

The quest for remedies concerning the "democratic deficit"-diagnosis with respect to the involvement of private actors, i.e. TNCs and stakeholders, in transnational governance may draw on the positions put forward in the debate about the legitimacy problem in global governance. Increasing democratic participation ("input legitimacy) in international governance faces the problem that in the international realm, there is no transnational "demos", no international public sphere as known from the nation-state. Thus, it is postulated, a deficit in "input legitimacy" has to be counterbalanced by an increase in "output legitimacy", that is the effectiveness and problem-solving capacity of governance arrangements. But there are practical limits to this approach.

An alternative position focuses on the concept of "deliberative democracy" as a remedy to overcome the problems of democratic accountability (democratic deficit) of private governance mechanisms. The general idea of this position is that "democracy is ultimately about involving the stakeholders, i.e. those concerned by a particular social rule. It rests on the assumption that the legitimacy of private actor arrangements can be increased through the open exchange of arguments and deliberation with the stakeholder community. The deliberative approach might also, in turn, increase the problem-solving capacity of transnational governance schemes ("output legitimacy"). The concept of deliberative democracy offers a way to tackle the legitimacy problems of "governance beyond the state" since it does not rely on a collective identity in terms of a "global demos".

In the end, from a sociological view, the viability of codes depends on whether the relevant audiences, i.e. the stakeholders accept them as *appropriate* instruments of corporate responsibility. Procedures and structures that ensure stakeholder access and accountability to those affected by corporate activities are crucial in this regard, because norms of access and accountability increasingly reflect shared understandings of "right process" transnationally.

[127] Risse, *supra* note 6, 269.

III. Corporate Motives Behind Voluntary Codes of Conduct

Are voluntary codes of corporate conduct mere public relations tactics or do they have genuine governance potential? The governance potential of codes depends on whether they are indeed observed in practice. Compliance issues are thus at the heart of the debate revolving around codes of conduct. This draws attention to the importance of understanding the conditions that motivate business actors to comply with the codes.

The starting point for studying corporate compliance behaviour is the company itself. It would be futile, however, to concentrate solely on the actor level since business operations are embedded in a specific milieu and thus are contingent on the respective environmental conditions. Both the actor level and the level of structural business action are thus relevant.

Potentially, three generic motives might account for the compliance behaviour of an actor: first, an actor may comply with a rule out of fear of a threatened sanction, i.e. rule enforcement through coercive action; second, rule compliance may be guided by a rational calculus in pursuit of self-interest; finally, rule compliance may be elicited by the power of truth or validity inherent in a norm, that is: by virtue of a normative belief of rectitude on the part of the actor concerned that a rule ought to be obeyed. In short, this latter steering mode operates by means of the norm's perceived "legitimacy".[128] From the preceding, thus, the three keywords for motivating an actor to obey a norm may be seen as: coercion, self-interest, and legitimacy.

As has been seen above, international and trans-national governance alike operate in realms marked by the absence of traditional enforcement capacities associated with the state. To be sure, no modern state relies solely on hierarchical modes of social control backboned by the power monopoly, for domestic governance notably presupposes, as an "a priori" element, a basic (democratic) consent of the people. The main difference between governance beyond the state and domestic governance, however, is that the former has to rely *solely* on voluntary compliance through non-hierarchical steering modes.

Barring the coercive element for rule enforcement, voluntary compliance in the context of transnational governance thus essentially draws on the two other motives of the aforementioned matrix: self-interest and legitimacy. These two sources of compliance form the conceptual framework for studying the compliance behaviour of private actors with voluntary standards as set out by codes of conduct. A crucial focus of attention, therefore, is the question of how these steering modes can be operationalized.

1. Economic Rationalism

If self-interest is the defining criterion influencing an actor's conduct, this means that an actor's choice of action can be manipulated towards code compliance by a certain configuration of incentives and disincentives. Such manoeuvring rests on

[128] *See* Hurd, *supra* note 90.

extrinsic factors that influence an actor's cost-benefit calculations. In other words, this mode of steering follows a logic of instrumental rationality as theorized by rational choice. In short: actors are seen as egoistic utility maximizers who conform to norms because compliance is perceived as to be in their own interest.

As regards the general conduct of business actor orientation, traditional understandings of the modern investor-owned corporation have been dominated by the view that its primary purpose and social responsibility is simply to maximise profits. One would expect that companies endorsing this management paradigm to define their social and ethical responsibilities narrowly, i.e. only within the boundaries of legal requirements. One would also expect that when companies with this management orientation went beyond their legal obligations, it would be for clearly defined public relations purposes governed by self-interest.

The findings from studies of codes of conduct suggest that this is in fact the dominant attitude. Anecdotal evidence is provided by statements like that of Francois Vincke, Secretary General of Pero Fina, who says in a recent discussion of the International Chamber of Commerce's campaign against bribery that "until recently, […] corporate responsibility was dictated by the law, or to put in even simpler terms: the ethical code of a company was the criminal code".[129] A recent OECD report authored by a business sector advisory group puts the point clearly. It states categorically that: "Most industrialized societies recognize that generating long-term economic profit is the corporation's primary objective. In the long run, the generation of economic profit to enhance shareholder value, through the pursuit of sustained competitive advantage, is necessary to attract the capital required for prudent growth and perpetuation."[130] The authors of the group acknowledge that ethics and ethics codes have a clear place in corporate governance whose goal is profit maximization. They propose, however, that ethical values endorsed by a corporation must connect directly or indirectly to enhancing the bottom line. Nonetheless, almost all the codes developed over the past decade acknowledge either explicitly or implicitly an obligation to contribute to common public interests beyond simply maximizing shareholder wealth. How, then, does economic rationality relate to ethical commitments enshrined in voluntary codes?

One would easily be prone to argue that there is an inherent contradiction between economic rationality and the principle of corporate social responsibility: so far as voluntary self-regulation is subordinated to profit maximization, this would entail that business actors approach voluntary standards advancing the common good from a purely instrumental perspective. If this was generally the case, discussing the merits of voluntary codes as regulatory schemes would be futile. Be-

[129] François Vincke/Fritz Heimann/Ron Katz, Fighting Bribery: A Corporate Practices Manual (International Chamber of Commerce, 1999), 15.

[130] Ira Millstein (Chairman), Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets, A Report to the OECD by the Business Advisory Group on Corporate Governance (1998), 27.

ing mere window dressing, they would be incapable of setting bounds to corporate conduct.

It can be argued, however, that this line of thinking is too simplistic, for the national and transnational context in which businesses operate is too complex to be reduced to a pure market constellation in which only the avoidance of costs and the outwitting of competitors count. Corporations operate in a space populated by public actors, shareholders, consumers, and other stakeholders, civil society groups, and, last but not least, by other companies. All of these actors heed certain normative expectations relating to business conduct. Amid conditions of a normatively enriched environment, the argument goes, the very concept of "economic rationality" is changing its definitional scope. A more differentiated view of the rational logic guiding business actors is therefore needed.

Both public and private actors can incur costs that need to be taken into account. The risks associated with binding national regulation, for example, count among the considerations that motivate business actors to adopt voluntary codes. While national regulations are founded on the principle of territoriality and thus are of limited effect on the global scale, they may well complicate the conditions for doing business in some markets and lead to a complex and unwieldy regulatory situation on the global level. In the context of increased consumer awareness and sensibility, the opportunities associated with making profits by producing for ecologically and socially "aware" consumers can be attractive incentives for ethically oriented investors. Most importantly, however, corporations have to take into account the normative expectations of the consumer community and of civil society in general. Aired through the media or adverse campaigning of civil society groups, negative publicity in the wake of disclosed labour rights abuses or environmentally irresponsible corporate performance, may result in a backlash of consumer demands and adversely affect a company's reputation. Given that a company's "good name" is an invaluable asset for its competitiveness, its protection is a major motive for the adoption of codes of conduct by the business sector.[131] The importance of civil society and consumer expectations has been stressed by the finding of a cross-sector study by OECD researchers that of the 246 codes surveyed, a large number were installed in response to the concerns of the general public and were "designed to reassure the public that the company is acting responsibly in areas such as environment and labour relations."[132] Codes of conduct, therefore, are often seen as an instrument used by companies to forestall

[131] The OECD survey of 246 codes found that the single most competitive advantage of the codes reviewed was to protect the company's reputation, see OECD, Expanded Review, *supra* note 76, 17 [Figure 14]; similarly, an Arthur Andersen survey (Arthur Andersen (2000), Ethical Concerns and Reputation Risk Management: A Study of Leading UK companies) has shown that desire to protect or enhance business reputation is "the most common factor influencing the development of business ethics activities among major UK companies", particularly among "heavily branded" companies" (Kathryn Gordon (2000), Rules for the Global Economy: Synergies between Voluntary and Binding Approaches, Working Papers on International Investment 1999/3, 6).

[132] Gordon/Miyake, *supra* note 65, 6.

(and deflect) the attention of a critical public, and, in turn, to vitiate or even decrease calls for public regulation. Hence, it becomes understandable that the major trigger for companies or associations to enter into codes of conduct is the aim to ease and accommodate civil society stakeholders' demands.[133]
Reputational concerns may not be limited to an individual company, but extend to the whole of an industry and thus account for the rise in popularity of industry-wide codes of conduct. Often, criticism first levelled at an individual company may extend to the entire business sector, which in turn becomes subject to public pressure. If a single corporation fails to comply with certain normative expectations of the public regarding corporate performance, this may cast a shadow on the whole industry's performance, which, in turn, makes a strong case for developing a sector-wide standard that has the potential to evade the risks associated with adverse campaigning and public regulation. Since industry codes measure all members against a common benchmark, this also procures greater transparency regarding the industry performance. In addition, by creating a "level playing field", sector codes seek to tackle the "free rider"-problem.

2. Acting out of a Normative Belief

a) Concept

Another type of non-hierarchical social steering relies on the compliance pull that is elicited by an actor's perceived legitimacy of a norm. Legitimacy in this sense refers to the intrinsic authoritative quality of a norm as perceived by those normatively addressed. Such legitimacy may be the function of the substance of a norm or derive from beliefs in the validity of the procedure by which the norm was constituted. As Ian Hurd put it, "[w]hen an actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by a calculation of self-interest, but instead by an internal sense of moral obligation […]".[134]
Voluntary compliance in this sense is based on a particular "logic of appropriateness".
As seen previously, corporations are guided in their adoption of voluntary codes primarily by enlightened self-interest. How then do business actors come to accept a new logic of appropriateness?

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[133] Economic considerations may also be served, albeit indirectly, by a code's potential effect of increasing the commitment of company staff, *see* OECD Expanded Review, *supra* note 131, 20; employees, in fact, are not neutral actors, but "bring their own values and ethics to work with them (Gordon (2000), *supra* note 131, 6) – codes, according to the Andersen survey (Andersen, *supra* note 131), can thus serve as an effective way of raising employee morale and loyalty. However, there exists also a range of other, more specific codes that are directed to employees and address questions of internal financial control and protection of shareholder value; while such codes are designed to ensure shareholder protection and compliance with securities and company law, other codes respond to litigation risks related to non-compliance with competition and environmental law (Gordon/Miyake (1999), *supra* note 65, 6).
[134] Hurd, *supra* note 90, 387.

b) The "Deliberative" Approach[135]

The answer to that question relies on challenging the different actors' value perceptions by involving the actors in a process of deliberation about the validity of particular norms and standards. The underlying mechanism at work here involves learning and persuasion based on arguing. This, however, presupposes a disposition on the part of the discourse participants to be persuaded by the better argument. Where such argumentative rationality prevails, actors are not in pursuit of attaining their fixed preferences, but aim to challenge and justify their inherent claims to validity, and are indeed prepared to modify their set of interests in light of the better argument.

As corporations operate in a dynamic environment that is characterized by a web of interactive relations, learning processes through dialogue and deliberation are expected to take place. Through the sharing of experiences and of "best practice" within the business community itself and in the course of interaction between corporations and the stakeholder community, business actors may come to reflect their own practices and, eventually, be persuaded to change their preferences. While interactive relations are a general characteristic of the business environment itself, dialogue and learning can be specifically institutionalized – such as is the case with some multistakeholder initiatives.

To sum up: companies may embrace voluntary initiatives out of a "rationalist" logic, but this rationale may be supplanted in the course of events by another rationale relying on the inherent validity, i.e. the "legitimacy", of the code content. Where a corporation acts out of such normative persuasion, corporate ethics standards become important to it not because of related risk management, but because these standards *per se* become a point of orientation for corporate conduct. Compliance issues, then, are no longer subordinated to cost-benefit-consideration, but are dealt with as a matter of course.

Companies may enter into a discourse over good corporate behaviour both with actors from the business community and with the larger set of stakeholders (employees, unions, environmental, human rights, labor advocacy groups). Where stakeholders are given a share in a company's decision-making processes regarding its external accountability, this at least partially responds to the principle of congruence between those who shape corporate governance and those who are affected by it. At the same time, stakeholder participation serves to enhance the 'input' legitimacy of corporate actors.

Deliberation and arguing between the business and stakeholder community thus fulfils the two-fold function of increasing voluntary corporate compliance with codes of conduct and enhancing the input legitimacy of corporate governance.

[135] For references *see supra* note 102.

c) Illustrations

In the following, the deliberative approach will be illustrated with two examples of voluntary initiatives: the Global Compact and Accountability 1000. Both arrangements rely on learning processes by means of stakeholder dialogue.

aa) Global Compact

The Global Compact is a United Nations initiative called into life at the instigation of United Nations Secretary-General Kofi Annan. In an address to the World Economic Forum on 31 January 1999[136] Annan challenged the business sector to engage in partnership with international labour and NGOs, with a voluntary international initiative – the Global Compact – to promote good corporate practices by adhering to universal environmental and social principles;[137] these are drawn from the Universal Declaration on Human Rights,[138] the ILO 1998 Declaration on Fundamental Principles and Rights at Work,[139] the Rio Declaration on Environment and Development,[140] and the UN Convention Against Corruption.[141] With 2,900 participants and other stakeholders from 90 countries, the Global Compact is the world's largest voluntary corporate citizenship initiative.

The Global Compact seeks to advance responsible corporate citizenship so that the business sector – in partnership with other social actors – can be part of the solution to the challenges of globalisation and further the vision of a more sustainable and inclusive global economy. A company initiates participation by having its chief executive officer send a letter to the UN Secretary-General expressing support for the Global Compact, whereupon that company is expected to implement its principles so that they become part of its culture and day-to-day operations. Further, a company is expected to publicly advocate the Global Compact and to publish in its annual report (or similar public venues) a description of the

[136] Secretary-General Kofi Annan, Address at the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), U.N. Doc. SG/SM/6881 (1999).

[137] The principles and other information about the Global compact may be found at http://www.unglobalcompact.org: Principles 1 and 2 deal with the protection of international human rights by requiring corporations to ensure they are not complicit in human rights abuses. Principles 3 to 6 concern labour rights, calling for the elimination of child labour practices and discriminations in the workplace, as well as guaranteeing the freedom of association. Principles 7 to 9 encourage measures aimed at protecting the environment such as developing environmentally friendly technologies. While there were initially only nine principles, at the Global Compact Leaders Summit in New York (June 2004) the tenth principle on working against corruption was added

[138] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

[139] ILO, Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233 (1998).

[140] Rio Declaration on Environment and Development, June 14, 1992, U.N. Conference on Environment and Development, Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 (1992).

[141] United Nations Convention against Corruption, October 31, 2003, *available at* http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

ways in which it is supporting the Global Compact.[142] The progress of participating companies is reported on annually on the Global Compact website.[143]
The Global Compact is not a regulatory instrument – it does not provide for monitoring and enforcement of company compliance. Rather, to achieve its ends, it relies on *policy dialogues and learning processes* triggered among the various participants through the open sharing of company submissions whereby peer review and other stakeholder comment is invited. The Global Compact thus provides a learning forum in which good corporate practices are identified, disseminated and promoted through the exchange of information, dialogue and deliberation.[144]
The design of the Global Compact thus purports to induce corporate change through a "logic of appropriateness" by means of deliberative processes. In that, the Global Compact represents a good example of a deliberative approach to governance.

bb) Accountability 1000

Accountability1000 (AA1000)[145] is an accountability standard that was established in 1999 by the UK-based Institute of Social and Ethical Accountability to provide guidance to an organization – a company or an NGO – on what constitutes good practice in accountability and performance management. It aims at improving the accountability and overall performance of organizations by increasing the quality of social and ethical accounting, auditing and reporting. Through training and stakeholder dialogue, companies are encouraged to define goals, measure progress made against these targets, audit and report on performance and develop feedback mechanisms. The process of engagement with stakeholders is at the heart of AA1000. Through stakeholder dialogue, AA1000 aims to support organizational learning and overall performance (social and ethical, and indirectly environmental and economic) in progress towards sustainable development. Benefiting from stakeholder participation through learning processes is the underlying motif of AA1000.

G. Monitoring Codes

So long as business actors approach the principle of corporate social responsibility from an instrumental, economically defined perspective, compliance with adopted codes of conduct is on lose footing. Thus, especially in relation to a

[142] This "Communication on Progress" is an important tool to demonstrate implementation through public accountability.
[143] *See* UN Global Compact, Frequently Asked Questions ('How Do Companies Participate in the Global Compact?'), *available at* http://www.unglobalcompact.org/AboutTheGC/faq.html.
[144] John Gerard Ruggie, The Global Compact as Learning Network, in: Global Governance 7 (2001), 371–378.
[145] Extensive information on the AA1000 Framework is available at http://www.accounta bility.org.uk. Particularly, an overview on the AA1000 Framework is provided at http://www.accountability.org.uk/uploadstore/cms/docs/AA1000%20 Overview.pdf.

company's social and environmental performance, the establishment of effective systems for monitoring labour conditions in factories around the world is at the very heart of questions directed at the value and legitimacy of codes of conduct as instruments of corporate accountability.[146]

I. Internal Monitoring

The great number of monitoring systems in place are internal.[147] By definition, self-monitoring entrusts the monitoring task to the very company whose compliance behaviour ought to be verified; in other words, self-monitoring involves the paradox of entitling those to be monitored to monitor themselves. Nonetheless, a good argument can be made that a thorough internal monitoring process could actually make a difference to a company's ethical performance, if only it were willing to carry it through. Reliance on a company's good intentions, however, is precisely the problem, which relates to the fact that self-monitored results are hardly ever made public, thus providing little incentive for code compliance. Often, therefore, outside observers (in fact, shareholders as well) do not know whether company claims to code observance are genuine or mere public relations gestures. Troubling questions about the company's intent to genuinely address the compliance issue thus arise. In so far, the notion of allowing the "fox to guard the hen-house"[148] acquires particular immediacy and invites criticisms emphasizing the disingenuity of voluntary codes, i.e. that such compliance systems allow business to "greenwash" themselves but otherwise are of little significance in improving the environmental and social performance of corporations.[149]

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[146] Monitoring contributes significantly to determining whether or not factories/plants are in compliance with codes of conduct. In a 1996 study of garment shops in Los Angeles, the U.S. Department of Labour found that a shop is three times more likely to be in compliance with wage/hour laws if the shop is monitored. 27 % of monitored shops had some violations, while 64 % of non-monitored shops had violations (U.S. Department of Labour Study, September, 1996).

[147] *See* Michelle Leighton, et. al., Beyond Good Deeds: Case Studies and A New Policy Agenda for Corporate Accountability (2002), 50.

[148] Internal monitoring is criticized because it "smells of the fox minding the chicken coop, and serious question arise regarding the extent to which code violations will be disclosed." (Sarah Cleveland, Global Labour Rights and the Alien Tort Claims Act, Texas Law Journal 76, (1998), 1533); *see also* Mark Baker, Private Codes of Conduct: Should the Fox Guard the Henhouse?, University of Miami Inter-American Law Review 24 (1993), 399–433; Laura Dubinsky, The Fox Guarding the Chicken Coop: Garment Industry Monitoring in Los Angeles, in: Rhys Jenkins/Ruth Pearson, Gill Seyfang (eds.): Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy (2002), 160–171.

[149] "The most remarkable effect of internal monitoring may be to provide MNCs with a useful public relations device, enabling them to divert attention from any existing gap between what they say and what they do." (Emeka Duruigbo, Multinational Corporations and International Law. Accountability and Compliance Issues in the Petroleum Industry (2003), 132, citing Robert Liubicic, Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labour Rights Through Private Initiatives, in: Law and Policy in International Business 30 (1998), 157).

A good illustration of this is the following case: In 1992, Guess Inc became the first American clothing manufacturer to enter an agreement with the Department of Labor (DOL) whereby contractors would be monitored for compliance with labour standards, a fact that was hailed as a blueprint for corporate responsibility. However, the Guess monitoring programme proved a blatant failure, as in 1996 widespread continuing labour rights violations, including child labor, illegal industrial homework, unpaid overtime and sub-minimum wages in Guess contract shops were exposed.[150]

As illustrated, self-monitoring bears an inherent risk of conflict of interest and is thus prone to be conducted in a disingenuous way, if at all. As Dubinsky writes, it is "risky to allow manufacturers, who profit from lower labour costs, to control the policing of working conditions in their contractors."[151] The validity of internal monitoring, therefore, is cast into serious doubt.

II. Third-Party Monitoring

There is general agreement among labour rights advocates and increasingly within the business community itself that internal monitoring of company (and notably supplier) compliance with codes of conduct is inadequate; for codes to claim any legitimacy, therefore, it is deemed necessary to resort to some form of third-party external monitoring or verification. While increasingly efforts are being made to circumvent the shortcomings of internal monitoring by mandating third-party monitors to conduct audits and compliance verification, disagreements persists as to the appropriate form such third-party monitoring shall take.

1. External Monitoring

While the external monitoring of codes does – prima facie – confer a higher measure of credibility by removing the monitoring function from the discretion of the company itself, here too empirical evidence, points to serious credibility problems, which are associated with the rapid expansion of a social auditing industry led by large private sector auditing firms. First, doubts may be raised related to the competence of these firms engaging in social auditing services, which require special skills and expertise. Second, there may be an inherent conflict of interest if the auditing firm is paid by their own clients to monitor their social and environmental performance. As Mamic stresses, "research has revealed that auditors may hesitate to present truly damaging information, based on a desire to maintain good business relations and receive future work from the client. Further, the question of competence and qualification of the auditor is a critical issue."[152] Accordingly, even some of the more respected initiatives, such as SA8000 and FLA, under which the companies themselves choose and hire the external social auditors

[150] *See* Dubinsky, *supra* note 148, 160.
[151] Id., 161.
[152] Ivanka Mamic, Implementing Codes of Conduct. How Businesses Manage Social Performance in Global Supply Chains (2004), 59.

from among a list of accredited certification bodies, are faced with criticism relating to the deficiencies of their monitoring systems.

As the world's largest private monitor of labour and environmental practices, PricewaterhouseCoopers (PwC) has taken the lead in this emergent non-financial auditing industry. In view of the fact that PwC is leading the development of corporate monitoring systems, one would expect its auditing procedures to reflect a high standard of professionalism. A strong critique of PwC's monitoring practices – with regard to two instances of factory audits[153]– however, has been delivered by O'Rourke.[154] In her analysis, she highlights a wide range of flaws related to the PwC's auditing process:

Workers' voices had not received due regard – rather, instead of adequately involving the workforce as a crucial non-management source of information, there was a general bias towards management. Thus, as O'Rourke noted, the PwC monitoring "failed to protect against the major challenge of evaluating factory conditions", i.e. access to reliable information on normal, everyday conditions.[155] Information, for instance, was gathered on site primarily from managers rather than workers,[156] nor had any pre-visit information been collected from workers. Worker interviews were also problematic. Significantly, the PwC audits failed to seriously address the challenge of obtaining accurate information from worker interviews: poor implementation of the questionnaire[157] was compounded by failing to establish a context in which sensitive issues could be discussed. Other insufficiencies include PwC's failure to adequately assess restraints on freedom of association.

This illustration serves to show that external monitoring through auditing firms is, at the least, not without its flaws. While in other cases external audits of this type may in fact produce valuable information on whether or not a company or its supplier is in compliance with a code, they largely rely on infrequent on-site inspections and may be flawed by a lack of human rights expertise or commitment to workers' rights and lack of information. Detractors go so far as to assert that the "service industry is driven by the logic of global corporate rule" and that ultimately codes and certifications of code conformance are not only inefficient, but are detrimental to more truly responsible corporate behaviour.

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[153] The two factory sites were based in Shanghai, China and Seoul, Korea.

[154] Dara O'Rourke, Monitoring the Monitors: A Critique of Corporate Third-Party Labour Monitoring, in: Rhys Jenkins/Ruth Pearson, Gill Seyfang (eds.): Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy (2002),196–208.

[155] *Id.*, 202.

[156] In one instance, the managers were actually asked to enter the data on wages and hours into the PwC spreadsheet.

[157] According to O'Rourke, many questions were skipped during the interviews. In one instance, the auditor omitted the sections on freedom of association and collective bargaining, and often skipped questions on discrimination, forced labour and child labour.

2. Independent Monitoring

The credibility of a monitoring exercise can be enhanced by the direct involvement of workers, and if the monitoring task is carried out by local organizations familiar with the living and working conditions in the respective country. Such an approach has been the object of several alternative monitoring models that have emerged in recent years in Central America. Companies such as Gap and Liz Claiborne are contracting local independent monitoring groups in countries like El Salvador and Guatemala.[158] The Independent Monitoring Group of El Salvador (IMGES), for instance, consists of respected local religious, human rights and labour rights organizations: representatives of the Secretariat of the Archdiocese of San Salvador; Tutela Legal, the Human Rights Office of the Archdiocese of San Salvador, the Human Rights Institute of University of Central America and Center for Labour Studies, a labour research organization.

The IMGES provides credibility to the monitoring process, and, conversely, to the Gap's code of conduct: on the one hand, its members are rooted in the communities where the factories are located and they are accountable to those communities, not to the company. On the other hand, the IMGES consists of respected nongovernmental organizations with specific expertise on human and labour rights; significantly, they are familiar with the local social, cultural and legal context, and enjoy the trust of the workers.

Monitor independence is crucial for the validity of the compliance report. From a stakeholder's perspective, the results of verification procedures of a company's code compliance are simply more credible when coming from a source independent of the company's control. In so far, independent monitoring adds legitimacy to the respective company's code.

III. Monitoring System Profiles of Multistakeholder Initiatives

1. Social Accountability 8000 (SA8000)

A fairly thorough attempt at improving labour conditions is marked by the "Social Accountability 8000" (SA8000) standard. Modelled on business certification standards developed through the International Organization for Standardization, particularly the quality control standard ISO 9000, it was established in 1997 by the Council on Economic Priorities Accreditation Agency (CEPAA) with the aim of providing a cross-industry standard for workplace conditions and a verification and certification system. In 2000, CEPAA was renamed Social Accountability International (SAI). It is a global system that helps manage the process of attaining and verifying facility-level conformance to the SA8000 standard through independent, accredited auditing and public reporting.

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[158] Marina Prieto, Angela Hadjipaternas and Jane Turner, The Potential of Codes as Part of Women's Organizations' Strategies for Promoting the Rights of Women Workers: A Central America Perspective, in: Rhys Jenkins/Ruth Pearson, Gill Seyfang (eds.): Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy (2002), 155; *see also* D. Schilling, *supra* note 74.

SAI convenes multiple stakeholders – companies, NGOs, and trade unions – to promote understanding and implementation of SA8000 standards worldwide. The SA8000 is based on the ILO Conventions and key human rights instruments. Its standards cover child labour, forced labour, occupational health and safety, compensation, working hours, discrimination, disciplinary practices, freedom of association and the right to bargain collectively, and "management systems".

At the heart of the SAI system is the SA8000 certification of compliance at the facility level and assistance for companies seeking to improve the social performance of their operations and those of their supply chains. The SA8000 implementation options are as follows:

Certification. For credible verification of SA8000 implementation, SAI places a premium on third party monitoring through accredited certification bodies.[159] Companies may seek certification of individual manufacturing facilities by these external auditors. As certification of SA8000 conformance is not issued to the company as such, but at the facility level, compliance guarantees apply locally.[160]

Corporate Involvement Program (CIP). Retailers and companies combining production and selling that commit to steering their facilities and those of their suppliers towards an SA8000 standard may join SAI's Corporate Involvement Program (CIP) as "Signatories". Those simply wishing to investigate SA8000 may join the program as "Explorers". The CIP includes training courses for managers, suppliers and workers, technical assistance for managing audits, and SAI-verified reports. SA8000 Signatories promote SA8000 certification in some or all of their supply chain facilities.[161]

Over time, the SA8000 standard has been extended to include not only manufacturing industries, but also agriculture and extractive industries. In that, it is a cross-industry standard. Although there are provisions for and recommendations to subcontractors, these do not constitute an enforced or enforceable part of a company's agreement with SAI.

The accredited auditors prepare a report and issue a statement of "conformance" or "non-conformance" with a view to certification. The audit reports go to the companies and to SAI. Other parties can only receive them after signing a confidentiality agreement with the company management and the external auditor.

The SAI issues a public list of certified facilities.[162] Signatories are required to annually disclose the number of their certified suppliers and applicants for certification as well as the approximate number of their suppliers.

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[159] For relevant information, *see* the SAI homepage at http://www.sa-intl.org. So far, there are 12 SAI-accredited certification auditors: ALGI, BSI, BVQI, CISE, CSCC, DNV, Intertek, SGS-ICS, TUV Asia Pacific, TÜV Rheinland Hong Kong, UL.

[160] As of December 2005, a total of 881 factories and facilities had obtained SA8000 certification, *see* http://www.sa-intl.org.

[161] As of April 2006, signatory members of the CIP are: Four-D Mgmt Consulting, Charles Vögele, Cutter & Buck, Dole Food, Eileen Fisher, Otto Versand, Solidaridad, Synergies Worldwide, Tex Line and Toys "R" Us.

[162] The SAI issues a public list of certified facilities. As of December 2005, 881 facilities had obtained SA800 certification, *see* http://www.sa-intl.org.

2. Ethical Trading Initiative (ETI)

The Ethical Trading Initiative (ETI) is an alliance of companies, NGOs and trade unions working to improve labour conditions in the global supply chains that produce goods for the UK market. The ETI approach is premised on the notion that understanding how to overcome the difficulties in implementing internationally agreed-upon labour standards along supply chains can be achieved through a collaborative approach involving business and civil society.

The ETI functions on the principle of incorporating internationally accepted labour standards into codes of labour practice as set out in the ETI Base Code. Corporate members agree to promote and observe the terms of the Base Code in their supply chains and are expected to collaborate with NGOs and trade unions as well as their suppliers with a view to identifying the most effective approaches to making codes of conduct a credible social accountability tool, particularly with regard to monitoring and verification.

Unlike the approach adopted by SAI, ETI does not certify good performance or offer consulting services. Rather, the ETI approach follows the principle of continuous improvement, portraying itself as a learning forum promoting good practice, sharing learning with members and the public, as well as measuring the impact on the lives of the workers of implementing the ETI Base Code.

Although supply chain monitoring is part of a member company's commitment to ETI, this does not constitute an "enforced and enforceable part of the agreement" between the company and the supplier. Though monitoring remains imperfect, the increasing number of auditing programmes is cause for optimism. While individual members are following their own approaches (ranging from in-house monitoring by technical advisors to the use of independent auditors), ETI conducts its own pilot projects designed to test monitoring and verification systems based on information exchange and related learning. The pilot projects are the main instruments for learning how to monitor supply chains, and they require the three caucuses of the tripartite alliance (companies, NGOs and trade unions) to work together.

One such example is the South Africa project (1998–2001), which aimed at inspecting labour practices in the wine industry of the Western Cape. The ETI members built relationships with wine producers, labor unions, NGOs and the Department of Labour in South Africa. The three rounds of inspections of six wine co-operatives and their farms were followed by improvements of labour conditions. As a result, the South African stakeholders decided to establish a local monitoring initiative ("Wine Industry Ethical Trade Association" [WIETA]).

Companies are expected to report progress to the ETI. Although they are not required to make their reports publicly available, most companies share them with the other ETI members of the stakeholder alliance.

3. Fair Labour Association (FLA)

The Fair Labour Association (FLA) is a multistakeholder coalition of companies, NGOs and colleges and universities established in 1998 as a successor body to

the White House Apparel Industry Partnership, which had been initiated by the White House in 1996 to promote labour rights standards in the US and worldwide apparel industries.

The FLA Charter Agreement outlines an industry-wide code of conduct and monitoring system. Member companies must submit to regular internal monitoring; internal company monitoring must cover half of all applicable facilities in the first year and all of them in the second year. In addition, the FLA accredits third-party monitors to conduct independent external verification of code conformance in member companies' facilities as well as along the supply chains. After 2-3 years of satisfactory external monitoring results, the FLA accredits member companies' compliance programmes, which must be reviewed every two years.

The FLA's third-party complaint procedures enable third parties to report serious labour problems or patterns of non-compliance with the FLA code of conduct. The FLA provides for a subsequent process of remediation, after which the third party will be informed of the results.

All internal and external monitoring reports are provided to the FLA, which publishes annual overviews of the global compliance record of its participating companies on its website. The companies are required to provide a complete list of its applicable facilities to the FLA.

4. Worker Rights Consortium (WRC)

Established in 2000 on the initiative of the "United States Against Sweatshops" (USAS), the Worker Rights Consortium (WRC) aims to assist colleges and universities with the effective enforcement of their manufacturing codes of conduct; these are designed to ensure that factories that form part of the supply chain of companies producing goods under license of for US colleges and universities adhere to internationally accepted labour standards.

The WRC Code has been designed as a model code that is juxtaposed to the codes of conduct of the member universities. The WRC does not certify a company's conformance with the WRC code or a member university's code of conduct, nor does it establish a comprehensive independent verification system. In contrast to other monitoring approaches, the WRC does not resort to accrediting a third-party monitor to carry out factory investigations, but independent verification is conducted by the WRC itself. This verification is conducted in response to worker and third-party complaints, as well as on a proactive basis. Reports of factory investigations are made public on the WRC website and distributed to affiliate colleges and universities.

H. Beyond Legitimacy – A More Pragmatic Approach: Potential and Limits of Self-Regulatory Initiatives

I. Limitations

Management theories that emerged in the sixties and seventies forcefully argued that a corporation's sole obligation was to generate economic profit for the benefit of its owners or shareholders. As Milton Friedman put it: "The business of

business is business". With the advance of globalisation and heightened concerns about the negative impacts of MNE activity, this managerial view has come to be increasingly challenged by global demands for corporate responsibility.[163]

The idea that corporations do in fact have responsibilities that go well beyond the simple maximisation of profit has found expression in a wealth of codes of conduct that define ethical standards of corporate practice. The hallmark of private codes is that they are *voluntary*, and for this, codes have been widely attacked as lacking in teeth to translate into practice. The voluntary and non-binding character of a code, however, does not *a priori* anticipate its ineffectiveness. In so far as the regulatory capacity of voluntary codes is cast into doubt by the argument that they cannot fall back on the enforcement capacities of the state, two preliminary caveats seem warranted.

First, in the context of "governance beyond the state", there is no "shadow of hierarchy" available either on which state actors can rely if they wish to influence the behaviour of other state or non-state actors, at least on a legal basis. Second, while it is true that in the context of the nation-state the enforcement of legal norms ultimately rests on the sanctioning power prerogative of the state, no modern legal and political system, to be effective, can solely rely on coercion and the "shadow of hierarchy", for "the most stable support will derive from the conviction on the part of the member [of a political system] that it is *right and proper* for him"[164] [emphasis added] to obey the law. In the international arena, likewise, acceptance of and consent to norms by those subject to them are more important than enforceability.[165] In other words, norm effectiveness hinges on the perceived *legitimacy* by those subject to a particular norm.

It can be argued that norms are more likely to be honoured in compliance when those that are subject to them can claim authorship in their creation, which, in turn, may facilitate their *internalization*. However, problems arise when the adoption of codes of conduct does not lead to internalization and compliance, and enforcement mechanisms such as are characteristic of national hard law do not exist. In practice, this precisely is a major weakness of voluntary codes. In view of the great variety of codes of conduct, assessments of the real achievements are not without ambiguity. Generally, however, it is fair to say that despite the considerable publicity surrounding codes of conduct, their record of achievement, to date, has been relatively limited.

The 1990s have seen a remarkable explosion of company codes, many of which are little more than general statements of business ethics lacking specificity and any indication of the way in which they are to be implemented. Despite the great popularity of company codes, they generally appear to be of strictly limited influ-

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[163] "[C]orporations, because they are the dominant institution of the planet, must squarely face and address the social and environmental problems that afflict mankind." (Paul Hawken/William McDonough, Seven Steps to Doing Good Business, in: Inc. (1993), 80).

[164] David Easton, A Systems Analysis of Political Life, New York/London/Sidney 1965, 278 (emphasis added).

[165] *See* J. Kokott, *supra* note 80.

ence on corporate behaviour and thus are often criticized as public relations instruments. In addition, many of the codes drawn up by NGOs (SA8000, ETI, FLA) have been adopted by a relatively small number of firms.

One category of practical shortcomings that limits the regulatory potential of corporate codes of conduct relates to the problem of *determinacy*. The language chosen in drafting a code may suggest the degree of likelihood that a firm will comply with the standards. Code language may be detailed and precise and suggest a high level of commitment to the standard, or general and vague and indicate a low level of commitment. Many codes, however, are marked by vague and non-operational standards. The lack of clarity and specificity leaves room for interpretation and entails that rules can be easily evaded. The blurring of the lines between "what is required and what is recommended, and between that which employees are prohibited from doing and that which is merely discouraged, portends a scenario in which everything is acceptable."[166] Significantly, vague stipulations also make monitoring difficult. Detractors maintain that codes "tend to be limited to what the corporation already does well and ignore the problematic issues."[167] Codes issued by non-profit actors, namely the notable multistakeholder codes, have emerged precisely to address this weakness of corporate codes – however, the vast bulk of codes are issued by corporations themselves (48%[168]) or by business associations (37%[169]).

Another major limitation of codes relates to the lack or ineffectiveness of compliance mechanisms. Independent monitoring is crucial to ensure that codes do not simply remain rhetoric, but translate into practice in relation to a company's operations and those of its subcontractors. Of the 246 codes covered in the OECD inventory, however, a total of only 52 codes provided for independent (external) monitoring, and only 4 of 118 company codes included such provisions.[170] Similarly, a survey of 132 codes by Kolk et al. found that in 41% of the cases there was no specific mention of monitoring and in a further 44% the monitoring systems provided for were internal.[171] A study of Ferguson in the United Kingdom found that none of the company codes surveyed made a clear commitment to systematic monitoring and independent verification. The reluctance of many firms to include independent monitoring to verify code compliance invites suspicion that they may be used more for public relations purposes than constitute a genuine

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[166] Emeka Duruigbo, Multinational Corporations and International Law. Accountability and Compliance Issues in the Petroleum Industry (2003), 133 (citing Rubin Seymour, Transnational Corporations and International Codes of Conduct, in: American Journal of International Law and Policy 10 (1995), 1286).

[167] Alain Lapointe/Corinne Gendron, The Regulatory Limits of Corporate Codes of Conduct, Les Cahiers de la Chaire, Working Paper 19 (2003), 5.

[168] Codes of Corporate Conduct – Expanded Review of their Contents, Directorate for Financial, Fiscal and Enterprise Affairs, Working Papers On International Investment, No. 2001/6 (2001), 5.

[169] Id.

[170] OECD, Expanded Review, *supra* note 76, 35 [Table 6].

[171] Kolk et al., International Codes of Conduct, *supra* note 77, 68.

attempt at improving corporate performance. The growth of a social and environmental auditing and certification industry seems promising. However, as seen above, a report by Dara O'Rourke on factory inspections in Asia by Pricewaterhouse Coopers, the world's largest private monitor of labour and environmental practices, gives rise to serious concerns regarding the utility and credibility of external monitoring processes. With the exception of the Global Compact, most MSI stress the need for independent monitoring.

Other limitations relate to the scope and extent of the codes. Many codes, as noted above, fail to even cover the ILO core labour standards, particularly in relation to freedom of association and collective bargaining, let alone go beyond these core standards to include other aspects of labour conditions. The notable multistakeholder codes covered in this paper provide a more promising picture. The SA8000, the Ethical Trading Initiative, the Clean Clothes Campaign, the Global Compact and the Worker Rights Consortium all incorporate the ILO core labour standards related to prohibitions on child labour, discrimination in the workplace, the use of forced labour as well as the right to collective bargaining and freedom of association. Apart from the Global Compact, these initiatives also include explicit references to minimum or "living wages".

Many codes include provisions that apply to suppliers and sub-contractors along the supply chain; they usually extend to immediate suppliers but do not always reach further down the supply chain. While some MSI schemes, especially in the apparel and sportswear sector, focus explicitly on standards and independent monitoring related to suppliers, others, including SA8000 and ETI, contain provisions and recommendations related to suppliers and subcontractors which, however, do not constitute an enforced or enforceable part of a company's agreement to submit to a MSI code. As regards, certification, suppliers and subcontractors are only certified at their request.

The relatively narrow sectoral focus of codes of conduct is also an issue. One of the striking characteristics of the recent growth of codes of conduct is their tendency to be concentrated in certain industry sectors where brand names and corporate image play an important role. Codes addressing labour issues are concentrated around the apparel, sportswear and toy sectors, whereas environmental codes focus on the chemical, forestry and mining industries; these are sectors that have particularly been the focus of northern NGO campaigns and the media spotlight. With regard to SA8000, it understands itself as a global standard to be applied to any industry sector, yet firms from only a limited number of sectors have pledged to adhere to SA8000. As of December 2005, the greater number of SA8000 certified facilities belonged to either the toy or apparel sector.

Multistakeholder initiatives more sensibly address the challenges of making regulatory norms of corporate conduct work, as opposed to self-regulatory initiatives. In some respects, however, MSIs seem to follow a similar path as company codes, as the proliferation of the former has led to several competing base codes and monitoring systems being developed by different NGOs and multistakeholder groups. This is particularly so in the apparel and sportswear sectors; largely in

response to northern consumer concerns about and civil society campaigns against sweatshops, various US initiatives have emerged, including: the Fair Labour Association (FLA), the Worker Rights Consortium (WRC), the Worldwide Responsible Apparel Production (WRAP) and SA8000, along with European schemes, notably the Ethical Trading Initiative (ETI) and Clean Clothes Campaign (CCC). The struggle of competing standards, thus, is cause for uncertainty.

II. Dangers

Codes are often aspirational in character. Owing to this, they may be conditioned on initial stakeholder goodwill and trust, i.e. that despite diverging rhetoric and deeds, a good-faith effort is made toward progress. If such trust is rewarded, it will often be extended further. If, however, business efforts are disingenuous, the disillusionment may result in a backlash. Many codes, especially those developed unilaterally by corporate actors, in fact have been seen simply as window dressing exercises.

Critics of voluntary initiatives voice concern that these might take the pressure off government control of corporations or even supplant government regulation. While private codes are partially the result of the reduction in the regulatory role of the nation-state, one commentator notes " the codes as such have not led to the reduced role of the state."[172] To be sure, codes often refer to the observation of local legal standards as a code element. However, the very fact that the private code phenomenon is a manifestation of the diminished role of the nation-state implies a shift in regulatory competencies from the public to the private. In this respect, a significant concern is what one might consider the privatization of regulatory functions traditionally perceived to be performed by national and international public policy makers.

III. Potential

The regulation of international economic activity and that of its adversarial impacts on labour and the environment developed mostly on separate tracks. Given the flexibility of codes in terms of issue area coverage and their ability to provide a negotiating platform for the various stakeholders, they could become a useful tool to breaking down the historically conditioned but artificial separation between the regulation of economic, social and environmental interests.

With respect to the potential beneficial effects of private codes, one could argue in their favour by stressing that their non-binding nature may serve to lower the hurdles for code accession and bring companies to commit to ethical standards. Upon accession to a code, there is the potential that – through stakeholder dialogue and the psychological entrenchment of the corporate social responsibility debate – both an internal process of value change and an external process of peer and public (civil society, government) pressure is set into motion.

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[172] Rhys Jenkins, Corporate Codes of Conduct. Self-Regulation in a Global Economy, Technology, Business and Society Programme Paper no. 2, United Nations Research Institute on Social Development (2001), 30.

Despite their limitations, private codes do have the potential of providing positive benefits for stakeholders, and in fact have been causal in improving corporate responsibility. Through the introduction of codes of conduct, labour conditions for workers at the Mandarin factory in El Salvador were improved. Dismissed workers were reinstated and allowed to re-establish their union. Similar results were also witnessed at the Kimi garment factory in Honduras, where workers were also reinstated and allowed to unionize. Concrete benefits resulting from code adoption have also been reported on Nike's factories in Viet Nam.

MSI have arisen largely in response to the perceived weaknesses of corporate self-regulation, notably in relation to the incorporation of labour rights, the responsibilities of suppliers and provisions for independent monitoring. The inclusion of stakeholders lends the code added legitimacy. Beyond increasing the input legitimacy of the code, stakeholder participation may initiate learning processes that serve to enhance a company's compliance performance. MSIs have the potential of providing a platform for *dialogue* between the business sector and civil society organizations from which internationally shared values might emerge (Global Compact, Accountability 1000).

Voluntary codes of conduct could lay the foundation for future public initiatives at domestic and international levels. Where codes of conduct are seen to be followed in practice, the exhibition of good business practices may not only inspire other companies to follow suit, but codes may also serve as a catalyst for legally creative action. Domestic and international courts may enhance the power of codes of conduct by referring to them. Over time, codes of conduct may transform from soft law into hard law, on both the national and international level. In so far, they may be seen as stepping stones in the crystallization of law.

I. Conclusion

A vital question in our globalising times is how to bring the authority of governance to bear on the agenda of world affairs. International law exists to bring regulation to the life of international society, with states being the pristine entities of international rule making. With growing complexity of the state of international affairs as well as of the international system itself as evidenced by the rise of a multiplicity of actors, the regulatory enterprise of state-centric international law, structured upon its traditional sourced triad, was frequently perceived to be inadequate to cope with the modern problems of international relations and new global challenges. As a result, new forms of norm creation emerged that sought to respond more flexibly to the challenges of ordering international and transnational relations.

This article focused on one feature of an emerging trans-national regime: codes of conduct – voluntary, non-binding instruments setting out standards and principles of behaviour. Typically, they relate to social and/or environmental issues and aim at improving the accountability of TNCs and their suppliers. Whereas earlier initiatives were driven by intergovernmental organizations, a plethora of non-state actor codes emerged from the 1990s on, created by corporations and NGOs.

While private codes of conduct have attracted remarkable popularity and continue to be a prominent part of the business landscape, ever since their inception they have been accompanied by criticism of their effectiveness, begging the question of how *in fact* they do contribute to *shape* the business landscape in more ethical ways. Rule setting within the international arena has proven more difficult than within the state, and it has always been difficult to enforce agreed-upon rules. Nonetheless, the establishment of codes of conduct contributes to filling some of the international regulatory voids.

The pivotal point in the debate on codes of conduct concerns the issue of compliance mechanisms. Monitoring and sanctions, in fact, "remain the most important test for the seriousness of the codes' implementation."[173] For codes to be meaningful and credible, *independent monitoring*[174] of a company's compliance record is imperative. A large number of firms, however, are reluctant to submit to independent monitoring and instead self-monitoring is prevalent, a fact that invokes the image of "the fox minding the chicken coop."

The initiation of private codes can be perceived as a contribution to transnational governance. However, due to the extant diverse multiplicity of codes, critics warn against placing too much faith in a fragmented system that yet remains in a developmental stage. However, codes of conduct do have a potential for governance provided that effective compliance mechanisms are in place. While many codes may be lacking in teeth, they nevertheless form part of the new rules of the game and contribute to the establishment of new regulatory institutions amid "an era of uncertainty regarding the shape of national and international regulatory regimes."[175]

Studies of codes indicate that they are most likely to be responsive to the real concerns of workers when they are multistakeholder codes rather than unilaterally developed by companies or business associations. Codes should not be seen as carved into stone; rather, they should be conceived as a "process which facilitates stakeholder engagement, and which provides a platform for further advances in terms of improving the impact of big business on social and environmental conditions."[176] Codes open up a space for dialogue and learning and should rather be seen as a platform for political disputation than as a solution to the governance challenge posed by economic globalisation. The limitations of codes are real, but they do have a regulatory potential.

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[173] Kolk et al., International Codes of Conduct, *supra* note 77, 175.

[174] In a broad sense, 'independence' may simply be understood as an incongruence between the monitoring entity and the organization to be monitored (through external auditing firms); more specifically, the requirement of 'independence' may also be understood to signify a financial independence between the external monitor and the corporation (or facility) in question.

[175] Ans Kolk/Rob van Tulder, Setting New Global Rules? TNCs and Codes of Conduct, in: Transnational Corporations 14:3 (2005), 19.

[176] Rhys Jenkins, Corporate Codes of Conduct. Self-Regulation in a Global Economy, Technology, Business and Society Programme Paper no. 2, United Nations Research Institute on Social Development (2001), 29.

In the end, private voluntary codes hinge on the goodwill of the adopting companies for effective implementation. The bottom line, Klein asserts, "is that corporate codes of conduct […] are not democratically controlled laws. Not even the toughest self-imposed code can put the multinationals in the position of submitting to collective outside authority."[177]

Codes are hybrid norms; while private in nature, they fulfil a public function that raises the question of their legitimacy. In the normative sense, the question of legitimacy relates to the justification of their authority, as compared to the acceptance of this authority by those affected. The legitimacy concerns need to be seen against the background of the ongoing debate over the reconfiguration of authority beyond the state. With respect to compliance, the legitimacy of voluntary codes gains added importance, precisely because codes of conduct lack the traditional enforcement capacities associated with the sovereign state.

Sourcing the legitimacy of private codes, however, implies a departure from the traditional legitimacy models of international law; as private codes are disconnected from state authority, invoking domestic notions of political legitimacy and looking at democratic processes within states or at the authority of states as a source of legitimacy is misleading. Generally, the legitimacy of governance rests on the two pillars of input and output legitimacy. Avenues relating to the enhancement of input legitimacy of private codes of conduct focus on expertise, stakeholder participation and deliberative democracy models. In a sociological sense, legitimacy rests on the shared acceptance by affected audiences, i.e. stakeholders, and on justificatory norms accepted by the latter.

Legitimacy of codes of conduct, in this connection, at its most basic means acceptance as appropriate by relevant audiences, i.e. the stakeholders. The perception of appropriateness, in turn, correlates with the participatory quality ('input legitimacy') and the perceived effectiveness ('output legitimacy') of the codes. However, a strict sociological notion of legitimacy "moves directly to addressing the empirical issue of the requirements for the acceptance of particular norms of governance (descriptive stance), while bypassing thorny philosophical questions of what non-state governance should ideally consist of (normative stance), or whether permitted at all."[178]

Enterprises operate in, and need acceptance by, society. To provide "the necessary framework conditions for the fundamental principles of social justice is the duty of political leadership"[179], i.e. the state. It is for the corporate sector to take the increased societal sensitivity for fundamental principles of social justice into account in their "own sphere of activities which they have the freedom of shaping

[177] Naomi Klein, No Logo (2002), 437.

[178] Steven Bernstein/Cashore, Benjamin, Non-state Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?, in: John Kirton/Michael Trebilcock (eds.): Hard Choices, Soft Law (2004), 41.

[179] Codes of Conduct. Position Paper of the International Organization of Employers, adopted by the IOE General Council, Geneva, 11 June 1999, 15.

directly."[180] Codes of conduct may serve to signal a congruence between corporate activities and societal values and expectations. In the final analysis, what is crucial is not the code, but the conduct.

[180] Id.

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