

# From Compliance to Rulemaking: How Global Corporate Norms Emerge from Interplay with States and Stakeholders

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## A. Introduction

Many industrial practices, such as the organization of working conditions or the use of hazardous substances, are no longer endemic to a specific jurisdiction. Rather, they spread through cross-border production chains or global markets for consumer products.<sup>1</sup> In many cases, such regulatory issues therefore cannot be resolved within a single territory. Instead, they require the involvement of global players, such as civil society, business actors or international organizations, who can often find pragmatic solutions to global problems, even if they lack the formal authority to do so. This seems to conform to a more global trend of national government getting replaced by global governance.<sup>2</sup>

Contrary to what is often concluded, this development has not led to a mere reduction of the role of the state in terms of 'neoliberal' deregulation. Rather, it results in a thorough transformation of the state's objectives and regulatory means.<sup>3</sup> The transformation of the

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<sup>1</sup> GARY GEREFFI & MIGUEL KORZENIEWICZ, *COMMODITY CHAINS AND GLOBAL CAPITALISM* (1994).

<sup>2</sup> JAMES N. ROSENAU & ERNST OTTO CZEMPIEL, *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (1992).

<sup>3</sup> STEPHAN LEIBFRIED & MICHAEL ZÜRN, *TRANSFORMATIONS OF THE STATE?* (2005); Sol Picciotto, *Regulatory Networks and Multi-Level Global Governance*, in *RESPONSIBLE BUSINESS. SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS* 315-341 (Olaf Dilling, et. al. eds., 2008); SOL PICCIOTTO, *REGULATING GLOBAL CORPORATE CAPITALISM* 12 (Cambridge University Press. 2011). At the national level similar developments have been addressed in German political and legal studies under the topic of the 'cooperative state' (*Kooperativer Staat*); see Gunnar Folke Schuppert, *Gemeinwohldefinition im kooperativen Staat* (Definition of the Common Good in the Cooperative

state and its regulatory capacities is illustrated in detail by the 'regulatory capitalism' approach.<sup>4</sup> According to this emerging school of thought, the welfare state has not been replaced by deregulated markets, as critics of Chicago-style neoliberalism often claim. While 'neoliberalism' led to the privatization of public assets and services, it did not result in deregulation and free competition.<sup>5</sup> Rather, capitalism and regulation of markets are inseparable and even mutually reinforcing.<sup>6</sup> For instance, the development of a global market for genetically engineered seeds required international regulation of intellectual property rights.<sup>7</sup> Similarly, the privatization and establishment of a common European market for network industries, such as electricity and gas, required the regulation of equal network access.

However, while commodification of knowledge and the privatization of monopolies may have been accompanied by regulatory growth, rather than de-regulation, there has been a shift from state legislation to rulemaking by regulatory agencies, hybrid 'administrative' networks or expert commissions.<sup>8</sup> The transformation of the state, which began in the early 1980s, has therefore led to the delegation of many governmental tasks to non-state actors. These activities of non-state actors relate to all of the three core functions of the welfare-state: provision, distribution and regulation.<sup>9</sup> While privatization primarily

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State), in *Gemeinwohl und Gemeinsinn im Recht* (Public Interest and Solidarity in Law) (Herfried Münkler & Karsten Fischer eds., 2002). However, at the transnational level there are also important differences that concern first and foremost, the de-territorialization of norm generation and compliance, and the more autonomously evolving modes of legitimacy.

<sup>4</sup> FABRICIO GILARDI *et. al.*, *REGULATION IN THE AGE OF GLOBALIZATION: THE DIFFUSION OF REGULATORY AGENCIES ACROSS EUROPE AND LATIN AMERICA* (2006); David Levi-Faur, *Varieties of Regulatory Capitalism. Getting the Most Out of the Comparative Method*, 19 *GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION AND INSTITUTIONS* (2006); JOHN BRAITHWAITE, *REGULATORY CAPITALISM. HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* (2008).

<sup>5</sup> BRAITHWAITE, *supra* note 4, at 1-31.

<sup>6</sup> BRAITHWAITE, *supra* note 4, at 11; STEVEN VOGEL, *FREER MARKETS, MORE RULES* (1996). Compare also the recent work on Karl Polanyi highlighting this nexus in the context of globalization, *e.g.* CHRISTIAN JOERGES & JOSEF FALKE eds., *KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* (2011).

<sup>7</sup> PETER DRAHOS & DAVID BRAITHWAITE, *INFORMATION FEUDALISM* (2002).

<sup>8</sup> Olaf Dilling, *et. al.*, *Introduction: Exploring Transnational Administrative Rule-Making*, in *TRANSNATIONAL ADMINISTRATIVE RULE-MAKING* (Olaf Dilling *et. al.* eds., 2011).

<sup>9</sup> BRAITHWAITE, *supra* note 4.

concerned the provision of services, regulatory functions have also increasingly been delegated to—or have independently been taken up by—non-state actors.<sup>10</sup> For a long time, this trend towards re-regulation has gone largely unnoticed, as legal scholarship and—to a lesser extent—political science, have mostly neglected transnational standardization processes as an inherently technical or “private” issue, without interest from a public policy perspective. In the last years, however, a vast literature on global governance has emerged, which acknowledges the development of standards by non-state actors with regard to the protection of common goods.<sup>11</sup> A contribution of transnational corporate standards to global public goods was first acknowledged under two different perspectives: from a regulatory angle, private standards of risk management on global marketplaces have sometimes been regarded as ‘transmission-belts’ between jurisdictions,<sup>12</sup> which pass on the effects of territorially-based regulation to the transnational sphere.<sup>13</sup> From the perspective of global governance, corporate standards were heralded as paradigmatic for the emergence of an autonomous law “beyond the state.”<sup>14</sup>

More recently, scholars of transnational law stress the institutional embeddedness of the mechanisms of global governance, in particular CSR, of the relevance of “dialectical regulation,” or the plurality of interactions between transnational governance and government regulation.<sup>15</sup> Primarily from an empirical perspective, the so called ‘regulatory

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<sup>10</sup> This article will primarily address the functions of provision and regulation, even if there are also important distributional aspects to environmental law, *e.g.* how environmental regulation distributes risk across different social strata.

<sup>11</sup> For political science, *see e.g.* VIRGINIA HAUFLE, *A PUBLIC ROLE FOR THE PRIVATE SECTOR* (2001). For legal scholarship *cf.* GUNTHER TEUBNER, *GLOBAL LAW WITHOUT A STATE* (1997); Benedict Kingsbury *et. al.*, *The Emergence of Global Administrative Law*, 68 *LAW AND CONTEMPORARY PROBLEMS* 15 (2005).

<sup>12</sup> Noah Sachs, *Jumping the Pond: Transnational Law and the Future of Chemical Regulation*, 62 *VANDERBILT LAW REVIEW* 1817 (2009); *see also* Olaf Dilling, *Proactive Compliance? Repercussions of National Product Regulation in Standards of Transnational Business Networks*, in *RESPONSIBLE BUSINESS - SELF-GOVERNANCE AND LAW IN TRANSNATIONAL BUSINESS TRANSACTIONS* 89 (Olaf Dilling *et. al.* eds., 2008).

<sup>13</sup> Compare also the early work of DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995).

<sup>14</sup> TEUBNER, *supra* note 11; Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 *MICH. J. OF INT.L.* 999 (2004); Joshua Cohen & Charles F Sabel, *Global Democracy?*, 37 *INTERNATIONAL LAW AND POLITICS* 763 (2006).

<sup>15</sup> KINGSBURY *et. al.*, *supra* note 11; Kenneth Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance. Overcoming the Orchestration Deficit*, 42 *VAND. J. TRANSNAT'L L.* (2008);

capitalism' approach by David Levi-Faur, Jacint Jordana and John Braithwaite aims to draw a more nuanced and comprehensive picture of the various contributions by public and private actors.<sup>16</sup> For various reasons, this approach could also prove fruitful for a legal perspective on transnational governance. If compared to some of the 'grand theories' of the social sciences, its conceptual frame seems to be well suited for empirical research.<sup>17</sup> Still, it extends beyond the narrow focus of a strong methodological individualism represented, for example, by rational choice, and has relevant normative implications: John Braithwaite, who identifies himself as a "civic republican," stresses the importance of moral attitudes.<sup>18</sup> These attitudes are socially constructed, as they are based in collective experiences, and are shaped by public learning, where they mutually influence each other. Therefore, in his analysis of regulatory capitalism, the responses and contributions of public, corporate and civil society actors to regulation are not regarded as independent and evenly distributed across time, but they are structured by collective patterns and dynamics.<sup>19</sup> In more or less regular cycles of co-evolution, government regulation is confirmed or challenged by societal responses, which follow, evade or subvert imposed rules. The challenges sometimes take the form of vicious circles, as social dilemmas may eventually force even generally good-natured individuals to follow a deviant path.<sup>20</sup>

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Kenneth Abbott & Duncan Snidal, *International Regulation without International Government. Improving IO Performance through Orchestration*, TRANSSTATE WORKING PAPERS. NO 127 (2009); DOREEN MCBARNET et. al., *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* (2007). For regulatory discourse, see Paul Schiff Berman, *Dialectical Regulation, Territoriality, and Pluralism*, 38 CONN. L. REV. 929 (2006).

<sup>16</sup> Compare, for example, DAVID BRAITHWAITE et. al., *Can Regulation and Governance Make a Difference?*, 1 Regulation & Governance (2007).

<sup>17</sup> The impossibility of empirical research from a social systems theory perspective is even acknowledged by John Paterson & Gunther Teubner, *Changing Maps: Empirical Legal Autopoiesis*, in THEORY AND METHOD IN SOCIO-LEGAL RESEARCH 215-237 (Reza Banakar & Max Travers eds., 2005).

<sup>18</sup> BRAITHWAITE, *supra* note 4, at 197, citing PHILIP PETTIT, *REPUBLICANISM* (Clarendon Press. 1997).

<sup>19</sup> See e.g. his analysis of cycles of "boom, bust and regulation," BRAITHWAITE, *supra* note 4, at 33.

<sup>20</sup> With regard to white-collar criminality, especially in tax planning, see Braithwaite, *supra* note 4, at 48; see also DAVID BRAITHWAITE, *MARKETS IN VICE, MARKETS IN VIRTUE* 17 (2005). For an excellent discussion of such collective dynamics, see also the analysis of the "sub-prime" crisis and similar financial crises, GEORGE AKERLOF & ROBERT SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY AND WHY IT MATTERS FOR GLOBAL CAPITALISM* 26-40 (2009).

However, collective dynamics, even if messy and difficult to predict, are not necessarily unfavorable for regulatory goals: in some cases, the vicious circle may flip into a virtuous circle, and collective action problems can be overcome. Braithwaite argues that regulators should use strategies to initiate and reinforce these favorable dynamics by actively “flipping markets in vice into markets in virtue.”<sup>21</sup>

Despite great efforts in the recent literature on regulation and governance, the description of these dynamics and interactions is still more of a research program, than an elaborate body of work. Most of the existing studies, on how private governance mechanisms are embedded in a regulatory frame, concern prominent initiatives. There is, for example, literature about the embeddedness of CSR in the UN-Global Compact,<sup>22</sup> or on the participation of civil society in sustainability initiatives such as the Forest Stewardship Council. Moreover, initiatives of industry associations are in the focus of attention, but often these associations have more to do with public relations campaigns than with actual problem solving at the operational level of the firm. On the other hand, there is still not much work on corporate standards in the “private sphere” of the corporate group or the supply chain, which have a low degree of institutionalization and visibility, even if they are of great concern for certain public policy issues.

However, as a precondition for a “better regulation” of transnational public policy issues, it is essential to understand the interrelations of government policies and the operational standards of transnational corporations. In other words, understanding the institutional context of governance seems to be a necessary precondition for deliberately developing strategies to indirectly influence, supervise and orchestrate transnational norm creation. While the issue of interactions between public regulators, corporate experts and civil society stakeholders can be considered as basic research, it may also help to address the following questions of legal policy:

- Can corporate standards help to protect the environment or human health?
- What typical problems do arise from such standards in terms of effectiveness and legitimacy?
- What institutional context could help to resolve these issues?

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<sup>21</sup> BRAITHWAITE, *supra* note 4, at 50; BRAITHWAITE, *supra* note 20.

<sup>22</sup> See particularly the so-called ‘Ruggie-Framework,’ John G. Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, 3 INNOVATIONS (2008). For a critical account of the notion of *embeddedness* in this context, cf. Claire Methven O’Brian, *The UN Special Representative on Business and Human Rights: Re-embedding or Dis-embedding Transnational Markets*, in KARL POLANYI, *GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* 323 (Christian Joerges & Josef Falke eds., 2011).

- What possibilities do remain for public regulators to influence corporate rulemaking?

The paper seeks to address these questions in the specific case of transnational chemical risk management. It is divided into three sections: the next section (B) introduces the management of chemical risk as a global governance problem. The third section (C) analyses the different roles that private and public actors take in the policy cycle, which leads to the implementation of chemical policies on the transnational level. The fourth section (D) evaluates the mechanisms of governance and concludes with proposals for reform. In this final section, the interplay between the public, business and civil society actors is analyzed in terms of the institutionalization of norms. It is shown how the state can further the legitimacy and effectiveness of transnational governance by regulating market access, establishing access to information and strengthening professional standards.

## **B. Management of Chemical Risk as a Global Governance Problem**

The risk of chemical substances to human health and the environment is one of the most pressing problems in environmental policy. There are at least four major issues in the field of chemical risk management, which have been addressed in the last 40 years:

- Chemical plant safety;
- Particularly harmful and persistent substances;
- Knowledge deficits concerning chemicals and their uses;
- Toxic waste consumer products in developing countries;

In the 1970s and 1980s several accidents in chemical plants raised public awareness for chemical risk. Three brief examples may recall the relevance of chemical plant safety. In 1976, relatively large quantities of the highly toxic dioxin TCDD were released from a chemical plant near Milan in Italy and contaminated neighborhood communities, especially the town of Seveso. In 1984, about 40 tons of methyl isocyanate gas leaked from a pesticide plant at Bhopal in India, which led to the immediate death of more than 2000 people and many more in the aftermath. Hundreds of thousands were directly exposed to the chemical. In 1986, near Basel in Switzerland, there was a fire at Sandoz' agrochemical storehouse, which resulted in massive mortality of fish in the river Rhine.

These accidents brought about the regulation of the safety of chemical plants. Examples are the EU Seveso-Directive 82/501/EEC and the US Emergency Planning and Community-

Right-To-Know Act, commonly known as SARA Title III.<sup>23</sup> While these responses were national or regional in character, it was largely acknowledged that chemical plant safety is a transnational issue. From a formal corporate law perspective, offshore subsidiaries often operate their chemical plants as legally independent corporations. Still, parent companies like the Union Carbide Corporation in the case of the Bhopal catastrophe, or Hoffmann-LaRoche, as in the case of Seveso, are held morally and sometimes even legally responsible for the 'exportation of risk' to developing countries.<sup>24</sup>

In the late 1980s and 1990s, the problem of persistent organic pollutants as well as substances that deplete the ozone layer emerged on the international political agenda. Several chemical substances, such as CFCs and HCFCs had been shown to play a role in the depletion of the ozone layer. They have been in use for different industrial and consumer applications, *e.g.* as refrigerants, solvents, blowing agents for spraying cans or for fire extinguishers. In 1987, the Montreal Protocol was signed, which phases out those and other substances, which cause ozone depletion.

Persistent organic pollutants (POPs) are organic chemicals that are resistant to environmental degradation. Therefore, they are distributed globally through the atmosphere and the oceans, bioaccumulate in organic tissue of living organisms and concentrate in the food chain. Even in very low levels of concentration, many POPs can have significant detrimental effects on human health and therefore pose a risk, which is "considered unmanageable."<sup>25</sup> POPs include pesticides such as Lindan, DDT or PCBs, which were used in transformers, or polybrominated biphenyls (PBBs), used as flame retardants. In 2001, the Stockholm Convention was signed, which restricts or bans twelve of the most problematic POPs.<sup>26</sup> Both POPs and substances that deplete the ozone-layer are examples of the global dimension of chemical risk regulation. Even if the production of POPs or CFCs is restricted to a few jurisdictions, their effects on eco-systems and climate change will be global.

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<sup>23</sup> Emergency Planning and Community Right-To-Know Act of 1986, 42 USC §§ 11001-11050 (1988).

<sup>24</sup> DEENA MURPHY MEDLEY, *Exportation of Risk: The Case of Bhopal*, available at: [www.onlineethics.org/Resources/Cases/Bhopal.aspx](http://www.onlineethics.org/Resources/Cases/Bhopal.aspx) (last accessed: 24 April 2012); Andrew Natale, *Expansion of Parent Corporate Shareholder Liability Through the Good Samaritan Doctrine: A Parent Corporation's Duty to Provide a Safe Workplace for Employees of its Subsidiary*, 57 CIN. L. REV. 717(1988).

<sup>25</sup> Romeo F. Quijano, *Elements of the Precautionary Principle*, in PRECAUTION, ENVIRONMENTAL SCIENCE, AND PREVENTIVE PUBLIC POLICY 21, at 24 (Joel A. Tickner ed. 2003).

<sup>26</sup> Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532, available at: <http://chm.pops.int/Convention/tabid/54/Default.aspx> (last accessed: 24 April 2012).

Another prominent issue in chemicals regulation turned out to be knowledge deficits about the hazards and paths of exposure of substances. In 1997, three-quarters of all high-volume chemicals in commercial use in the USA were lacking basic toxicity testing results according to the public records.<sup>27</sup> It was therefore unclear whether these commonly used chemicals posed a risk to human health and the environment or not. In Europe there was a similar situation, which eventually led to a thorough reform of EU chemicals law in 2006.

Apart from information about the intrinsic hazards of chemicals, such as its toxicity, a risk assessment also requires data about the exposure to humans and the environment. Often, there is a lack of information concerning the use of substances, releases to the environment, disposal or other data, which is necessary to estimate the risk. This kind of information is usually not available to public authorities, and in many cases, is subject to commercial and industrial confidentiality.

Toxic or harmful substances are also used for consumer products, electronic office equipment or consumer devices, for example. This may not pose any serious problems, as long as the products are handled properly and disposed of adequately after use. However, in countries where there are no adequate waste management facilities, these products cause considerable environmental degradation.<sup>28</sup> To tackle the problem at source, it has been demanded that certain toxic substances in consumer products should be phased out or replaced by substitutes. Both the assessment of risk and the development of standards that reduce risk without disproportionately hampering trade and innovation require detailed technological knowledge. Therefore, it is necessary to integrate the practical experience of private actors into the regulation process of knowledge-intensive risk technologies such as the chemical industry.

### C. Roles of Public and Private Actors in the Policy Cycle

The above described problems of chemical risks led to partly subsequent, and partly overlapping waves of regulation. Each of the waves follows a policy cycle with phases of scandalization or problem definition, policy formulation, adoption, implementation and

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<sup>27</sup> ENVIRONMENTAL DEFENSE FUND, TOXIC IGNORANCE. THE CONTINUING ABSENCE OF BASIC HEALTH TESTING FOR TOP-SELLING CHEMICALS IN THE UNITED STATES (1997). The toxicity of a substance is usually tested with animal tests: the common standard of the LD50 stands for the dose of a chemical, of which 50% of a normal population of rats die.

<sup>28</sup> Olaf Dilling, *Risky Uses for Safe Technology: Towards a Legal Reconstruction of the User Perspective*, in USE OF SCIENCE AND TECHNOLOGY IN BUSINESS: EXPLORING THE IMPACT OF USING ACTIVITY FOR SYSTEMS, ORGANIZATIONS, AND PEOPLE 75 (Håkan Håkansson et. al. eds., 2009).



evaluation. The different phases of the cycle often correspond with specific contributions of state and non-state actors to the transnational regulation of chemical risk. Regulatory functions, whether they are served by the state or non-state actors, can be subdivided into rule-making, rule-implementation and the development of (quasi-)constitutional meta-rules to enhance the legitimacy of regulation.<sup>29</sup>

The following paragraphs will analyze how the contributions of different actors during the various stages of the policy cycle relate to each other, which is comparable to arguments in a dialogue or mutual adaptations in a process of co-evolution. While the paper focuses on the more recent issues of knowledge deficits and toxic consumer waste, the issues of plant and workplace safety and substance restriction will also be addressed, where relevant.

### *1. Problem Definition by Transnational Civil Society*

In the initial phase of a policy-cycle, non-governmental organizations (NGOs) often direct attention to globalization-related problems and thereby create starting points for a public debate.<sup>30</sup> In the field of chemicals regulation many national, international and transnational initiatives were originally preceded by NGO-‘scandalization.’ While NGOs have no decision-making authority, they nonetheless play a prominent role in directing public attention to issues of toxic risk. In terms of political influence, this role should not be disregarded.

NGOs and other civil-society actors played a very important role in the early years of the environmental movement, when ecological issues were still not routinely considered in institutionalized politics. This concerned both chemical plant safety after the major accidents, as well as persistent pollutants like DDT. However, while solutions to known problems have often been successfully institutionalized in environmental law and policy, the critical potential of civil society to detect new problems has not been entirely absorbed. As has already been mentioned, the use of chemicals is specifically fraught with a lack of knowledge. In the late 1990s the keyword of ‘toxic ignorance’ was successfully introduced into the political debate by the U.S.-based NGO, the Environmental Defense

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<sup>29</sup> For the similar distinction between ‘Entscheidungskompetenz’ (decision-making), ‘Organisationsmacht’ (organizational power) and ‘Legitimationskompetenz’ (legitimacy of competence), see MARIANNE BEISHEIM *et. al.* eds., *WOZU STAAT? GOVERNANCE IN RÄUMEN BEGRENZTER UND KONSOLIDIRTER STAATLICHKEIT* (Why State? Governance in Spaces of Limited and Consolidated Statehood) 18-20 (2011).

<sup>30</sup> JENS BECKERT, *TRANSNATIONALE SOLIDARITÄT: CHANCEN UND GRENZEN* (Transnational Solidarity: Opportunities and Limits) 175 (2004); ROBERT COSTANZA *et. al.*, *EINFÜHRUNG IN DIE ÖKOLOGISCHE ÖKONOMIK* (Introduction to Ecological Economics) 229 (2001).

Fund. The discussion, which later contributed to the regulatory reform of EU chemicals law, dealt primarily with the lack of knowledge of toxic properties of most chemicals. As the use of chemicals extends well beyond the chemical sector, the debate was later extended from the inherent hazards of a substance (*e.g.* its toxicity) to the risk of the substance use. Often, the exact chemical composition of consumer goods was even unknown to the manufacturer. The nature and kind of chemical risk that consumers were exposed to was therefore unclear, as was the question of how waste products should be treated after disposal.

A prominent example for global problems caused by chemical substances in consumer products is the electronics sector. During the past decade, environmental concerns have increasingly been addressed with reference to the electronics and semiconductor industry.<sup>31</sup> While the IT industry used to be regarded as a model of post-industrial 'green' technology with minimal impact on the environment until well into the 1990s,<sup>32</sup> it has since then been targeted by NGO critics. Particularly due to reports of two small U.S.-American non-governmental organizations, the Basel Action Network (BAN) and the Silicon Valley Toxics Coalition, damages to health and environment caused by this economic sector attracted public attention.<sup>33</sup> In those reports, it was shown how waste electronic equipment was exported to China and disassembled in a rather primitive way with huge consequences for public health and the environment. For instance, it was shown that children living in areas with electronic waste dumps in the south of China had elevated blood levels of the heavy metal lead.<sup>34</sup> These reports created significant momentum for political action as well as for corporate initiatives.

## *II. Global Regulation of Chemicals by Governmental Actors*

### *1. International Law*

While world trade policy is dominated by the international governance regime of the WTO, most rules and decisions concerning the global environment are still made by

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<sup>31</sup> ELIZABETH GROSSMANN, *HIGH TECH TRASH. DIGITAL DEVICES, HIDDEN TOXICS, AND HUMAN HEALTH* (2006).

<sup>32</sup> ERIC WILLIAMS, *COMPUTERS AND THE ENVIRONMENT: UNDERSTANDING AND MANAGING THEIR IMPACTS 2* (2003).

<sup>33</sup> SACHS, *supra* note 12.

<sup>34</sup> XIA HUO *et. al.*, *Elevated Blood Lead Levels of Children in Guiyu, an Electronic Waste Recycling Town in China*, 115 *ENV'T'L HEALTH PERSP.* (2007).

governmental actors at the national or regional level. At the international level, the degree of institutionalization of environmental policy is still relatively low.<sup>35</sup> In this policy field, international institutions such as the UNEP have only acquired few decision-making powers. Problems, therefore, are addressed in a piecemeal manner by international treaties. Nevertheless, a number of international agreements dealing with various issues in the field of chemicals legislation have been concluded during the past three decades. These include the Montreal Protocol (signed in 1987) substantiating the Vienna Convention for the Protection of the Ozone Layer, the Basel Convention (1989), the Rotterdam Convention (1998) and the Stockholm Convention (2001).<sup>36</sup> International conventions prohibit a certain number of hazardous substances, particularly CFCs and HCFCs in the Montreal Protocol, and the 'dirty dozen' persistent organic pollutants in the Stockholm Convention. However, the vast majority of substances remain unregulated at the international level.

The Basel Convention, which regulates among other things the export of hazardous waste into developing countries, does not sufficiently address the problem of toxic waste consumer products. These products are often declared as used products for the second-hand market. Also, international law does address the export of chemicals to countries with limited capabilities to manage their hazards in the Rotterdam Convention. However, the prior informed consent procedure, which was established by this convention, does only apply to some of the most hazardous substances, mostly pesticides. In this respect, the role of the international community as decision-maker has so far been relatively minor.<sup>37</sup>

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<sup>35</sup> FRANK BIERMANN & UDO E. SIMONIS, *Institutionelle Reform der Weltumweltpolitik? Zur politischen Debatte um die Gründung einer "Weltumweltorganisation"* (Institutional reform of global environmental policy? On the political debate surrounding the establishment of a "World Environmental Organization"), 7 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN (2000).

<sup>36</sup> Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 26 I.L.M. 1529, available at: <http://untreaty.un.org/cod/avl/ha/vcpol/vcpol.html> (last accessed: 24 April 2012); Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 26 I.L.M. 1529, available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%201522/volume-1522-I-26369-English.pdf> (last accessed: 24 April 2012); Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal, 22 March 1989, 28 I.L.M. 649, available at: <http://www.basel.int/TheConvention/Overview/TextoftheConvention/tabid/1275/Default.aspx> (last accessed: 24 April 2012); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, 38 I.L.M. 1, available at: <http://www.pic.int/TheConvention/Overview/TextoftheConvention/tabid/1048/language/en-US/Default.aspx> (last accessed: 24 April 2012).

<sup>37</sup> Gerd Winter, *Dangerous Chemicals: A Global Problem on Its Way to Global Governance*, in UMWELTRECHT UND UMWELTWISSENSCHAFT - Festschrift für Eckard Rehlinger 819 (Martin Führ et al. eds., 2007).

## 2. Unilateral Regulation of Transnational Markets

The European Union determines the rules for consumer goods for a significant market. Many manufacturers based outside of Europe therefore aim at compliance with European product legislation. Thus, the regulation of global chemical risks by the European Union obtains considerable influence on transnational industrial standards. However, these effects mainly concern product standards and are less relevant in the case of the regulation of the safety of chemical plants. However, it is sometimes assumed that there may be indirect effects of regulation, which promote the use of Environmental Management Systems in transnational corporations.<sup>38</sup>

The REACH Regulation, which stands for the Registration, Evaluation, Authorization, and Restriction of Chemicals, resulted in a fundamental reform of EU chemicals legislation. REACH entered into force on 1 June 2007. It is particularly aimed at resolving the lack of knowledge with regard to the risks of substances. Characteristic of REACH is its strong focus on precaution and reversing the burden of proof. It places greater responsibility on industry for risk management and for the provision of information. Consequently, the registration of substances and collection of all necessary data by importers or manufacturers is a precondition for placing chemicals on the market, as specified in Article 5 of REACH ('no data, no market'). The REACH Regulation, therefore, not only affects European business, but also firms, which want to export their products to the EU. In the electronics industry, the European Union adopted a directive prohibiting the use of certain substances in electrical and electronic goods (RoHS). This affects heavy metals such as lead, mercury, cadmium, and brominated flame-retardants. Even though the Directive was initially adopted in the field of waste legislation and relates to the take-back obligations of the EU directive on waste electric and electronic equipment (WEEE), it also strongly affects chemicals legislation. The requirements of the RoHS Directive are binding for all electronic products, which are marketed in the EU, regardless of their origin.

The U.S.-American Clean Air Act is another striking example of the transnational impact of national regulation. The Clean Air Act established a labeling requirement for products (especially micro-chips) that were manufactured using CFCs.<sup>39</sup> This presented a significant stimulus for the substitution of substances, which threatened the ozone layer. In this

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<sup>38</sup> This is disputed, as the evidence for the improvement of environmental performance by firms using EMS, such as ISO 14000 is inconclusive; see Nicole Darnall & Stephen Sides, *Assessing the Performance of Voluntary Environmental Programs: Does Certification Matter?*, 36 THE POL'Y STUD. J. (2008).

<sup>39</sup> Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525 (2004).

context, it becomes apparent that in practice, the distinction between product and production risks is often blurred. The risk of these substances lies particularly in the fact that they are released during the production of microchips, although they may also be located as residues in the finished product. Even if, in this case, the risk is primarily related to production, the labeling requirement links it to the product.

Territorially defined governmental actors like the European Union or influential nation states can use their control over market access for products as a powerful lever for the regulation of transnational environmental risks. However, the impact of import control depends on regulatory strategies, which take advantage of transnational industrial standardization in the corporate sphere.

### *III. Private Standardization and Auditing*

When managing transnational environmental problems, companies and business associations play an important role in developing, spreading or implementing environmental standards. Under certain conditions, government regulation can take advantage of already existing compliance and monitoring schemes of the private sector for managing risks for public goods. The common use of uniform standards in transnational corporations and cross-border value chains can thereby boost already existing spill-over effects of national or European legislation to other jurisdictions.<sup>40</sup>

In this section, three different aspects of corporate risk management will be analyzed:

- Compliance control schemes,
- Corporate environmental standards,
- Public legitimacy and accountability.

#### *1. Corporate Compliance and Monitoring*

Even if legal compliance is often taken for granted, in complex regulatory environments, such as corporate environmental, health and safety-regulation, it is a demanding task. Therefore, a major part of corporate environmental standards and auditing schemes are devoted to regulatory compliance. According to the ISO 14000 standards, it is necessary to document all the applicable laws and regulations, which apply to the business activity of an ISO-certified corporation.

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<sup>40</sup> David Vogel, *Environmental Regulation and Economic Integration*, 3 J. INT. ECON. L. 265 (2000).

The implementation of the requirements that have been established in the RoHS Directive and the REACH Regulation can serve as an example for the involvement of corporate actors in transnational systems of compliance. As mentioned above, the prohibitions and obligations in chemicals legislation do not only have significant impact on European manufacturers but also on suppliers or producers outside the EU. However, since law enforcement and administrative infrastructure for European law is restricted to the territory of the EU member states, companies wanting to produce for the European market need to implement the requirements themselves.

To meet the legal requirements of the EU and other OECD countries, the industry developed some complex auditing standards and procedures. For compliance control, companies usually do not exclusively rely on random samples of the final product. Rather, compliance with the requirements must be ensured at all stages of the production. It has largely become the responsibility of the firm to find suitable organizational adjustments for enforcing legal requirements.

In the value chain, compliance with standards normally gets enforced through formal auditing procedures. The direct (or first tier) suppliers of product manufacturers commit themselves to both complying with the standards as well as to controlling their own (second tier) suppliers to ensure compliance with the standards. Extra-territorial effects of product regulation became particularly evident in the case of the RoHS Directive of the EU for the reduction of certain hazardous substances in electrical and electronic products.<sup>41</sup> Even though the RoHS Directive makes use of rather conventional command-and-control instruments such as prohibitions and threshold levels, the transnational nature of the production of electronic devices compels the manufacturers or importers to complex forms of co-operation. They also have to ensure the compliance of suppliers and contract manufacturers in the value chain. Accordingly, those who are responsible for the compliance of the end-product have to assume responsibility for the implementation of mandatory requirements in the value chain.

The RoHS Directive has therefore a strong influence on corporations outside the EU, which consequently have to substitute certain substances, such as lead, in their products. A survey of standards of the electronics industry has shown that the provisions of the RoHS Directive are regarded to be binding by both European and non-European producers of end-products and suppliers of parts.<sup>42</sup>

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<sup>41</sup> SACHS, *supra* note 12; Aaron Ezroj, *How the European Union's WEEE & RoHS Directives Can Help the United States Develop a Successful National E-Waste Strategy*, 28 VA. ENVTL L. J. 45 (2010); Tseming Yang & Robert V Percival, *The Emergence of Global Environmental Law*, 36 ECOLOGY L. Q. (2009).

<sup>42</sup> DILLING, *supra* note 12, at 89.

Moreover, the reform of European chemicals legislation with the REACH Regulation has led to a strong involvement of corporations in the testing and risk assessment of chemicals. This can be understood as a form of regulated self-regulation and often implies proactive forms of compliance.<sup>43</sup> Comparable to the RoHS Directive, the REACH Regulation has a considerable transnational impact. For example, U.S.-American chemical producers will test and register chemicals, which are intended to be exported to the EU.<sup>44</sup> Although only the importer of a substance has the formal legal obligation to register, due to economic reasons the tests are usually carried out by foreign producers according to EU standards. In any case, the EU importers are not able to meet the requirements without the assistance of foreign suppliers, so that these become virtually affected by the requirements, too.

In addition to the reinforcement of companies' responsibility in terms of risk management, the reform of chemicals legislation has also led to greater involvement of the users of chemicals. This happens mainly through duties to provide information in the supply chain according to Articles 31-34 REACH.<sup>45</sup> Manufacturers of consumer products can be "downstream users" of chemical substances. In this case, they are, according to Article 37 REACH, obliged to report to their supplier new uses they make of chemical substances. This is to ensure that suppliers of chemicals can make comprehensive risk assessments with due consideration of exposure resulting from specific substance use. If they do not wish to disclose such information, they can also take the responsibility to make their own risk assessments. It is expected that the duties to provide information in the supply chain will improve transparency of substance risks and will initiate the substitution of toxic substances. Due to the increase of chemical information requirements in production chains, it is expected that the pressure to substitute hazardous substances will grow.<sup>46</sup>

In the case of the U.S. Clean Air Act, many companies in the electronics industry started to ban the use of ozone-depleting substances by their foreign suppliers to avoid the

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<sup>43</sup> Martin Führ & Kilian Bizer, *REACH as a Paradigm Shift in Chemical Policy - Responsive Regulation and Behavioural Models*, J. CLEAN. PROD. 327 (2007).

<sup>44</sup> Frank Ackerman, Elizabeth Stanton & Rachel Massey, *European Chemical Policy and the United States: The Impacts of REACH*, GLOBAL DEVELOPMENT AND ENVIRONMENT INSTITUTE, (Working Paper No. 06-06) 8 (2006).

<sup>45</sup> FÜHR & BIZER, *supra* note 39. REACH also sets incentives to establish cooperative risk assessment, according to Article 29 REACH, the so-called Substance Information Exchange Forum (SIEF). In the meantime, more than 3000 SIEFs have been established; see the ECHA-website, available at: <http://echa.europa.eu/> (last accessed: 24 April 2012)

<sup>46</sup> SACHS, *supra* note 12.

compulsory labeling requirements. To the extent that manufacturing conditions are specifically associated with the product, whatever form this might take, government regulation may have an indirect impact on production-related standards.

## 2. CSR: Corporate Rule-Making in the Public Interest

The role of companies in environmental governance is not restricted to the implementation of definite legal obligations and compliance control, but involves the making of rules, which are required by stakeholder demands, or are in the public interest. In addition to their role in terms of indirect regulation, private actors can take over self-regulatory functions by establishing and enforcing their own requirements within a company, corporate group or value chain. Often, these activities are subsumed as CSR. The distinction of such CSR-standards from standards which merely ensure compliance with legal obligations can pose considerable problems. In the field of EU chemicals and waste law, the difference between the two types of standards is somewhat blurred by general legal responsibilities to avoid the use of harmful substances in consumer goods. Many corporate standards, however, include prohibitions or disclosure requirements for substances, which are as yet not regulated by formal environmental law. In these cases, it is safe to say that companies take a proactive role with regard to environmental protection.<sup>47</sup>

Most often, such 'green corporate standards' that go beyond legal obligations are used by the leading manufacturing companies. These companies often have a greater interest in scandal-free business than in a short-term cost reduction. They want to avoid the risk of falling short of the usual expectations of process safety and environmental protection.<sup>48</sup> Use and monitoring of these norms are not restricted to the internal corporate sphere, but implemented throughout the supply chain. Under the threat of liability and reputational damage, large firms tend to regulate risks up and downstream the supply chain, so as not to fall victim of the irresponsibility of their smaller business partners.<sup>49</sup>

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<sup>47</sup> Jürg Schneider, *Globale öffentliche Güter und das internationale Umweltregime* (Global Public Goods and the International Environmental regime), *GLOBALE ÖFFENTLICHE GÜTER* 25 (2005).

<sup>48</sup> Martin Herberg, *Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making*, in *RESPONSIBLE BUSINESS. SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS* 22 (Olaf Dilling et. al. eds., 2008).

<sup>49</sup> BRAITHWAITE, *supra* note 4; OLAF DILLING, *GRENZÜBERSCHREITENDE PRODUKTVERANTWORTUNG: ZUM PROZEDURALEN RECHT ZWISCHENBETRIEBLICHER RISIKOBEWÄLTIGUNG* (Transboundary Producer Responsibility: Towards a Procedural Law of Inter-Firm Risk Management, 2010).



Mainly in response to the Bhopal disaster, corporate standards and environmental management systems have evolved to ensure process safety in chemical plants.<sup>50</sup> Four years after the catastrophe in Bhopal, the Responsible Care (RC) program was launched by North American industry associations.<sup>51</sup> RC has been considered a “leading example” or “emblematic policy” of CSR and has often been studied by social scientists and legal scholars.<sup>52</sup> It is also discussed as a typical case of environmental management systems, which “set forth internal rules, create organizational structures, and direct resources [...] to routinize behavior in order to help satisfy their organizations’ environmental goals.”<sup>53</sup> RC is organized at the level of national or regional associations of the chemical industry. Currently, most national RC-initiatives include eight to twelve guiding principles, which make general commitments about obligations to the local community and wider public, and issue specific codes of management practices. It is expected that norms and values of RC that penetrate into the organizational structures of firms could change their preferences and routines.

A critical appraisal of RC shows that it focuses on organizational means rather than environmental results, that the assessment of compliance does not necessarily involve third-party verification, and that there are no formal sanctions—apart from rare occasions of exclusion from the program.<sup>54</sup> These features and an evaluation of its effectiveness have resulted in criticism of the Responsible Care program. According to some of the leading chemical firms, in the first years of its existence the program has had little effect and invited free-riding. Empirical studies about the performance of Responsible Care showed “at best mixed results.”<sup>55</sup>

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<sup>50</sup> HERBERG, *supra* note 48, at 19.

<sup>51</sup> See BRAITHWAITE, *supra* note 4, at 22. About the development of Responsible Care, see Bradley Karkkainen, *Information as Environmental Regulation*, 89 GEO. L. J. 257, 305 (2001).

<sup>52</sup> E.g. Cary Coglianese & Jennifer Nash, *Environmental Management Systems and the New Policy Agenda*, in REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS? 1 (Cary Coglianese & Jennifer Nash eds., 2001); Nicolas Berland & Marie-Claire Loison, *Fabricating management practices: “Responsible Care” and corporate social responsibility*, 3 SOC’Y. AND BUS. REV. 41 (2008).

<sup>53</sup> COGLIANESE & NASH, *supra* note 48, at 2.

<sup>54</sup> BERLAND & LOISON, *supra* note 48. However, there seem to have been some improvements in more recent amendments of the program concerning performance measures and third-party certification.

<sup>55</sup> NEIL GUNNINGHAM & DARREN SINCLAIR, *Organizational Trust and the Limits of Management-based Regulation*, 43 L. AND SOC’Y. REV. 865 (2009), citing Howard.

This diagnosis feeds into a more general critique of management-based standards and auditing schemes. Critics argue that a strong focus on environmental management systems neglects that an environmental management system is just a tool and that improvements in performance rather depend on strong commitment to environmental goals.<sup>56</sup> According to Michael Power, bureaucratic organizational routines established by EMS may even lead to a lack of flexibility and distract attention from unforeseen risks.<sup>57</sup>

Apart from Responsible Care at the level of industry association, there are also risk management practices to improve chemical plant safety at the level of the corporation or corporate group. Martin Herberg gives a detailed empirical account of the hazard management practices of German chemical firms at the plants of offshore subsidiaries. To ensure the smooth operation of production facilities, corporations have developed internal audit procedures that are based on voluntary codes of conduct.<sup>58</sup> Thereby, particular attention is paid to facilities situated in foreign locations in emerging markets and developing countries. Objectives and principles stated in the codes of conduct are enforced by either allocating competences within organizations or by external audit procedures. Usually a specialized department of the company, such as the environmental or toxicology department or the safety and environmental protection officer, is given the task of monitoring compliance with the code. This specialized department has cross-cutting competences and is consequently involved in all areas of the organization. In fact, there are often possibilities to intervene into the operation of a chemical plant at a foreign location, even if the basic legal independence of the company subsidiary has to be formally respected.<sup>59</sup>

In chemical corporations, the mentioned organizational units are responsible to scrutinize all the environmentally relevant institutions and processes. This is to be done in regularly recurring intervals of about one to two years and in the context of formalized audits, going well beyond the traditional liability requirements, which have been judicially developed in OECD countries.<sup>60</sup> In the course of this review, auditors *in situ* are exercising functions that

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<sup>56</sup> COGLIANESE & NASH, *supra* note 48.

<sup>57</sup> MICHAEL POWER, *THE AUDIT SOCIETY. RITUALS OF VERIFICATION* (1997). See also below, in section D(I), the fifth paragraph on the neo-institutionalist critique.

<sup>58</sup> MARTIN HERBERG, *GLOBALISIERUNG UND PRIVATE SELBSTREGULIERUNG* (Globalization and the Private Self, 2007).

<sup>59</sup> HERBERG, *supra* note 48, at 27.

<sup>60</sup> *Id.* at 27.

almost require criminological sensitivity.<sup>61</sup> The main aim lies in the prevention of accidents and detrimental environmental or health effects. At the operational core, these “paralegal regimes” consist of technical norms that have proven to be successful and were incorporated into the organization’s current set of standards.<sup>62</sup> The respective standards include, for instance, occupational safety, the prevention of air pollution, the treatment of sewage and the proper handling of waste.<sup>63</sup> Hence, the auditors both contribute to maximizing corporate profits and improving the environmental conditions of stakeholders, such as immediate residents or the general public at large. The standard setting by private actors, however, is not only limited to the internal structures of organizations but also plays a role in corporate networks. In this respect, standards are often initially tested within individual lead firms before being extended to inter-firm relations and finally, in some cases, even enforced at the level of industry associations.<sup>64</sup>

Unlike the chemical industry, firms in the electronics industry are highly specialized on a few steps in the value-chain. This means that most production steps in the manufacture of electronic products are not enacted by brand manufacturers themselves, such as Apple or IBM, but are the responsibility of the suppliers, such as Intel or Flextronics. Sometimes corporations, which hold the brand name of a consumer product and organize the production and marketing process, do not produce the products themselves, rather they outsource all production steps and even the assembly of the parts.<sup>65</sup> These forms of virtual production require strong institutions of networked organization. Therefore, the enforcement of uniform environmental production standards calls for the establishment of standards and monitoring systems on the inter-firm level.

Consequently, many transnational norms are not merely applied as corporate standards within a single organization; in fact, companies in production networks mutually expect compliance with certain standards. In the electronics industry, corporate standards concerning the use of hazardous chemicals have only recently been generally established.

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<sup>61</sup> HERBERG, *supra* note 58, at 134.

<sup>62</sup> *Id.* at 175.

<sup>63</sup> HERBERG, *supra* note 48.

<sup>64</sup> RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 3 (Olaf Dilling, Martin Herberg & Gerd Winter eds., 2008).

<sup>65</sup> Confusingly they are sometimes called Original Equipment Manufacturer (OEM), even if they no longer “originally manufacture.”

These standards are compiled and published in 'Controlled Substance Lists' or 'Green Procurement Guidelines.' Manufacturers use these standards to communicate current requirements on the use and labeling of chemicals in products, and in some cases in production processes, to business partners and other affected parties of the value chain. The corresponding lists of prohibited substances are often designated as the standard of a single company or industry group and get applied within the organization. Nonetheless, they are addressed to all actors in the value chain. During the first period after the implementation of the RoHS directive, there have been corporate requirements for the disclosure of the use of certain substances. Later, several manufacturers started to prohibit the use of substances, which are not legally restricted yet, but are likely to come under regulatory control. A striking example is a number of mobile phone manufacturers, which prohibit that their suppliers use certain plasticizers (phthalates), several or all brominated flame retardants and PVC, as well as the metals beryllium and antimony.<sup>66</sup>

To reduce the confusing variety of corporate standards, trade associations try to unify or at least harmonize the diverse requirements of individual organizations. Therefore, comprehensive standards on the level of the industry sector are established. In this context, the automotive industry developed a standard in co-operation with several trade associations, which aims, as far as possible, to replace the huge variety of company standards.<sup>67</sup> Nevertheless, the goal of unification has not been completely achieved. Instead, the business standards used in production networks remain a source of diversity. This is partly due to the fact that with regard to more far-reaching CSR-requirements, the association standards fall short of the standards of many individual companies.

So far, association standards basically give a synopsis of legal requirements. They barely come to binding decisions with regard to environmental aspects, even if they sometimes require disclosure of certain substances, which are not yet regulated. Consequently, the fragmentation of private environmental standards cannot get satisfactorily resolved at association level, which presents a serious restriction to transparent and comprehensive forms of industrial self-regulation.

In general, corporate standards show mixed results regarding environmental performance.<sup>68</sup> While substantial efforts have been made to reduce toxic risks beyond

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<sup>66</sup> For details, see DILLING, *supra* note 45.

<sup>67</sup> Alexandra Lindenthal, *Transnational Management of Hazardous Chemicals by Interfirm Cooperation and Associations*, in RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 123 (Olaf Dilling et. al. eds., 2008)..

<sup>68</sup> For a more general account of CSR with similarly mixed results, see KURT A. STRASSER, MYTHS AND REALITIES OF BUSINESS ENVIRONMENTALISM: GOOD WORKS, GOOD BUSINESS, OR GREENWASH? (2011).

legal compliance by some of the leading corporations, the main middle range of standards is in compliance with the strictest public regulations. Yet there are also several standards which do not explicitly comply with every regulation of relevant jurisdictions.

### 3. *Corporate Legitimacy and Accountability*

When companies develop standards that go well beyond the legal requirements for protecting certain public goods, the legitimacy for their decision-making authority can be called into question. They may then be held accountable by their shareholders or business partners. Even more, general stakeholders may sometimes consider themselves as negatively affected, if conflicting public goods are at stake. For example, the voluntary phasing-out of brominated flame retardants for the protection of human health has raised concerns about the fire safety of electronic devices.

Unlike political legislation, corporate standards cannot rely on the political will of a *demos* to resolve such conflicts, but they have to draw on other modes of legitimacy. Indeed, transnational governance seems to rely on a variety of different sources of legitimacy, which are often conflicting.<sup>69</sup> From a certain economic perspective, especially dominant in the Chicago School of Economics, the legitimacy within the economic sphere is based exclusively on competition and exchange on the *market*. In particular, a company's performance is legitimate, if it meets the demands of the financial market and is in the interest of its shareholders.<sup>70</sup> Usually, it would be understood that their interest is directed at increasing the profits of the firm.<sup>71</sup> Therefore, at least beyond legal compliance, a legitimate corporate standard should not take opposing interests of third parties or public

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<sup>69</sup> E.g. distinguishing between pragmatic, normative and cognitive legitimacy, see Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOV'E. (2008). See also KLAUS DINGWERTH, *THE NEW TRANSNATIONALISM: TRANSNATIONAL GOVERNANCE AND DEMOCRATIC LEGITIMACY* (2007).

<sup>70</sup> ALFRED RAPPAPORT, *CREATING SHAREHOLDER VALUE: THE NEW STANDARD FOR BUSINESS PERFORMANCE* (1986).

<sup>71</sup> Compare Milton Friedman's famous statement that "the social responsibility of the firm is to increase its profits," in Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, NEW YORK TIMES MAGAZINE (1970). Similarly, in contract law, this perspective implies that inter-firm standards must be covered by the will of the parties and at the level of the industry association, the decisions need to represent the interests of individual members. For a critical perspective on both the shareholder approach and corporate social responsibility, see e.g. Beate Sjøfjell, *Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers*, 40 GEO. WASH. INT'L L. REV. 981 (2010).

welfare into account, even if the interests between share- and stakeholders may eventually coincide.<sup>72</sup>

In the chemicals sector, there are three main economic arguments for the need to check rulemaking based on market legitimacy by other elements of legitimacy or public accountability:

- Market power of globally operating corporations in the highly concentrated chemical sector is in fact hardly checked by competition.
- Informed choice is challenged by knowledge deficits on toxic effects and industrial uses of chemicals.
- For many of the often highly persistent chemical substances there are virtually inevitable externalities.

Therefore, market competition will often not be considered as a sufficient base of legitimacy for corporate conduct. To tackle the problem of knowledge deficits, technical standards also have to be based on forms of 'technocratic' or *cognitive legitimacy*. Accordingly, the standardization process relies on the expertise of certain professionals, who do not primarily care about economic consequences, but feel responsible that 'things work out well'.<sup>73</sup> For example, engineers usually care about the fact that a pipe in a chemical plant is strong enough and does not break under pressure, even if using thinner pipes could lead to a short-term cost reduction. While the notion of technocratic legitimacy normally has a negative connotation, it does make sense in certain circumstances and institutional settings to let 'the experts' decide.

Finally, standards used voluntarily in the corporate sphere may also draw on *public legitimacy* by stakeholder involvement. This can be the case, when e.g. workers have a say in standardization of occupational safety measures or when neighbors are consulted for the determination of emission standards. Of course, these three different models are ideal-typical. In real organizations, they are mixed in complex arrangements and do often

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<sup>72</sup> It should be noted that not only from a strict economic point of view, but also in the practice of certain business lawyers, legal compliance is primarily considered in terms of the cost of non-compliance; see generally Christine Parker, Robert Eli Rosen & Vibeke Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation*, 22 GEO. J. LEGAL ETHICS 201 (2009).

<sup>73</sup> Cf. HERBERG, *supra* note 58; Martin Herberg, *Bringing Professions Back in: A Fresh Look at the Dynamics of Institution-Building in (World) Society*, KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS (Christian Joerges & Josef Falke eds., 2011).

overlap or clash in questions of practical decision-making.<sup>74</sup> These conflicting modes of legitimacy result in a somewhat confused self-image of corporate regulators. Corporate standards often include a general mission statement or justify specific requirements by giving a reason for including it.<sup>75</sup> The 'Controlled Substance Lists' of the European or North-American electronics sectors often resemble formal laws in terms of their structure and contents, being divided into *purpose*, *scope*, *definition*, etc. In the first section they usually give the purpose of the standard, which can vary considerably from corporation to corporation. In many documents, this purpose seems to be chosen rather arbitrarily. Either legal compliance or compliance with customer requirements or protection of the environment and workplace security or a combination of these different objectives, are given as purposes. Many of the standards, which make no clear commitment to corporate environmental and social responsibility, have a more technical appearance as well.

This shows a tension between moral and more technical or even opportunistic argumentations. In the often rather ornate introductions of some of the Japanese 'Green Procurement Guidelines', deep concern for ecology and a healthy environment is expressed and declared to be an integral part of the organizational culture. However, in terms of the substantial effort to restrict toxic substances, Japanese standards are not superior to European and North American standards. Several of the standards, which promise efforts to go beyond legal compliance, actually do not keep this promise. However, there are also examples of standards, which went beyond compliance without explicitly pointing it out. This confusion seems to reflect the widespread public criticism of a purely profit-oriented approach to entrepreneurial activity, which is not sufficiently limited by social and environmental restrictions. Companies risk their reputation, if they fail to comply with certain universal standards. A well-known example is the use of exploitative child labor by overseas suppliers. However, the same also applies in the case of toxic management, where corporations are under the obligation not to produce products, which put the health of consumers at risk.

However, the tension between different modes of legitimacy can also be overcome. Some corporate standards also mention the 'anticipation of future laws' as a purpose.<sup>76</sup> This opens a way to combine economic accountability to shareholders and the interest of the general public in environmental protection beyond strict legal compliance. By taking the

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<sup>74</sup> See Julia Black, using a slightly different typology, Julia Black, *Legitimacy and the Competition for Regulatory Share*, LSE LAW, SOCIETY AND ECONOMY WORKING PAPERS, No. 14 (2009).

<sup>75</sup> For a detailed analysis of the code of conduct "*Unser Grundgesetz*" by the chemical company BASF, see HERBERG, *supra* note 58, at 78, and particularly at 86.

<sup>76</sup> Dilling, *supra* note 49, at 54.

lead in standard-setting for their industry sector, early movers may obtain a competitive edge later on in the regulatory cycle. Interestingly, none of the analyzed standards mention prevention of litigation risk as a reason for the prohibition of substances—a fact, which may reflect difficulties to establish clear evidence in most jurisdictions and for most substances with suspected toxic effects.<sup>77</sup> Since a transnational discussion of problematic aspects of economic globalization started in the 1990s, transnational corporations have come under close scrutiny from an emerging global public. Problems do not only result from free trade and regulatory loopholes on globalized markets, but also from the failure of the State to effectively control evolving technological risks in the domestic sphere.<sup>78</sup> Therefore, it does not suffice that companies comply with applicable laws; they also have to account for their activities' compatibility with public welfare. This has led to new forms of interaction between civil society actors and business organizations.

Companies can promote legitimacy by self-imposed environmental standards vis-à-vis stakeholders or the general public. However, their successful implementation through specific business norms and practices at the shop-level will decide whether the company's claim to legitimacy can be regarded as authentic. Otherwise, the standard or corporate code of conduct has to be considered as a public relations strategy, without effectively changing corporate practice. By sociologists, this is characterized as a form of organizational hypocrisy and may be dismissed by environmental organizations as a 'greenwashing'-deal.<sup>79</sup> To achieve an adequate level of commitment, the codes of conduct need to imply substantive criteria for decision-making, which can then be claimed in specific cases.<sup>80</sup> In this respect, legitimacy can only be achieved successfully, if the company makes binding decisions to resolve a clash of conflicting values. Of course, these decisions are legally binding only for members of the organization.

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<sup>77</sup> For a very instructive account of the corresponding information deficits in U.S. chemicals law and toxic tort litigation, see Wendy Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, in 53 DUKE L. J. 1619 (2004).

<sup>78</sup> At the European level, this development is reflected in the debate about "new modes of governance," GRÁINNE DE BÚRCA & JOANNE SCOTT, *LAW AND NEW GOVERNANCE IN THE EU AND THE US* (2006).

<sup>79</sup> Veronika Tacke, *Beobachtungen der Wirtschaftsorganisation. Eine systemtheoretische Rekonstruktion institutionenökonomischer und neo-institutionalistischer Argumente in der Organisationsforschung* (Observations of economic organization. A system-theoretical reconstruction of institutional economics and neo-institutionalist arguments in organizational research), in *INSTITUTIONENÖKONOMIE UND NEUER INSTITUTIONALISMUS* (Institutions, Economy and New Institutionalism) (Thomas Edeling et. al. eds., 1999).

<sup>80</sup> HERBERG, *supra* note 54.



In contrast to such organizational standards whose scope is clearly limited to decision-making *within* a company or a business group, there are also standards that apply *between* or *above* firms, based on business contracts or business associations. Standards used in supply chains or production networks are usually based on contractual arrangements. These standards often have an even greater impact than organizational standards, and usually extend both across national borders and borders of industry sectors. The fact that they apply to an open target group reinforces their public character, and also the need for a formal and explicit codification, which can be understood and applied in different organizational contexts. Contractual inter-firm standards in complex production networks cannot be individually negotiated and adapted in arm's length market transactions. This leads to increased demands on their legitimacy; important long-term suppliers are therefore usually consulted, when developing a new standard.<sup>81</sup> Other companies often have no choice as to conform to the standards set by the manufacturer of the end-product. Apart from the legitimacy issue, this can make it difficult for suppliers to keep up with the variety of dynamically evolving standards used by their customers.

A new generation of hybrid rule making solves these problems by bringing standardization to the level of the industry sector based on 'antagonistic co-operation' between civil society organizations and business.<sup>82</sup> Typically, environmental NGOs and trade unions form strategic alliances with transnational corporate actors to develop standards for sustainable business. A well-researched example is the standardization of sustainable forestry, particularly through the Forest Stewardship Council (FSC). It is claimed that standards developed in such institutional settings prove more legitimate than traditional private-sector association standards.<sup>83</sup> Similar standards, which sometimes also include ecological aspects, can be found in the field of fair trade.

This development also exemplifies the changing role of environmental NGOs during the past 20 years. Initially the main concern was to draw attention to existing problems and to exert political pressure. Later, many NGOs became increasingly involved in the development and monitoring of standards, which are applied in transnational business.

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<sup>81</sup> OLAF DILLING, GRENZÜBERSCHREITENDE PRODUKTVERANTWORTUNG: ZUM PROZEDURALEN RECHT ZWISCHENBETRIEBLICHER RISIKOBEWÄLTIGUNG (Transboundary Producer Responsibility: Towards a Procedural Law of Inter-Firm Risk Management, 2010).

<sup>82</sup> The concept of antagonistic cooperation has originally been used to describe partnerships between public and civil society actors in development policy. I owe to Martin Herberg the idea to use it for NGO-business-partnerships.

<sup>83</sup> Klaus Dingwerth, *North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council*, 14 GLOBAL GOVERNANCE (2008).

Therefore, NGOs actively help to shape a normative framework for global markets. However in the field of chemicals policy, such direct cooperation between civil society and business is not yet as advanced as in other fields. The Responsible Care (RC) initiative of various national associations of the chemical industry does not involve civil society actors in its rule-making processes. Most participating chemical firms and associations are rather reluctant to adopt third party certification. Even though U.S. firms participating in RC must adopt “a policy of openness” to satisfy information demands of neighbor communities, they still decide on which information to hold back from disclosure.<sup>84</sup>

However, an exceptionally advanced example of multi-stakeholder rule-making can be found in the product standards of the Mobile Phone Partnership initiative under the umbrella of the Basel Convention, where NGOs and multinational corporations of the electronics sector try to develop solutions for the problem of hazardous waste from mobile phones.<sup>85</sup> The reason for the lack of such prominent initiatives in the chemical sector may lie in the strong ideological barriers between chemical firms and NGOs. At the same time, technical expertise is required for a successful co-operation, which NGOs either do not have or are not given credit for. Therefore, the governance functions taken over by private sector actors in the chemicals sector are only subject to very general or piecemeal civil society control.

The trend to base legitimacy of private standards on direct forms of interaction with stakeholders or an emerging transnational public need not always be framed as a clear alternative to market competition and shareholder accountability. Of course, the interests of shareholders and business partners are still a relevant basis for legitimate corporate decision making. However, it seems to be characteristic of transnational governance that different modes of legitimacy are combined and have to be coordinated.<sup>86</sup> A coordination of shareholder interests and stakeholder involvement seems to be possible even in the financial sector, where under certain conditions an interest in long-term investment can be developed. In recent years, standards for sustainable or ‘green’ finance have been established and are applied to a considerable portion of investments.<sup>87</sup>

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<sup>84</sup> COGLIANESE & NASH, *supra* note 48.

<sup>85</sup> MOBILE PHONE PARTNERSHIP INITIATIVE, available at <http://archive.basel.int/industry/mppi.html> (last accessed: 24 April 2012).

<sup>86</sup> BLACK, *supra* note 70.

<sup>87</sup> Oren Perez, *The New Universe of Green Finance: From Self-Regulation to Multi-Polar Governance*, RESPONSIBLE BUSINESS. SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 151 (Olaf Dilling et. al. eds., 2008). For various reasons, Germany is lagging behind in this development; see Benjamin J Richardson & Friederike Johanna Preu, *German Socially Responsible Investment: Barriers and Opportunities*, 12 GERM. L. J. (2011), available at:

In many cases still, a variety of standards and certificates are dealing with the same problems. For instance in forest certification, the FSC competes with yet another certificate called Programme for the Endorsement of Forest Certification (PEFC). For that reason Errol Meidinger concludes that there is a competition of standards, which depends on consumer choice.<sup>88</sup> The legitimacy of such standards could therefore (ultimately) be based on some kind of consumer sovereignty, in which the appropriate standards of protection will prevail in the market. Nonetheless, Meidinger does not consider the different systems of norms in terms of mutually exclusive choice, but acknowledges that the systems imitate or learn from each other. This has already resulted in a degree of convergence. Besides, by appointing representatives of economic and environmental associations and trade unions as well as respecting North-South parity, an element of participatory legitimacy is provided for in certification systems. According to this model, consumers in industrialized countries are therefore not imposing their own regulatory rules on the societies of developing countries or emerging markets.<sup>89</sup> Instead they are giving workers and local communities a voice, which are affected by profound changes of their social relations, working conditions and natural environment. Before rashly assuming a form of post-colonial paternalism, it should also be considered that the economic practices that are responsible for the profound changes are based on constitutive rules, which are not endemic, but introduced as a precondition for foreign direct investment.

#### D. Overcoming the Challenges of CSR

Concerning the relation between public regulation, corporate self-regulation and claims of civil-society, the empirical results confirm the institutional embeddedness. Transnational corporate standards are neither characterized by a formal application of national laws nor by autonomous self-regulation in the sense of having lost touch with state-based law. The case study shows that corporate standards react responsively to issues of health and environment brought to public attention. Therefore, in the field of toxic risk management, corporate standards do not emerge spontaneously from 'the' economy, but from interactions between the various involved economic and non-economic actors and

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[http://www.germanlawjournal.com/pdfs/Vol12-No1/PDF\\_Vol\\_12\\_No\\_03\\_865-900\\_Articles\\_Preu\\_Richardson.pdf](http://www.germanlawjournal.com/pdfs/Vol12-No1/PDF_Vol_12_No_03_865-900_Articles_Preu_Richardson.pdf) (last accessed: 24 April 2012).

<sup>88</sup> Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHIC. J. INT'L L. (2008).

<sup>89</sup> This does not preclude that in reality some serious shortcomings still remain; see DINGWERTH, *supra* note 78, at 53.

constituencies. At the same time, corporate standards are not simply determined by public regulation and are not exhausted by legal compliance. Corporate regulators use public regulation of different jurisdictions as normative reference points, which provide them with orientation. Still, they usually do not understand themselves as passive subjects of the law. Rather, they anticipate, implement and adapt norms according to their own needs thereby actively shaping the normative landscape. This rather strategic attitude towards environmental law has led to serious criticism of corporate social and environmental responsibility. Indeed, it is rather obvious that many initiatives of CSR lack effective results, lead to formalistic routines or do not respond to the needs of local communities.

### *I. CSR—Challenges and Pathologies*

Despite of the fascination for the variety of substantial corporate norms, for their independent mechanisms of monitoring and control, and for their own modes of legitimacy, corporate standards should be understood as a response to public regulation or in general normative demands of their environment.<sup>90</sup>

Many issues of corporate norms cannot be sufficiently addressed, if they are regarded as a form of self-regulation, which exclusively takes place in the private sphere of the corporation or corporate group. Both the symbolic value and the factual effects of corporate environmental norms are not restricted to their constituencies, but they are usually directed at the general public and affect the environment by definition. From a Foucaultian perspective normative arrangements that emerge from interactions between public regulation and corporate norms can be used as an example of what Foucault described in his lectures on governmentality.<sup>91</sup> According to Foucault, social control dissociates itself from the state and formal law and is increasingly incorporated in more decentred and diffuse mechanisms. Examples are professional expertise, control technologies or management practices. A Foucaultian approach can be very illuminating for a detailed diagnosis of corporate environmental practices or for the work of expert commissions in rule making.<sup>92</sup> It could probably help to discern the hidden and often rather

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<sup>90</sup> Cf. JAN SAMMECK, A NEW INSTITUTIONAL ECONOMICS PERSPECTIVE ON INDUSTRY SELF-REGULATION 12 (2012).

<sup>91</sup> Cf. with references JACINTH JORDANA & DAVID LEVI-FAUR, THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE 154 (2004). See also MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977-1978 (2009); MICHEL FOUCAULT, THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE 1978-1979 (2008).

<sup>92</sup> See for example, BETTINA LANGE, *Foucauldian-Inspired Discourse Analysis: A Contribution to Critical Environmental Law Scholarship*, in LAW AND ECOLOGY: NEW ENVIRONMENTAL FOUNDATIONS (Andreas Philippopoulos-

subtle power structures and mechanisms of control at the shop-level of corporations. In general, the governmentality literature offers valuable insights into the ongoing deconstruction of a fundamental constitutional distinction, namely between the sphere of legitimate public authority on the one hand and the consensus-based private sphere on the other. However, beyond the diagnosis of these problematic developments, this literature seems to offer few alternatives and usually does not focus on ideas for regulatory reform.<sup>93</sup>

Corporate standards do not only result in more or less effective ways to control industrial practice. They are also directed at normative demands which are brought forward by the social environment of the organization. In other words, corporate standards have a symbolic value in an ongoing public discourse on the legitimacy of business practices. Often, corporations will try to evade rather than fulfill the demands of their environment. Instead of either complying or openly challenging public regulation or civil society pressure, corporate actors try to get away with an opportunistic strategy: often organizations deliberately create, just like individuals, a public self-image that distracts from their weaknesses without really resolving them. Such corporate strategies to 'legitimize' the public appearance of the organization without effectively changing its practices have often been analyzed using a neo-institutionalist framework.<sup>94</sup> From this perspective, the phenomenon of CSR, which permeates the corporate sphere, "is only the latest fashion."<sup>95</sup>

Both of these critical theories of private regulation highlight problematic tendencies in modern social development and can be helpful to heighten the awareness for 'false facades' of legitimacy or hidden mechanisms of control. However, these approaches give

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Mihalopoulos ed. 2010). For a Foucaultian perspective on environmental policy in general, see JOHN S. DRYZEK, *THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES* (2005).

<sup>93</sup> JORDANA & LEVI-FAUR, *supra* note 86, at 156.

<sup>94</sup> NILS BRUNSSON, *ORGANIZATION OF HYPOCRISY. TALK, DECISIONS AND ACTIONS IN ORGANIZATIONS* (1994). For an application to CSR, with further references to John Meyer and Brian Rowan, Paul DiMaggio and Walther W. Powell, *i.e.* the classics of this approach, see Pauline Göthberg, *Lost in Translation: The Case of Skandia's 'Ideas for Life,' in MANAGING CORPORATE SOCIAL RESPONSIBILITY IN ACTION: TALKING, DOING AND MEASURING* 93, at 96 (Frank Hond *et. al.* eds, 2007).

<sup>95</sup> GÖTHBERG, *supra* note 89, at 109. For a more nuanced neo-institutionalist perspective, see Stefanie Hiß, *Durch Reden zum Handeln?! Zur Rolle freiwilliger Unternehmensinitiativen bei der Verbreitung von Sozialstandards* (Through talk to action? On the Role of Voluntary Corporate Initiatives in the diffusion of Social Standards), 6 *ZEITSCHRIFT FÜR WIRTSCHAFTS- UND UNTERNEHMENSETHIK* 215 (2005).

rather basic and general explanations for social phenomena such as power relations or symbolic resources. They usually do not aim *in any prescriptive sense* at distinguishing between illegitimate and legitimate uses of power or, respectively, between fake or authentic public self-images. For the question of what typical pathologies of CSR exist and in what institutional circumstances they might be overcome, it is more suitable to develop a typology of interactions between corporate regulators and the normative demands of their organizational environment. This could help to distinguish successful from failed initiatives of CSR and serve as a starting-point for regulatory reform.

Following Robert Merton, Braithwaite distinguishes five different modes of adaptation by business actors to regulatory demands.<sup>96</sup> This typology can be useful to analyze the complex patterns of dependency, conflict and mutual learning, as well as the inherent dynamics, which are characteristic of global standardization processes. Addressees of norms may either accept or reject both the cultural goals underlying the normative order and the institutionalized means, which are used to achieve these goals (see Fig. 1: *Conformity* or *Retreatism*).<sup>97</sup> *Innovation* is a response, which is insofar mixed, as it accepts the cultural goals, but rejects the institutionalized means. Correspondingly, *Ritualism* is defined as adherence to the means of a regulation, while rejecting the regulation's goals. Finally, addressees may also neither accept nor reject, but substitute the goals and means with their own values or strategies (*Rebellion*).

Modes of Adaptation	Cultural Goals	Institutionalized Means
I. Conformity	+	+
II. Innovation	+	-
III. Ritualism	-	+
IV. Retreatism	-	-
V. Rebellion	+/-	+/-

Fig. 1: Typology of responses to normative demands<sup>98</sup>

<sup>96</sup> BRAITHWAITE, *supra* note 4.

<sup>97</sup> ROBERT K MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1968).

<sup>98</sup> *Id.* at 194. A plus (+) signifies that goals or means are accepted; a minus (-) signifies that they are rejected; both plus and minus show that goals or means are substituted.

What is not exactly convincing about the conceptual frame, on which this table is based, is the relation between *rejection* of goals or means and their *substitution*. From the perspective of the regulator, rejection seems to obstruct her normative demands, while substitution may result in improvement by mutual learning: by substituting deficient means with more practical solutions, while accepting and furthering the given goal, regulated individuals can contribute productively to the normative demands of their environment. If, on the other hand, the institutionalized means are simply rejected, the general acceptance of cultural goals does not really support the normative demand. Therefore, it seems to be misleading that the second mode of adaptation is called *innovation*, which has rather affirmative connotations and therefore does not convey the problematic aspects of this kind of response from the perspective of the regulator. The notion of innovation should therefore be reserved for adaptations that accept the goals, but substitute the means in a productive way by developing own strategies or organizational routines. Instead, the second mode of adaptation should refer to, what has been termed *hypocrisy* by Nils Brunsson, thus a response, where the official ideal and the factual behavior do not fit together.<sup>99</sup> According to Merton's typology, such a response could be characterized as a mode of adaptation, which basically accepts the goals of normative claims, but rejects any effective means to achieve these goals.<sup>100</sup>

Having said that, Merton's typology can help to distinguish and structure some of the critical objections, which are typically raised against CSR-codes of conduct or more technical corporate standards with purported relevance for human health and environment. Probably the most important challenges or pathologies of corporate codes are ritualism and hypocrisy (i.e. in Merton's terminology: *Innovation*).

Braithwaite uses Merton's typology exclusively in order to clarify the problem of ritualism, the response that he considers to be central for the auditing and accounting practices of present-day market regulation. He can thereby draw on empirically founded organizational studies of private governance, which criticized that practices of standardization and auditing often result in "rituals of verification."<sup>101</sup> Closely following a routine is comforting, even if it does not help to take care of unpredictable damages. This sort of ritualistic adherence to organizational routines, while neglecting the results in terms of

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<sup>99</sup> BRUNSSON, *supra* note 89.

<sup>100</sup> This is a significant deviation from Merton's original typology, as far as Merton (and Braithwaite) characterizes this constellation as "Innovation;" see MERTON, *supra* note 92, at 194, 195-203.

<sup>101</sup> See especially POWER, *supra* note 53.

environmental performance has also been implied for the environmental management systems of the Responsible Care initiative. Similar criticism has been brought forward with respect to the ISO 14000 standard series. The main contention is that standardized procedures are applied indiscriminately to a wide array of different industrial practices without requiring an improved outcome. Thus, in concentrating on procedural means, reaching the political goal of protecting human health and the environment seems to be neglected. By sticking to certain routines, the organization thus loses the ability to adapt the goal to changing circumstances.

Especially in the political debate on corporate social responsibility, organizational hypocrisy is often highlighted as another problematic response. It is characteristic for this behavior, that firms pay lip-service to the objectives of public demands, but do not take any effective steps to accomplish them. Typical cases of the debate about social and environmental responsibility of global business are certain corporate codes of social and environmental responsibility. Most multinationals have adopted such codes in the last decade to commit themselves to better working conditions or environmental protection. These codes are often dismissed as a form of symbolism, which only consists of the shallow rhetoric of public relations, or as it has already been introduced above, as “greenwashing.” As mentioned above, such evading responses of organizations to the normative demands of their environment have also been analyzed critically by sociologists and have been highlighted as “organizational hypocrisy.”<sup>102</sup> The main characteristic of this form of corporate symbolism is that its commitments to certain goals are so general that they do not give criteria for compliance and control at the level of organizational practice.<sup>103</sup> Neo-institutionalists often tend to accept the legitimating function of CSR and its associated instruments irrespective of their effectiveness. According to their account, codes of behavior spread throughout the corporate sphere by mimesis. While in general this seems to be an accurate observation, it should also be considered that corporate misconduct is periodically challenged by scandals or crisis.<sup>104</sup> By opening up ways for looking behind the organizational façade, corporations could be forced to take their own “greenwash” literally.

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<sup>102</sup> BRUNSSON, *supra* note 89; Veronika Tacke, *Systemrationalisierung an ihren Grenzen - Organisationsgrenzen und Funktionen von Grenzstellen in Wirtschaftsorganisationen* ('System Rationalization' at its Boundaries-Organizational Boundaries and Functions of Interfaces in Economic Organizations) , 7 MANAGEMENTFORSCHUNG 1 (1997).

<sup>103</sup> For a pragmatic analysis of such negative, but also positive examples of corporate Codes of Conduct, see HERBERG, *supra* note 44, at 24, 26.

<sup>104</sup> BRAITHWAITE, *supra* note 4, 32-63.



*II. Institutional Embeddedness Resulting from Interplay*

The descriptive part of the paper showed how the different governmental, civil society and economic actors mutually influence each other. This interplay may help to overcome blockages for learning and to unmask organizational mimicry as the most typical challenges to corporate social or environmental standards.

The main components of regulatory interplay consist of the following: in response to state regulations, transnational corporations can further define corporate obligations in their standards. National legislators, for their part, can draw on already existing industry standards and pass them as law. Civil society actors, in turn, can urge for a tightening of standards by criticizing low statutory requirements or vague corporate codes. In addition, transnational corporations are compelled to react to the scandalization of practices that have a strong environmental or social impact.<sup>105</sup> By issuing voluntary commitments they can avoid damage to their reputation. NGOs again have the opportunity to critically compare the activities of the companies with their promises. For them, national laws can serve both as a measure as well as a subject of criticism. As a result, they influence state legislation, but also take over the values incorporated in the legislation, when criticizing companies for not following the law.

All three types of norms, resulting from public regulation, from corporate standardization and from moral claims of civil-society, therefore, influence each other by institutionalizing normative values on the transnational level. In the course of this interactive process, norms may lose constitutive and defining characteristics, such as being of territorial scope, being based on private autonomy, or relying on moral conviction rather than being legally binding (see Figure 2).

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<sup>105</sup> Apart from formal corporations and corporate groups, TNEs in a wider sense may also include contractual networks. For the qualification of franchising and just-in-time networks as corporate actors from legal perspective, see GUNTHER TEUBNER, *Hybrid Laws: Constitutionalizing Private Governance Networks*, in LEGALITY AND COMMUNITY (Robert Kagan & Kenneth Winston eds., 2000).

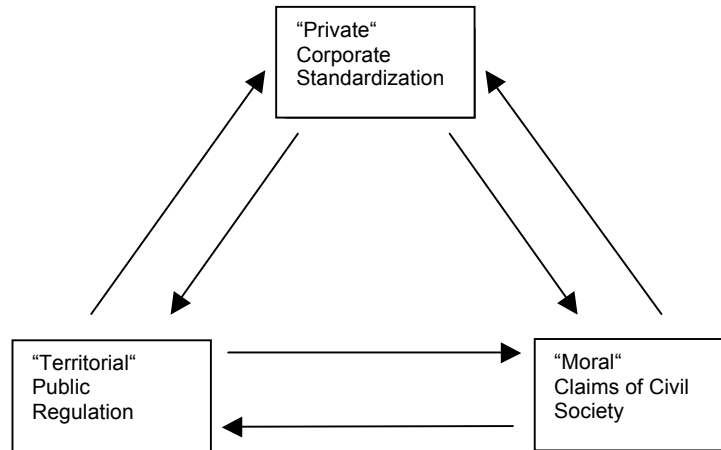


Fig. 2: Transnational Norms Emerge from Interplay of Different Constituencies

Examples of corporate environmental standards, which were primarily established in reaction to or in anticipation of state regulation, are the lists of banned substances of the electronics industry. Initially their function was to pass on the legal prohibitions, especially those of the RoHS Directive. This EU directive restricts the use of certain hazardous substances, from the producers to other companies of the value chain. Although standards of this type have been developed by several European companies since the early 1990s, they have only become ubiquitous on a global scale since the EU's adoption of the RoHS Directive. As described above, the task of implementing the requirements of the directive in the value chains calls for inter-firm standards, practices of risk management and corresponding organizational structures that have to cover all firms in the value chain. For the implementation of RoHS in global value chains, a transnational institutional infrastructure had to be created. This can now be used for the enforcement of other public regulation as well as for the development, implementation and enforcement of genuine company standards. These company standards are not only shaped by law, but also anticipate legal policy initiatives and demands of NGOs. Therefore, the establishment of inter-firm risk and compliance systems served as a precondition for the enforcement of own corporate standards in the value chain. In this respect, the adoption of governance functions by private actors was expanded from compliance to rule making. As a side effect, it significantly increased the leverage of lead firms in the supply chain.

In sum, a "ritualistic" phase of legal compliance, monitoring and data collecting was replaced by rather innovative attempts to substitute toxic substances beyond what is legally required. Generally, the self-referential character of many auditing and monitoring schemes might be overcome, if the focus is shifted from purely procedural standards to actual performance and outcome. A similar interplay becomes apparent in the relationship

between NGOs and companies. As a reaction to the scandalization of disruptive environmental or social practices, corporations often used codes of conduct and other forms of 'self-regulation.' In particular, the reputable manufacturers of brand products, which rely on a positive brand-image of consumers, have opted for the public adoption of corporate codes.

Not only certain environmental and human rights organizations, but also social scientists have often criticized this as a diversion strategy. In fact, some of the codes of conduct are kept at a relatively general level; nevertheless, in many cases the established rules provide information as to when a violation can be assumed. At any rate, NGOs have often been able to prove violations of companies against their own codes or have highlighted cases of irresolute implementation. Prominently covered by mass media were cases of lead in Mattel-toys or PVC and brominated flame retardants in Apple's iPhone. While media coverage for such cases is mostly an issue with big and prominent corporations, scandals often also affect close business partners or in major cases even the reputation of a whole business sector. Rather than avoiding scandalization, corporate codes have instead created further potential for public attention, monitoring of compliance and legal discourse. Instead of abstract demands for justice, NGOs and mass media can invoke the promises of the companies by holding them to their word. To meet this second phase of scandalization and to comply with the promised environmental standards, procedures and responsibilities had to be developed within corporations. Compliance with corporate codes and monitoring by responsible staff or independent third parties requires, however, that codes are operationalized in specific standards and guidelines. This dynamic development demonstrates how the interplay between companies and civil society could gradually lead to normative order: in successful cases, the companies' voluntary self-obligations shifted from mere 'legitimacy facades' into complex systems, which also consist of comprehensive standards and individual decisions on the basis of clear competences.<sup>106</sup> Therefore, procedural rules and responsibilities have to be established.

### *III. Government's Response to CSR-Challenges*

The main aim of this paper was to describe the dynamic interplay of business, civil society, and public elements of governance, which sets the institutional context for emerging transnational environmental norms. It would certainly require another paper to address potential measures for regulatory reform in sufficient detail.<sup>107</sup> However, some tentative

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<sup>106</sup> Herberg describes the three-layered systems of "paralegal" norms in transnational chemical corporations; see HERBERG, *supra* note 54.

<sup>107</sup> For some valuable suggestions, see BRAITHWAITE, *supra* note 4, at 140-156.

ideas can be developed from the analysis of the challenges. In the last section, it has been shown that there exist institutional dynamics, which result from regulatory interplay and help to overcome some of the typical deadlocks of CSR. In the context of a widespread belief in disembedded and deregulated transnational markets, it should first be stressed that public regulation still matters for transnational business actors. This is especially the case, when product standards for substantial parts of the global market are concerned, as in the case of the RoHS Directive of the European Union. Often, the mere expectation of a further tightening of standards will be enough to set incentives for technical innovation and proactive commitment. Despite of the worldwide institution of free-trade, the remaining control of access to consumer markets can still serve as a cornerstone for intervention into a globalized economy.

However, substantial parts of the normative development in the global corporate sphere are beyond the direct influence of effective public government. Here, the side of the triangle of regulatory interplay comes into focus, which links civil society and business. At first in a piecemeal manner, NGOs have insisted on the protection of basic human rights, on sustainable business practices, and tried to control the consistency of corporate commitments. Case by case, this has led to more definite criteria for corporate conduct. Nonetheless, an essential precondition for such a development is public access to relevant information about corporate environmental standards. Freedom of information should not be generally subordinated to the protection of trade secrets. First and foremost, governments should encourage civil society control by providing effective access to relevant data held by the state. However, in the context of corporate environmental regulation, the traditional restriction of access to government-held information becomes an obstacle to an effective control of regulatory power.

A telling example for the adaptation of the freedom of information regulation to the age of regulatory capitalism is the Aarhus-Convention. This international treaty established public procedural rights and, in particular, access to environmental information in many European and Eurasian countries. In principle, the Aarhus-Convention follows the traditional lines, by restricting the right of access to information to data which is available in the public sector. However, according to Article 2 Section 2 (b) of the Convention the definition of “public authority” includes also natural or legal persons performing public administrative functions.<sup>108</sup> The objectives of the convention have been strengthened both by EU regulation and the jurisdiction of the ECJ.<sup>109</sup> Environmental information is also

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<sup>108</sup> See Andreas Fischer-Lescano, *Transnationales Verwaltungsrecht. Privatverwaltungsrecht, Verbandsklage und Kollisionsrecht nach der Aarhus-Konvention* (Transnational Administrative Law. Private Administrative Law, Class Action and Conflict of Laws According to the Aarhus Convention), 63 JURISTENZEITUNG (2008).

<sup>109</sup> For a recent case of the ECJ, see C-266/09, *Stichting Natuur en Milieu et al vs College voor de toelating van gewasbeschermingsmiddelen en biociden* (Nature and Environment Foundation et al vs. Board for the authorization of plant protection and biocidals), 2010 E.C.R. I-0000.

defined rather broadly in European law and includes not only the results of risk assessments, but also the necessary data basis for the evaluation. This makes public control of corporate risk assessments possible.

Remedies for the challenges of CSR might not only result directly from the state or from civil society, but may also concern the corporate sphere itself. Most notably, engineers or toxicologists working in chemical firms can act as an institutionalized conscience, which can draw on their expert knowledge to argue for higher standards.<sup>110</sup> However, this is only likely to happen, if their professional practice can be successfully shielded from certain short-term economic interests of the management. For example, legal rules for protecting whistle-blowers help to shift the balance between corporate professionals, who have to take care for public goods, and the management. The corporatist and more harmonious German law solution to the problem is the institution of in-house supervisors for environmental protection.<sup>111</sup> The standards of sound science can also be strengthened by reinforcing professional associations and networks, which extend beyond the individual firm.<sup>112</sup> These inter-firm relations can help to establish collective learning-processes and will further environmental innovation.

## E. Conclusion

On closer examination, neither the mechanistic notion of a transmission-belt between different jurisdictions, nor the organic metaphor of spontaneous self-regulation seem to be an adequate description of corporate norms. Both positions tend to neglect the manifold interactions between government policies and corporate standards of the global economy.<sup>113</sup> Neither do corporations and their norms emerge spontaneously in a legal and political vacuum, nor do they simply comply in a predictable way with state-based law.

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<sup>110</sup> Cf. HERBERG, *supra* note 54.

<sup>111</sup> E.g. according Article 53 of the Federal Law of Pollution Abatement (§ 53 BImSchG), so-called “*Immissionsschutzbeauftragte*” have to be appointed in major polluting facilities. They are responsible for monitoring the protection against air pollution, have a supervisory function and can give advice without having genuine decision-making power. Article 58 establishes protective measures concerning discrimination and dismissal. See the Bundes-Immissionsschutzgesetz [BImSchG] [Federal Immission Control Act], May 14, 1990, FEDERAL LAW GAZETTE at 880 (Ger.).

<sup>112</sup> DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM - FOUNDATIONS OF A NON-MARXIST CRITICAL THEORY* (1992).

<sup>113</sup> Noah Sachs discusses more nuanced responses to extraterritorial effects of regulation, but seems to apply it only to regulatory interactions between different public law jurisdictions; see SACHS, *supra* note 12. For a similar argument, see also the comment of Paul Schiff Berman to Robert Adieh’s theory of “Dialectical Regulation,”

Instead, the global players of transnational norm development, including expert commissions, NGOs and multinational corporations, act as legal entrepreneurs in a governance network: partly, they are involved in exerting pressure on regulatory activities; some also take standards of national origin and enforce them beyond territorial confines; again others even develop environmental standards on their own initiative. As these actors untie environmental norms from the territorial scope of the state jurisdiction, even the most remote production site may come into the reach of transnational environmental norms.

Corporate standards thus develop a dynamic of their own, which results in both risks and opportunities for the legitimate and effective governance of common global goods. The typical challenges, which result from such momentum, can best be overcome, if the pre-existing embeddedness in public regulation and civil society is confirmed by strengthening the rights of stakeholders. Rather than hoping for centrally planned attempts to “re-embed” the global economy at the international level, it might be both more realistic and promising to draw on preexisting structures. This conclusion seems to be in line with Karl Polanyi’s understanding of the self-regulating market system as a utopian project and with his stubbornly paradoxical insistence on a spontaneous countermovement: “Laissez-faire was planned; planning was not.”<sup>114</sup>

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arguing that Adieh’s concept should also be applied to interactions between public regulation and private governance; see BERMAN, *supra* note 15. See also Robert Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. (2006).

<sup>114</sup> See also the foreword by Fred Block, KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 174 (2001); Karl Polanyi, *The Economy as an Instituted Process*, in *PRIMITIVE, ARCHAIC AND MODERN ECONOMIES* (George Dalton ed. 1968).