

# GOVERNANCE

BASEL INSTITUTE ON GOVERNANCE

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## Private standards in the North – effective norms for the South?

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Corporate self-regulation in transnational business activities has become more and more common. In the background, there is a lack of effective hard law for the regulation of transnational business activities. International law is only binding towards states<sup>1</sup>. As far as private contracts are concerned, for example in the case of transnational production and supply chain management, multinational European enterprises as well as their consumer counterparts are not always too sure about the relevant national law to be applied. These uncertainties of hard law (and the transactional costs they create) are in the background of the soft law developments I will now focus on.

With this, I am also presenting results from the European research project ESTER. ESTER is a collective EU-sponsored European research project about the social practices of transnational European companies<sup>2</sup>. One of the project's aims is to find out if CSR concepts on social standards in transnational production are able to strengthen and export the "European social model" rather than threaten it – and how the European Union could contribute to this project, by an adequate regulatory instrument. That is why we are worried about the regulatory and legal quality of those soft law standards that are at the heart of corporate self-regulation in transnational business activities.

As a result of the study, we can already say that enterprises tend to adopt CSR-policies or start to use the label CSR as soon as they define themselves as "global players"<sup>3</sup>. So, in effect, they hardly vision themselves as European players and/or representatives of the European Social Model.

But there is another side of the coin to the ESTER questions, which is reflected in the title of my presentation today: Corporate self-regulation is concerned with regulating transnational business

activities. In these cases the production is often situated in Southern countries, especially in the case of labour-intensive production; sales and distribution mainly takes place in Northern countries. If transnational enterprises export social models (be they "European" or not), can this affect the regulatory capacity of states in the South? Can corporate undertakings formulated (and sometimes negotiated) in the North strengthen the regulatory capacity of state norms in the South? Or do they rather substitute state norms in the South?

### 1. Private Rules between International Law and Local National Law: the Case of Social Standards

One area of self-regulation that has become a mainstream part of modern "CSR" policies (Corporate Social Responsibility), is the area of social standards. After having been developed in the US, concepts of "CSR" started in Europe in the 1990s; enterprises in the Netherlands and Belgium (and some in Germany and France) seem to have been forerunners, while enterprises in Spain and Italy are just beginning to frame and/or reframe entrepreneurial social policies in CSR-terms. In the majority of enterprises, CSR-strategies started with environmental policies. Social policies developed later on in the wider context of "sustainability" policies.

In the CSR context, transnational enterprises use soft-law-undertakings for their public promises to adhere to certain social standards in transnational production, i.e. in their overseas establishments and/or the supply chain. Instruments used are corporate undertakings such as Codes of Conducts (directed towards consumer markets, investors, rating agencies and NGOs in the North). Supporting and reinforcing these standard-setting processes, private labels on social standards by certifiers such as Social Accountability (SA) 8000, the Fair Labor Association (FLA), or the Rugmark Label have played a major role in the standardization. Nowadays, sustainability indexes and rating agencies acting on the financial markets have become the main actors in the reinforcement and dissemination process. An ISO standard on Social Responsibility (ISO 26.000) is being developed and supposed to be available in 2008.

The primary instruments of corporate self-regulation and private standard-setting are corporate Codes of Conduct. They may be unilateral. However, in the area of social standards, a range of European enterprises have

<sup>1</sup> On evolutions in international law see for example Großmann/Busse/Fuchs/Koopman, 2002; Ölz, ZIAS 2002, 319.

<sup>2</sup> ESTER („Régulation Sociale des Entreprises Transnationales Européennes“), direction Isabelle Daugareilh; see on <<http://ester.u-bordeaux4.fr>>. Interdisciplinary Teams of legal, social and economic scientists at the Universities Bordeaux IV, Toulouse 2, Brussels, Hamburg, Trento, Utrecht, Castilla La Mancha, Complutense de Madrid and Essex cooperate under the overall direction of Bordeaux IV.

<sup>3</sup> This is true for three of the four enterprises studied in Germany as well as for many enterprises researched by other teams.

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concluded so-called “International Framework Agreements”, agreements between transnational enterprises and Global Union Federations and sometimes also European (or even World) Works Councils. The standards are often integrated in business contracts with suppliers or even employment contracts within the transnational enterprise. They are also the major reference for certifiers and rating agencies.

## a. ILO Conventions as Regulatory Models

There is a more than tacit understand as to “what is commonly accepted” as constituting “minimum” labour standards. ILO core labour norms, as well as regulations on industrial health and safety, figure prominently in all the tools we examined. ILO core labour norms, that is (according to the respective ILO declaration of 1998) bans on child work and forced labour, non-discrimination as well as freedom of association and collective bargaining. It is since the standardization processes initiated with the ILO 1998 declaration on core labour norms, that corporate standard-setting increasingly contains, over and above health & safety rules, the ban on child labour, guarantees of freedom of association and collective bargaining. International Framework Agreements concluded by Global Union Federations contain these standards invariably.

### aa. A Success Story of International Law?

The adoption of the ILO labour standards by private standard-setters can be seen as a relative success of international law. The proliferation of its standards in an informal way was one of the reasons the ILO adopted the declaration on core labour norms in 1998. Important steps towards the standardization we are witnessing were the revision of the OECD-Guidelines for Multinational Enterprises in 2000; since then, the Guidelines refer to the ILO core labour standards as part of the minimum standards in the area of employment and social standards. The UN Global Compact which was initiated in 2000 and has since been quite a success with OECD transnational enterprises, limits its understanding of minimum standards on the ILO core labour standards. In view of this development, corporate standards can thus also be seen as one way of enforcing international law – one that has explicitly been intended by the ILO when adopting the 1998 declaration.

However, this is only a relative success of international labour law. The problems of this strategy – having private institutions enforce international law – can be clearly seen when taking a closer look at the crucial standards: freedom of association and collective bargaining. These standards are crucial in many ways: The collective aspects of labour relations are at the heart of international labour law and the ILO Conventions. And secondly: The regulatory quality of standards in the area of employment depends heavily on the implementation and monitoring mechanisms used.

### bb. Entrepreneurial Guarantees for Freedom of Association?

The guarantee of freedom of association in a private document brings two paradoxes: Firstly, freedom of association is a right to be guaranteed by a state. A “guarantee” of freedom of association presupposes the means to provide legal or institutional assurances for upcoming organisations. But in the texts we are talking about, it are the private enterprises that guarantee the freedom. Common formula states: “The freedom of association and protection of the right to organise is also guaranteed in those countries in which freedom of association and the right to organise is not acknowledged as a right.”

Secondly: The associations we talk about in this context are necessarily and by definition organisations representing workers’ interests as opposed to employers’ interests. Free trade unions are by definition organisations not dominated or controlled by employers. How could and how can private enterprises proactively promote and “guarantee” freedom of association?

In order to understand what is happening in the area and in different branches of business, countries and enterprises, we undertook qualitative interviews with actors in the field. In the summer of 2005, the national teams conducted each about 40 interviews with representatives of enterprises, trade unions, employee representatives on the shop floor level, advocacy NGOs, consumer organisations, business associations, etc. In Germany, we interviewed stakeholders of four enterprises: an enterprise in the textile and sportswear sector, another one in the sector of telecommunications, one in the metal industry (a supplier for the automobile industry) and an enterprise of the automobile sector. All these enterprises perform transnational business activities in Eastern Europe, South-East Asia and South-America – but not in Africa. Nevertheless, the soft law standard-setting by private enterprises we found, can tell us something about the regulatory capacity of transnational enterprises all over the world. After all, the study does not aim for representativity. Instead, the interviews (that have been anonymized) are to provide deeper insights into possible motives and approaches by different actors.

As to the question of entrepreneurial guarantees for freedom of association, let me cite some of our interviewees: Asked about the implementation of the guarantee of freedom of association in China, one enterprise representative said: “We say there needn’t be a union at the location, and if having a union is prohibited by law, then that does not meet our standard. It becomes difficult the moment the employees come and say, we want a union. Luckily, there isn’t anything like that right now, thank goodness.” Obviously, the company is relieved not to have been forced to take a stand in the question of freedom of association, and, faced with an insufficient implementation, has not acted for itself. “...

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the important thing for us, and that is that we also demand, by means of a standard, that employees in one way or another get the opportunity to represent their interests vis-à-vis company management. And, partly, these can be very simple things; it can be: I have complaints management, I have a box and I can stick a letter in it, or I'm the responsible person from among my ranks who can then, let's say, can appear in front of management." A mere possibility of complaint is here to replace freedom of association.

Aspects of Social Dialogue, freedom of association and complaint management are clearly separated as distinct issues by another enterprise representative who fundamentally distances himself from the task of forcing union participation through the companies: As an enterprise representative, one did not want to assume a mediating role for unions at suppliers', representation being the task of the unions themselves. As for the enterprise's "guarantee", he meant the important thing was for the workforce to have the opportunity to further their interests in some way, even if it was only through a complaints box.

There are also examples in our study of companies that foster in-company workers' representative bodies at suppliers' or dependencies. How the installation of such in-company workers' representative bodies can result in a threat to freedom of association, was discussed by an NGO representative on the occasion of a conflict at one German transnational enterprise's supplier in El Salvador. In order to avoid the criticism that there was no union, the enterprise formed one or two work management committees, with the factory management determining who would be included on the committee. A trade union representative mentions that another German transnational enterprise, in a Brazilian plant, had set up a so-called Factory Commission in which trade unionists were not allowed to be members.

As far as international law is concerned, we can cautiously conclude: A privatisation of rules takes place where it is for the private standard-setters to interpret the rules according to their own understanding – which must not necessarily coincide with the ILO's understanding of the standards.

## **b. Corporate Standards and National/Local Rules**

### **aa. Reservations and their Interpretations**

One of the most common points of reference in the corporate undertaking is the reservation in favour of local/national law, "national regulation" or "local practice". A typical formula is the clause: "The work hours correspond at least to the respective national legal requirements or to the minimum standards of the respective economic sectors." These reservations could make one doubtful as to the regulatory quality of private standards in relation to the national hard law of Southern countries. Are these undertakings really meant to regulate working conditions in establishments/the supply

chain in Third-World countries, independently of the national law of the country? Are they really meant to override contradicting rules of national law?

There are some and few examples of the application of a favourability rule, i.e. codes saying, for example, that "employees must not be required, except in extraordinary circumstances, to work more than 60 hours per week including overtime or the local legal requirement, whichever is less." The interviews mostly show that, in practice, a pragmatic interchange between the corporate rules and the national legal rules takes place.

For example: The Code of Conduct valid for a supplier in Thailand referred to a maximum 48 hours a week, according to ILO standards, but below law and customs in Thailand. The German enterprise representative quoted suppliers there as saying "*quite rightly, of course*" that they had people work 60 hours a week. One (meaning the transnational enterprise) could only slowly move towards the 60 hours.

A reverse arrangement has also been told of: One enterprise representatives recounts the case of a corporate Code of conduct being revised in respect of child labour, because of corresponding changes in the national laws of the "*principal countries*" of production in Asia. As those countries rose the minimum age from 14 to 15 years, the Code of Conduct followed.

But there are also examples where Corporate Codes have been set in competition to national labour law. This has been shown especially in relation to Latin-American labour law and the labour law of some Asian countries that still guarantee high labour standards as a relict of their 1980s development policy. On interviewee said: "*The NGOs in Central America, for example, say that the labour law that exists is much more important for us; that's national legislation, and a company is required to stick to it here. That means they actually have very little use for the code of conduct tool. And why should they? The labour law is good. They should simply stick to it.*"

In view of this danger, several stories of cases exist where campaigns were conducted against TNEs by NGOs, claiming failures to implement national law. An NGO representative mentions a case where the day of menstruation leave (granted under Indonesian law) was enforced by a transnational company against a supplier, even without an explicit mention of the rule in the corporate Code. This also shows: The actors, especially the enterprises, often don't regard the explicit contents of the Codes as ultimate or exclusive statement. They rather see them as a general statement in favour of a private enforcement of minimum standards, whatever their source and content.

### **bb. Private Law Enforcement of the National Law in the South by Transnational Enterprises?**

Many of our interviewees made it explicitly clear that they do not see the private standards in a function of constitutive standard-setting, but rather in the function of furnishing existing standards with enforcement

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mechanisms. One German trade union actor told us about the trade union's policy towards private standards: "So, we actually demand binding rules. Now we have the ILO's set of rules. Of course it's always a problem, when you leap on to new things when you already actually have a good set of tools. The only thing is you know yourself how they are, the ILO norms. The ILO simply often appears like a toothless tiger. And what's missing are sanction mechanisms. And in this respect everything unions do in this connection is in the direction of obligation." One enterprises representative reminds us that in many states in which suppliers are based, ILO standards and human rights pacts have been ratified, but not been observed. The task of law enforcement to him seemed to be the obvious thing, but he also calls it into question: It could not be the task of the European countries to run transnational law enforcement; this would mean privatising law enforcement.

Actors have become more concrete when asked about China, a production land which, in various interviews, is generally felt to be problematic. In view of the general lack of industrial health and safety standards, but also in view of the obvious deficiencies in respect of the freedom of association, two representatives of German transnational enterprises made it clear that they do not see themselves as institutions in opposition to the government. The enterprises representative expresses doubts as to a strategy of "the West" taking on a certification role. In view of the "enforcement deficit" in China, he says: "I.e., we assume that, of course, the Chinese government also has an interest in seeing that the laws there are in the country on this issue are gradually implemented.... And now the question arises as to how by supporting the Chinese government, international companies can perform support, a supporting role."

## cc. Globalization: Universalism or Pluralism?

With these results, we are far from establishing a general pattern as to the relationship between corporate standards and national laws. But one thing is for sure: The relationship is definitely a complicated and multifaceted one. Behind the confrontation national law/corporate law, the confrontation social interests/economic interests always lurks in the back and results in tactical approaches to corporate and hard law rules. We could call this a relativistic instead of a universalistic approach.

The relativistic approach to the corporate standards has frequently been legitimized by a "respect" for local customs. We could also call this the "cultural objection". Asked if the enterprise intended to transfer social standards into countries in the South, a representative said: "first we don't want it, and, second, we can't do it anyway, certain cultural things that have developed naturally in Germany, take it abroad, or transfer it as an export hit, just like that." Note that the "cultural things" he mentions here are, among others, the ILO standards laid

down in the corporate Code of Conduct. Another enterprise representative: "...on culture – we always go at it with our German way of thinking. ...A Pakistani will either hire only men or only women. He'll never mix them because he's a Muslim. Like hell he will. So either he employs only men or only women. And there we have classic discrimination. How are we going to deal with it? If he employs men and women together, he has a much bigger problem." Note here that this representative expresses not having a clue how the enterprise should act in front of discrimination violating the corporate standard; and implicitly legitimizes the idea that there should not be done anything. This form of relativism constitutes a fundamental discrepancy to the universalism of the standards that are used and the ILO-core labour norms that are used as normative orientation. The question whether private standard-setting and law-making in the context of globalization is developing a new universalism or rather a new pluralism has been discussed at length in legal theory. Our findings up to here do not support the view of a new pluralism; they rather show that the enterprise actors see the universal standards adopted as a framework for a general policy of "minimum standards" to be developed in cooperation with entrepreneurial actors in the South.

## 2. Corporate Standards in the World of Legal and Paralegal Rules

Subsequent questions arise:

Firstly, these findings tell us that the written contents of the documents only roughly tell us something about the standards set. We need to know how they are interpreted and applied in concrete cases to get an idea about the concrete contents of the standard. To understand the content of regulatory instruments itself is not enough. The regulatory character of a legal or paralegal instrument can only be assessed, if the implementation, monitoring and control mechanisms are likewise put under scrutiny.

Secondly: Corporate undertakings can only provide paralegal character if they own regulatory capacity. Do the transnational enterprises use private regulation to exercise authority or even sovereignty? Is their regulatory capacity in competition to the regulatory capacity of the national law in the South? To answer these questions, we also need to look at the authority exercised, and that means looking at the implementation, monitoring and control mechanisms.

### a. Legal Authority and Regulatory Capacity

For a lawyer, this direction the research has taken does not come as a surprise. Norm creation and norm finding, interpretation and application are all part of a circular process inside one and the same legal system. But a legal or paralegal system does only exist where there is a delegation of interpretation and application to third persons – dispute resolution mechanisms or other

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implementation mechanisms – without necessarily amounting to institutionalised forms of cooperation as in regimes. Standards without procedures for interpretation and application cannot be called “legal”, but are rather promotional, political or economical standards. Other standards than legal standards can be effectively implemented, that is true. Political and/or economical enforcement mechanisms can even be more effective than legal ones. But they apply a different logic and different sources of power.

I have deliberately using the terms “legal” and “paralegal” to avoid the terms “hard law” and “soft law”. This common terminology can be misleading.

Firstly, soft law is usually defined from the perspective of hard law. Soft law, in this definition, does not mean non-binding law, to the contrary: Soft law, in this definition, are those informal rules which can be made binding via specific open hard law clauses. For example, most hard law on unfair competition considers as unfair any competition that is not in conformity with commercial soft law standards as long as these soft law standards have created legitimate expectations. The Codes of Conduct we are talking about here can thus contribute to the creation of a standard of “unfair competition”. This is a legal debate to which I have contributed and are contributing in other contexts and will not go deeper into here.

Secondly, the divide soft law/hard law suggests a gap, while there are rather gradual differences between law and non-law. „Standards“, „Norms“ and „Law“ can be seen as concentric circles, “standard” determining the outer and “law” the inner circle.

The focus on implementation mechanisms also enables us to avoid putting too much emphasis on the question of generality or specificity of rules. Any regulatory legal regime consists of a cascade of rules and principles, principles constituting the outer ring of rather general ideas, rules providing concrete directives. In many legal systems, principles are created by legislators and other formal institutions, while rules derive out of concrete conflicts and are basically established by the judiciary – in our context, the functional equivalent of the judiciary being the implementation and monitoring procedures delegated to institutions that are not the first-grade standard-setters. It is the quality and effectivity of these delegated procedures that are important to judge the regulatory and legal capacity.

## **b. Ownership of Implementation and Monitoring Mechanisms**

But how judge the quality and effectivity of implementation procedures? Empirically, it has been shown that the self-regulatory social standards have hardly contributed to a real improvement of working conditions. This is mainly due to the fact that enterprises make tactical use of self-set standards. But anyway, just looking for effects on the shop-floor is not the most adequate way to judge effectivity of legal or paralegal

standards. Most regulatory laws are not always and in any case observed. But Law can already be rated as effective if there are implementation, monitoring and/or conflict-solving procedures, in which third actors can enforce their own interests in standard-compliance.

But that’s where more doubts as to effectivity arise. When it comes to implementation and monitoring of corporate undertakings, transnational enterprises mostly rely on company-owned mechanisms. However, there are exceptions to the rule, where external actors such as certification agencies and/or auditors participate in monitoring the standards. Further, the standard of “freedom of association” as referred to in most of the undertakings, has to be considered as a procedural rule. It could provide for the participation of trade union actors and/or other employee representatives in implementation and monitoring.

It remains to be seen how the standardization of implementation and monitoring can contribute to effectivity. At the moment, such a process of standardization is going on, mostly promoted by certifiers, auditors and rating agencies. There is some danger that the focus on a company-driven management system (which the actors on the financial market, especially rating agencies, demand) could be prioritized.

## **3. Conclusion**

Concluding: The national hard law of the South does have to fear the competition of private standards set in the North, because of their legal and regulatory pretence. The respective danger mainly lies in the privatisation of international and national laws.

However, the danger corporate codes on social standards could pose for the sovereignty of Southern states is limited, due to their weak regulatory quality, effectivity and legitimacy. The respective danger in so far mainly lies in the enforcement mechanisms the corporate undertakings provide – and the lack of legitimacy. Only in few cases, actors in the South are involved. There is a specific danger for employee representatives and union representation who may have gained some participation in the negotiation of an International Framework Agreement. They may lose any importance in the implementation and monitoring process. This is the main difference of these soft law mechanisms in relation to hard law mechanisms: They do not provide rights for the employees protected, but rather delegate implementation and monitoring to entrepreneurial and external actors.

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