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Revisiting the Junctures of International and Domestic Administration in Times of New Forms of Governance: Modes of Implementing Standards for Sustainable Development and their Legitimacy Challenges

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Revisiting the Junctures of International and Domestic Administration in Times of New Forms of Governance: Modes of Implementing Standards for Sustainable Development and their Legitimacy Challenges

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I. Introduction

In the wake of increasingly global economic, social and environmental interdependencies, new challenges for traditional forms of governance arise. They prompt the emergence of new forms of governance at the international level beyond traditional international treaty law. International organisations, for example, while often limited in their formal authority to set binding norms, frequently respond to the pressing functional necessities by developing various forms of voluntary instruments. These instruments set standards and prescribe rules of behaviour for public and private actors within the domestic normative space.[1]

While traditional international lawmaking safeguarded the conceptions of state sovereignty through consent and ratification requirements as well as the doctrine of subjects of international law, and thereby upheld a clear distinction between the international and domestic normative space, these new forms of governance contribute to a blurring of this distinction.[2] International norms aim at directly regulating private actors, and representatives of the national executive cooperate in international bodies and implement the resulting rules at home even without formal transposition or ratification. As the domestic legal sphere is thus penetrated and determined by the international legal sphere in new ways and through new processes, traditional forms of legitimacy connected to the traditional sources and procedures of law-making are called into question.

In the ongoing global scholarly effort of finding new forms of legitimacy and accountability for phenomena of global governance and administration,[3] we believe that it is

[1] For an overview, compare **J.E. ALVAREZ**, *International Organisations as Law-makers*, Oxford, 2005, pp. 217-244.
[2] For a more detailed analysis of the blurring distinction of domestic and international law and the emergence of a global administrative space, consider **B. KINGSBURY, N. KRISCH and R. STEWART**, "The Emergence of Global Administrative Law", *Law and Contemporary Problems*, 2004-2005, pp. 15-62.
[3] The global administrative law project at New York University has inspired a global debate; see the project's website: http://iilj.org/GAL/default.asp; compare also the results of an international conference on legitimacy at

paramount to take a close look at the actual functioning of particular instruments in specific regimes and issue areas, namely the field of behavioural standards in sustainable development. The diversity and fragmentation of international cooperation and administration requires a detailed regime and instrument-specific analysis of the functions and impact of the activities before one can assess and prescribe on how to improve legitimacy and accountability of such instruments. One can certainly perceive many different approaches to such an analysis. Considering that legitimacy was -in the world of traditional international treaty law- secured to a considerable extent by the proviso of domestically legitimated implementation procedures, we look at how new instruments diverge from these traditional ways. In other words, to reconsider the junctures of the domestic and international law for specific areas of governance and specific instruments will help to identify whether and why new legitimacy challenges arise from new developments.

With this paper, we attempt to provide such an analysis for the area of instruments of sustainable governance by looking at the various modes of how the norms of these instruments determine and thus internationalise domestic administration. By concentrating on a limited number of similar but nevertheless sufficiently diverse international codes of conduct that address sustainable development issues (Part II), we strive to strike the balance between specificity and generalisation. Our subsequent analysis aims to provide not only a detailed account of the impact and influence of such norms, but more importantly attempts to establish a taxonomy of various modes of implementation indicating various ways in which these norms directly determine administrative or private action (Part III).

We thereby aspire to underscore existing theoretical assumptions on the impact of nonbinding norms on domestic law with examples. While there is a growing body of scholarship investigating the emergence of global administration and administrative law, detailed accounts of the impact on the national administrative law and governance are rare.[4] Even though the analysis takes German administrative and constitutional doctrine as a point of departure, it carefully draws general conclusions on the impact of such norms with the help of examples from other legal cultures, owing to the fact that administration functions

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the Max Planck Institute for Comparative Public and International law, in **R. WOLFRUM and V. RÖBEN**, *Legitimacy in International Law*, Heidelberg 2008.

[4] For notable exceptions in German scholarship, see **B.-O. BRYDE**, *Internationale Verhaltensregeln für Private – Völkerrechtliche und verfassungsrechtliche Aspekte*, Frankfurt am Main, 1981, pp. 21-41; **C. TIETJE**, *Internationalisiertes Verwaltungshandeln*, Berlin, 2001, which has a clear focus on binding international instruments.

differently throughout legal cultures.[5] Administration is thus widely understood as the self-dependent formation and organisation of a polity within the legal framework through measures aimed at realising the objectives promulgated by legislation.[6] For the sake of reducing complexity, we omit possible interrelationships between international nonbinding norms and international treaty law, since our focus is on direct implementation into domestic law and administrative action. This process of implementation may in some cases but not necessarily be indirectly enhanced through treaty law incorporating soft law. Throughout the analysis and in our conclusion we attempt to juxtapose the identified taxonomy of modes of implementation with specific legitimacy challenges arising in each particular case, thereby indicating the need for reform and further research (Part IV).

II. International codes of conduct

Three expressly voluntary codes of conduct[7] and the activities pertaining to their implementation provide the background for this study. The selection stands for three fundamental regulatory problems in international (environmental) affairs, namely common goods protection, trade of dangerous goods and regulation of multinational enterprises, which had at least at the time of the adoption of the instruments not been adequately addressed by international law. Instead, international organisations attempted to fill the regulatory gap with nonbinding codes of conduct and various international compliance-enhancing mechanisms. The three cases therefore illustrate efforts of international organisations to respond to functional necessities with expressly voluntary instruments in the absence of international regulation by states.

[5] For an overview of different administrative traditions, see **C. HARLOW**, "European Administrative Law and the Global Challenge", in **P. CRAIG and G. DE BURCA**, *The Evolution of EU Law*, Oxford, 1999, pp. 263-265, at p. 267.
[6] *Cf* **D. EHLERS**, in **H.-U. ERICHSEN and D. EHLERS**, *Allgemeines Verwaltungsrecht*, Berlin, 2006, Sections 1 I 2 (5-ff) and 1 V 1 (34-ff); see also **D.D. BARRY and H.R. WHITCOMB**, *The Legal Foundations of Public Administration*, St Paul, 1981, p. 53.
[7] *Cf* **FAO Code of Conduct on Responsible Fisheries**, Article 1; **FAO Code on the Distribution and Use of Pesticides**, Article 1 § 1; **OECD Guidelines for Multinational Corporations**, § 1.

A. Fisheries regulation: The FAO Code of Conduct for Responsible Fisheries

The Code of Conduct for Responsible Fisheries (henceforth, "CCRF")[8] was unanimously adopted by the FAO Conference on 31 October 1995 as part of a resolution.[9] The CCRF is explicitly voluntary (Article 1 § 1). The central aim of the CCRF is to ensure sustainable exploitation of aquatic living resources in harmony with the environment. It contains principles and proposes measures and policies for better conservation, management and the utilisation of marine living resources, as well as standards regarding trade and marketing of fish. It is meant to apply to all fisheries. Addressees of the Code are all states irrespective of their membership to the FAO, but also governmental and non-governmental regional and global organisations as well as fishing entities and all persons engaged in activities related to fisheries.

The main document of the CCRF is further supplemented by numerous more precise Technical Guidelines on Implementation and Supplementary Guidelines and by several International Plans of Action.[10] A salient feature of the CCRF is the follow-up mechanism by which the FAO attempts to enhance the implementation of the Code. In addition to extensive compliance assistance programmes directed mainly at capacity building and support of developing countries, the FAO has established what can be classified as a reporting and monitoring system. According to this system, "members would provide information on national implementation using a questionnaire to be designed by the Secretariat".[11]

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[8] For a detailed analysis of the FAO Fisheries Code, see **W. EDESON** "The Code of conduct for Responsible Fisheries: An Introduction", *International Journal of Marine and Coastal Law*, 1996, p. 233; "Closing the Gap: The Role of Soft International Instruments to Control Fishing", *Australian Yearbook of International Law*, 1999, pp. 83-104; "Soft and Hard Law Aspects of Fisheries Issues: Some Recent Global and Regional Approaches", in **M.H. NORDQUIST, J.N. MOORE and S. MAHMOUDI**, *The Stockholm Declaration and the Law of the Marine Environment*, 2003, pp. 165-180; **G. MOORE**, "The Code of Conduct for Responsible Fisheries", in **E. HEY**, *Developments in International Fisheries Law*, 1999, pp. 85-105.

[9] **FAO**, *Conference Resolution 4/1995*, 31 Oct. 1995, § 1; the text of the resolution is attached as Annex 2 to the CCRF, www.fao.org.

[10] **W. EDESON**, "The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument", *International Journal of Marine and Coastal Law*, 2001, pp. 603-623.

[11] It had been agreed upon by the FAO Council at its 112th session in 1997 following a proposal from the Committee on Fisheries (COFI); **FAO COFI,** *Report of the 22nd session of the Committee on Fisheries*, 17-20 Mar. 1997, **FAO Fisheries Report No 562 FIPL/R562 (En)**, § 29.

B. Regulation of pesticides and chemicals: The FAO Pesticide Code and UNEP's London Guidelines as precursors of the PIC Convention

The FAO International Code of Conduct on the Distribution and Use of Pesticides (henceforth, "Pesticides Code"),[12] adopted by the FAO Conference in 1985, and the UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade[13] adopted as a decision by UNEP's Governing Council in 1987, represent an outstanding example of the successful joint effort of two international organisations to use nonbinding codes of conduct to establish and implement international standards on pesticide and chemical regulation. In 1989, both organisations amended their respective instruments to include the principle and procedure of "prior informed consent" (henceforth, "PIC"). The voluntary procedure provided the basis for the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (henceforth, "PIC Convention"). It was adopted in 1998 and entered into force in 2004 and largely reflects the voluntary procedure.

C. Regulation of corporate behaviour: The OECD Guidelines

The OECD Guidelines for Multinational Enterprises (henceforth, "OECD Guidelines")[14] were adopted in 1976 as part of a declaration on international investment and multinational enterprises and extensively revised by 2000. The Guidelines and their procedures of implementation are remarkable for the comprehensive notice-and-comment procedures which ensure broad participation of advisory bodies, including NGOs, via OECD Watch. The Guidelines establish explicitly voluntary[15] standards of behaviour for business enterprises operating in and from adhering countries. The aim of the Guidelines is to improve corporate responsibility in a broad range of areas as diverse as human rights, labour relations and consumer protection and, since 1991, environmental stewardship. Although mainly directed at enterprises, the Guidelines equally address governments, as is illustrated by their recommendation that governments should encourage and promote the use of the Guidelines

[12] **FAO Conference**, *Resolution 10/85*, 28 Nov. 1985, www.fao.org.
[13] **UNEP Governing Council**, *Decision 14/27,* 17 June 1987.
[14] **OECD**, *Guidelines for Multinational Enterprises*, *I.L.M.*, 1976, p. 969; for the most recent version of the Guidelines after an extensive review in 2000, see **OECD**, *The OECD Guidelines for Multinational Enterprises: Revision 2000*, www.oecd.org/daf/investment/guidelines.
[15] **OECD Guidelines**, Chapter I, § 1 reads: "observance of the *Guidelines* by enterprises is voluntary and not legally enforceable" [emphasis added].

by the enterprises operating from their territory.[16] Although formally adopted as a declaration outside the framework of the OECD, the OECD Council immediately after the adoption decided[17] that the OECD would take over the task of implementing the declaration.[18] In line with the general approach of the Guidelines to directly address enterprises, the thus-developed international implementation procedures comprise a remarkable complaint procedure allowing interested persons or groups to challenge activities of multinational enterprises.

III. A taxonomy of modes of implementation: How international codes of conduct enter the national normative space

A. Policy-making and action plans

One objective of codes of conduct is to change the general policy of a state.[19] This may occur through parliamentary or executive legislative acts, but mostly it is not undertaken by the administration itself but by the governing part of the executive. This is not a legal effect strictly speaking. Yet, it furthers implementation by legislation and administrative action and therefore, in the long run, it has legal consequences, also by serving as a point of reference for future legislation or lower level administrative action.

For example, the influence of the CCRF and its accompanying International Plans of Action at the policy-making level of the EC is clearly visible. The Green Paper on the Future of the Common Fisheries Policies adopted by the EC Commission expressly draws on the CCRF as an expression of the "large worldwide consensus on the overall objective of fisheries policy" when suggesting the basic principles of the new policy.[20] Furthermore, the International Action Plans are implemented by Community Action Plans and expressly referred to.[21] Codes of conduct are thus used as a source of authority for new strategies.

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[16] **OECD Guidelines**, Chapter I, §§ 2 and 10.
[17] **OECD**, *Decision of the Council on Inter-governmental Consultation Procedures on the Guidelines for Multinational Enterprises,* 21 June 1976, **C (1976) 117**, §§ 1- 4.
[18] *Ibid.*, Preamble.
[19] **D.J. DOULMAN**, *The Code of Conduct for Responsible Fisheries: The Requirement for Structural Change and Adjustment in the Fisheries Sector*, FAO, Nov. 1998, Heading V, www.fao.org.
[20] **European Commission**, *Green Paper on the Future of the Common Fisheries Policy*, 20 Mar. 2001, **COM(2001) 135 final**.
[21] **European Commission**, *Communication from the Commission to the Council and the European Parliament Laying Down a Community Action Plan for the Conservation and Sustainable Exploitation of Fisheries Resources in the Mediterranean Sea under the Common Fisheries Policy*, 9 Oct. 2002, **COM(2002) 535 final**, § 3 (4) (3); compare also **European Commission**, *Community Action Plan for the Eradication of Illegal, Unreported and Unregulated Fishing*, 28 May 2002, **COM(2002) 180**, § 1.

Comprehensive policies by national governments raise awareness with local authorities to the issues of the codes of conduct and change their behaviour -formally based on law or not- when applying administrative measures. This is reflected by the 'call' to the local governments of the coastal states of India to translate policy into action by setting up legal tools and implementing mechanisms while directly referring to international obligations under the CCRF. The change in paradigms in fishery policy is supposed to mirror every component of the CCRF.[22]

B. Specific legislative implementation: Establishment of a legal framework for administrative action

The nonbinding nature of the instruments does not prevent states from legislating accordingly. Nonbinding international standards then alter national law as national legislation in the spirit and sometimes even with the wording of the codes of conduct is adopted or references to international codes of conduct are included in legislative acts.

Even though changes in the 'law in the books' may not always translate into actual environmental improvement[23] and major implementation problems -in particular in developing countries- severely limit actual environmental effectiveness,[24] formal compliance with nonbinding instruments is often remarkable. For instance, ninety-five percent of the responding FAO members reported to have legislation and policies in place which are

[22] **Government of India, Ministry of Agriculture, Department of Animal Husbandry & Dairying**, *Indian Comprehensive Marine Fishing Policy*, New Delhi, Nov. 2004, Foreword, http://dahd.nic.in/fishpolicy.htm; see also "Agenda items for discussion during the Conference of the State Ministers of Fisheries on 24th February 2007 at New Delhi", www.dahd.nic.in.

[23] See, *e.g.*, **L. SOCHEATA**, "Report on Cambodia", in **FAO, Regional Office for Asia and the Pacific**, *Proceedings of the Asia Regional Workshop on the Implementation, Monitoring and Observance, International Code of Conduct on the Distribution and Use of Pesticides, Bangkok, Thailand, 26-28 July 2005*, RAP Publication 2005/29, Bangkok, 2005, http://www.fao.org/docrep/008/af340e/af340e07.htm#bm07; "though existing regulations, Sub-decree 69 addressing that the disposal of waste and unwanted pesticides and empty containers should be permitted […] but procedures to discard them have not been established yet" and "plans have been developed for the enforcement of pesticide legislation, but still need to be implemented"; see also **FAO**, *Analysis of Government Responses to the Second Questionnaire on the State of Implementation of the International Code of Conduct on the Distribution and Use of Pesticides*, Article 3, on pesticide management, http://www.fao.org/ag/agp/agpp/pesticid/manage/quest2/intro.htm, and Article 5.

[24] For the implementation problems regarding the CCRF, consider **D. BARNHIZER**, "Waking from Sustainability's 'Impossible Dream': The Decisionmaking Realities of Business and Government", *Georgetown International Environmental Law Review*, 2006, pp. 595-609, at p. 677; **N. ALAM** *et al*., "Compliance of Bangladesh Shrimp Culture with the FAO Code of Conduct for Responsible Fisheries: A Development Challenge", *Ocean and Coastal Management*, 2005, pp. 177-188, at p. 186.

partially or totally in conformity with the CCRF, and nine out of ten states reported to be either in conformity or were working towards conformity in both policy and legal domains.[25] A recent independent expert evaluation confirms these results by emphasising the "very considerable impact" of the code on worldwide fisheries management by both developing and developed states.[26]

The impact of the codes of conduct is not limited to less developed countries. For instance, seventy percent of the FAO member states are using the vessel monitoring systems recommended by the CCRF.[27] Yet, established legal orders recur less often to international instruments, as frequently the existing legislative instruments had already been in accordance with the international codes.[28] The Indian government, for instance, stresses that the "Insecticide Act, 1968, and the rules framed there under take care of […] all the provisions of the Code of Conduct" on the Distribution and Use of Pesticides.[29] Likewise, according to the Implementation Plan for the Code of Conduct for Responsible Fisheries by the U.S. National Marine Fisheries Service, the ideas of the CCRF had already been part of U.S. fisheries legislation before the CCRF had been negotiated.[30] However, the 1976 Magnuson-Stevens Fishery Conservation and Management Act[31] had to be amended by the 1996 Sustainable Fisheries Act[32] in order to capture most of the principles of responsible fisheries in Articles 6 to 8 of the CCRF.

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[25] **FAO COMMITTEE ON FISHERIES**, *Twenty-Seventh Session, 5-9 March 2007, Progress in the Implementation of the 1995 Code of Conduct for Responsible Fisheries, related International Plans of Action and Strategy*, **COFI/2007/2**, § 6.

[26] **FAO**, *Independent External Evaluation of the Food and Agriculture Organization, FAO: The Challenge of Renewal,* Working Draft, July 2007, http://www.fao.org/unfao/bodies/IEE-Working-Draft-Report/K0489E.pdf, § 425.

[27] **FAO Newsroom**, "Global Code for sustainable fishing turns 10: FAO calls for renewed efforts to improve fisheries management on 10th anniversary of code's adoption", 31 Oct. 2005, www.fao.org/newsroom/en/news/2005/1000112/index.html.

[28] One has to be careful to conclude from the existence of laws in conformity with the international codes that this is always due to compliance with international law as many (Western) laws date from before the negotiation of the 1985 Pesticides Code or the 1995 CCRF respectively. Especially in Canada, the change of attitude towards exploitation of marine resources had occurred before the CCRF and had even furthered and largely influenced its negotiation. See **Canadian Fisheries**, *Responsible Fisheries Summary, Code of Conduct for Responsible Fishing Operations*, Dec. 2003, available through Fisheries and Oceans Canada.

[29] **M. SINGH**, "Report on India", in **FAO, Regional Office for Asia and the Pacific**, *Proceedings of the Asia Regional Workshop on the Implementation, Monitoring and Observance, International Code of Conduct on the Distribution and Use of Pesticides, Bangkok, Thailand, 26-28 July 2005*, RAP Publication 2005/29, Bangkok, 2005, www.fao.org/docrep/008/af340e/af340e0i.htm.

[30] **U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service**, *Implementation Plan for the Code of Conduct for Responsible Fisheries*, July 1997, http://www.nmfs.noaa.gov/plan.html.

[31] **Magnuson-Stevens Fishery Conservation and Management Act**, 16 U.S.C. 1801-1882, 13 Apr. 1976.

[32] **Sustainable Fisheries Act**, Public Law 104–297, 11 Oct. 1996.

1. The need for legislative implementation

Code-specific legislation is the only way the legislature can oblige the national administration to respect and implement the nonbinding international standards. In contrast to international treaties, nonbinding codes of conduct neither become part of the national legal order for monist systems nor do they have to be transposed into national law for dualist systems. Thus, the national administration is not *per se* legally bound by them.[33] State action in relation to its citizens is only possible within the framework of the respective administrative and constitutional law. As administrative power is delegated power that can only be exercised within the framework of law and in reliance on competences assigned by the legislature, the legislature has to transform codes of conduct into binding national law if it strives to guarantee compliance.[34] Without a specific legislative act, specific actions in accordance with the respective code of conduct would not be guaranteed but be dependent on the respective inclination of administrative officials and the breadth of their discretionary power.[35] Legislation is thus used in order to 'program' administrative behaviour in the spirit of the codes of conduct.[36] Transposing nonbinding international standards into binding national law carries the advantage of preventing legal uncertainty. Moreover, uniform legislation within one state guarantees a level playing field for private actors.

Legal acts are also needed to underscore a change in policy by introducing new institutions, instruments and agencies competent to enforce and implement the legislation in accordance with the code of conduct.[37] This appears to be the first essential step to face

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[33] For the German legal order, see **C. TIETJE**, *Internationalisiertes Verwaltungshandeln*, *supra* note 4, pp. 608-613 and 622-623; who emphasises that Article 20 § 3 of the German Constitution -"all state power is bound by law and statutes"- obviously does not include non-binding international norms, nor does Article 59 § 2 of the German Constitution, which demands that international treaties have to be transposed by national statutory law.

[34] **European Commission**, *Action plan for the eradication of illegal, unreported and unregulated fishing*, 28 May 2002, **COM (2002) 180**, Article 2 § 2, "to give binding effect to […] instruments"; the European Commission further proposes that Community rules banning trade in fishery products taken in breach of international agreements on responsible fishing are adopted, thus seeking an efficient way to enforce norms on responsible fishing; although the action plan speaks of "international agreements", the nonbinding CCRF is likely to be included, as the European Commission explicitly refers to the CCRF and the Action Plan to prevent illicit, unreported and unregulated fishing by the FAO-COFI of 23 June 2001 in the introduction.

[35] See *infra*, for an analysis of implementation without specific legislative acts: Part III, C, 2 and 3.

[36] This is proposed by **A. FAGENHOLZ**, "A Fish in Water: Sustainable Canadian Atlantic Fisheries Management and International Law", *University of Pennsylvania Journal of International Economic Law*, 2004, pp. 639-667, at p. 641; see also **D.J. DOULMAN**, *Requirement for Structural Change*, *supra* note 19, Heading V.

[37] See **Indian Comprehensive Marine Fishing Policy**, *supra* note 22, Articles 5 § 1, 5 § 4 and 9 § 0; **FAO**, *Making Global Governance Work for Small-Scale Fisheries*, New Directions in Fisheries, A Series of Policy Briefs on Development Issues, No 9, Rome, 2007, http://www.fao.org/fi/eims_search/1_dett.asp?calling=simple_s_result&lang=en&pub_id=223166.

institutional shortcomings identified by the FAO as a fundamental problem in the implementation of the codes.[38] For example, the Indian government established a Coastal Aquaculture Authority in order to promote environment-friendly and responsible aquaculture.[39] Also, the number of developing countries without an approved legislative authority to regulate the distribution and use of pesticides has significantly decreased between 1986 and 1993 after the Pesticides Code had been elaborated.[40] Likewise, the government of the Republic of Korea adopted a full pesticides registration scheme pursuant to Article 3 and Article 6 § 1 (2) of the Pesticides Code.[41]

A transposition into national law also becomes indispensable when codes do not contain detailed rules, but rather define goals which can be reached by different means. For example, Article 7 § 6 (9) of the CCFR reads "states should take appropriate measures to minimize waste, discards, catch by lost and abandoned gear"; therefore, leaving a broad margin for the state to decide how it is going to fulfil this 'obligation' and leaving leeway to adapt laws to national particularities.[42] Legislation that defines the means of administrative and factual implementation then becomes indispensable. This task of defining the national policy should rest to a large amount with the national legislator as the directly legitimated sovereign.[43]

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[38] **FAO Fisheries and Aquaculture Department**, "Backgrounder: National Governance of Fisheries", http://www.fao.org/fi/website/FIRetrieveAction.do?dom=topic&fid=12261; see also **FAO COFI**, *Regional Statistical Analysis of Responses by FAO Members to the 2006 Questionnaire on the Code of Conduct for Responsible Fisheries Implementation*, 2007, unpublished, available through the FAO, p. 25, table 40, where institutional weaknesses are identified as constraints to implementation by 29% of the responding members, second after financial problems; **H. LAZOUMAR**, "Législation phytosanitaire pour les pays du Sahel", *Journées d'études sur la protection des végétaux dans le Sahel*, 1993, pp. 15-24, at pp. 19-20, http://80.88.83.202/insah_share/doc/documents/L-393.pdf.

[39] **Costal Aquaculture Authority Act**, **2005**, *Gazette of India*, 23 June 2005, Part II, Section 1. For the motivation underlying the establishment of this authority, see **Government of India, Department of Animal Husbandry & Dairying, Ministry of Agriculture**, *Annual Report 2004-2005*, New Delhi, § 5 (4) (3) (2), http:\\www.dahd.nic.in/rep/ann2005.htm.

[40] **FAO**, *Analysis of Government Responses*, *supra* note 23, Article 3 on pesticide management, http://www.fao.org/ag/agp/agpp/pesticid/manage/quest2/intro.htm.

[41] **SU-MYEONG HONG**, "Report on the Republic of Korea", in **FAO, Regional Office for Asia and the Pacific**, *Proceedings of the Asia Regional Workshop on the Implementation, Monitoring and Observance, International Code of Conduct on the Distribution and Use of Pesticides, Bangkok, Thailand, 26-28 July 2005,* RAP Publication 2005/29, Bangkok, 2005, www.fao.org/docrep/008/af340e/af340e0i.htm.

[42] *Cf* **D.J. DOULMAN**, *Requirement for Structural Change*, *supra* note 19.

[43] Although the codes are mainly addressed to the state in general, it is mostly seen as the duty of the legislation to create an enforceable background for state policies; see, *e.g.*, **H. LAZOUMAR**, "Législation phytosanitaire", *supra* note 38, pp. 19-20, who emphasises the duties of the legislative power to vest the administration with powers to regulate certain areas of pesticide control.

A similar need for legislative transformation exists when states -perhaps for reasons of capacity- prefer to 'pick and choose' from the practices of the code when enacting national legislation;[44] *i.e.*, they do not transfer the complete code of conduct, but only those provisions that suit their policies or fit with the existing laws. For example, Council Regulation 2371/2002/EC on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy[45] strikes a balance between word-to-word transferrals like Article 2 § 2 (i) of Regulation 2371/2002/EC -which mirrors Article 7 § 5 (1-2) of the CCRF-, and its own measures filling in the margins like in Article 7 § 1 (7) of the CCRF. Accordingly, many countries report that "large proportions of the CCRF […] have been *assimilated* into national legislation" [emphasis added][46] rather than directly 'translated' from international codes of conduct.

2. Problems and benefits of 'programmed legislation'

One should not overlook that international codes of conduct often provide -in particular, through supplementary instruments and guidelines- for rather detailed norms prescribing the means of implementation. If followed, codes of conduct therefore often serve as a sort of blueprint for legislation; a feature which renders codes of conduct particularly useful for those countries regulating the issue for the first time and lacking the resources and capacity for drafting adequate legislation. Legislation is then closely oriented by the wording of the codes of conduct and their technical guidelines.[47] For example, the proposal for a revised Marine Fishing Regulation Act in India contains a strict ban on all types of destructive methods of fishing[48], closely resembling Article 8 § 4 (2) of the CCRF; "states should prohibit dynamiting, poisoning and other comparable destructive fishing practices".[49]

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[44] See also **K.M. MEESSEN**, "Internationale Verhaltenskodizes und Sittenwidrigkeitsklauseln", *Neue Juristische Wochenschrift*, 1981, pp. 1131-1132, at p. 1131; "sporadischer und sehr selektiver Erlaß innerstaatlicher Gesetze" ("sporadic and very selective enactment of municipal statutes").
[45] **EC Council**, *Regulation on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy*, 2371/2002/EC, 20 Dec. 2002, *Official Journal*, 2002, L 358, pp. 0059-0080.
[46] **D.J. DOULMAN**, *Code of Conduct for Responsible Fisheries: Development and Implementation Considerations*, FAO Publication, July 2000.
[47] **FAO**, *Analysis of Government Responses*, *supra* note 23, Article 3 on pesticide management; see also **DO VAN HOE**, "Report on Viet Nam", in **FAO, Regional Office for Asia and the Pacific**, *Proceedings of the Asia Regional Workshop on the Implementation, Monitoring and Observance, International Code of Conduct on the Distribution and Use of Pesticides, Bangkok, Thailand, 26-28 July 2005*, RAP Publication 2005/29, Bangkok, 2005, www.fao.org/docrep/008/af340e/af340e0i.htm; "Based on guideline of FAO Code of Conduct the registration scheme was revised in line with international scheme".
[48] **Indian Comprehensive Marine Fishing Policy**, *supra* note 22, Article 5 § 4.
[49] Similarly, Cambodia uses nearly the exact wording of Article 8 § 1 (2) of the Pesticides Code in **Sub-decree No 69 on Standard and the Management of Agricultural Materials**, 28 Oct. 1998, RGC (1998), Article 20. It can be found at **L. SOCHEATA**, "Report on Cambodia", *supra* note 23, Annex 1.

Despite the specific legislative enactment, such 'programmed legislation'[50] may raise particular legitimacy challenges. The main concern is the factual shift of norm making to the international level. Even though this may not *per se* contravene constitutional provisions as long as basic principles of democratic legitimation are respected,[51] the discussion of legislative options that should take place in the national parliaments is transferred to the international level, where it is conducted by representatives of the executive branch without direct participation and often insufficiently controlled by the national legislatures. To the extent that parliaments -often overwhelmed by the technical complexity of the issue and politically unable to unwrap the international 'package deal'- only copy and rubberstamp the international instrument, debate on such norms and the balancing of interests in fact shifts from the national to the international. This poses legitimacy challenges for control of the executive by national legislature as well as norm elaboration and decision-making procedures at the international level.[52]

A further if unrelated problem particularly of programmed legislation is the loss of flexibility. Once the transposed codes are 'petrified' in municipal law, modification is difficult and national implementation does not keep pace with international changes.[53] Codes of conduct are supposed to initiate law-making processes, but they are not their result; thus, legislation that follows the wording too closely terminates this process.[54] In order to tie national legislation to the international developments, parliaments have to either periodically review national legislation and revise it every time a modification at the international level takes place -and thus give up their authority to decide on the birth and life of a legislative act- or have to recur to dynamic references to international norms in national legislation. The latter is however not completely free from legitimacy concerns, as the following discussion will show.

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[50] So far, the transfer of international law into national law has been called "parallel legislation"; *cf* **P. KUNIG**, "The Relevance of Resolutions and Declarations of International Organisations for Municipal Law", in **G.I. TUNKIN and R. WOLFRUM**, *International Law and Municipal Law*, Berlin, 1988, pp. 59-78, at p. 65; to underscore the fact that national law, which is enacted in a parallel process, mirrors international law; as this complete transfer is rather seldom, the term 'programmed legislation' seems more adequate, reflecting the triggering of legislative processes through international codes of conduct with a foreseeable outcome.

[51] In German law, the question of whether Article 59 § 2 of the Constitution prohibits transposition of soft-law norms was very much discussed; see, for an overview, **C. ENGEL**, *Völkerrecht als Tatbestandsmerkmal deutscher Normen*, Berlin, 1989, pp. 246-250, who reaches the conclusion that a transposition is permissible.

[52] This will be discussed in more detail in the final considerations.

[53] See **C. ENGEL**, *Völkerrecht*, *supra* note 51, pp. 247-249.

[54] **K. HAILBRONNER**, "Völkerrechtliche und staatsrechtliche Überlegungen zu Verhaltenskodizes für transnationale Unternehmen", in **I. VON MÜNCH**, *Staatsrecht – Völkerrecht – Europarecht*, Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag, Berlin, 1981, pp. 329-362, at pp. 350-351.

3. Implementation by reference

Another way to determine national administrative behaviour is to incorporate a reference to international law in a national statute. Referencing occurs either by direct reference to a specific code, like in § 23 (1) of the German Plant Protection Act,[55] which particularly mentions the Pesticides Code as a norm to be taken into account,[56] or by the general notion that international standards or agreements have to be considered. Following § 23 (1) of the German Plant Protection Act an export license for pesticides may only be granted if the Pesticides Code is respected. This means that the issue is directly conditioned by international nonbinding standards which thereby gain binding force.

The use of such a dynamic reference, which always refers to the version of the international instrument currently in force, guarantees that the flexibility of international codes of conduct is safeguarded and reflected. In that sense, dynamic references can be perceived as the legal ideal of the principle of international cooperation,[57] as the process of determination and filling-in of norms is left to the international level. References also lead to an enhanced harmonisation of rules governing certain areas as there are the same benchmarks for administrative and private behaviour everywhere. National unilateralist leanings are hence prevented.[58]

Yet, such dynamic references are often problematic from the point of view of national constitutional law. As can be seen with § 23 (1) of the German Plant Protection Act, the legislator, instead of defining the further criteria for an export permit itself, leaves the administration to choose the applicable principles from the Pesticides Code and to interpret the partly vague terms. On the one hand, this gives leeway to the administration and thus

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[55] **German Plant Protection Act**, 15 Sept. 1986, *Bundesgesetzblatt* 1986, p. I-1505; **Revised Enactment**, 1 July 1998, *Bundesgesetzblatt*, 1998, p. I-971.

[56] **2003 Tanzanian Fisheries Act**, Article 8 § 3 appears to be another example; stating that "a local authority with the responsibility to exercise functions in accordance with the provisions of this Act, Code of Conduct for responsible fisheries"; however, the function of the reference remains unclear, as it might also only define the kind of local authority more closely without explaining which role the CCRF plays in this context. **An Act to repeal and replace the Fisheries Act, 1970, to make provisions for sustainable development, protection, conservation, aquaculture development, regulation and control of fish, fish products, aquatic flora and its products, and for related matters**, United Republic of Tanzania, No 22 of 2003, 13 Nov. 2003, http://faolex.fao.org/docs/pdf/tan53024.pdf.

[57] **C. TIETJE**, *Internationalisiertes Verwaltungshandeln*, *supra* note 4, p. 605.

[58] See **E. REHBINDER**, "Das neue Pflanzenschutzgesetz", *Natur und Recht*, 1987, pp. 68-74, at p. 71; stating that one of the incentives for the reference to the Pesticides Code in the **1986 German Plant Protection Act**, *supra* note 55, § 23 (1) was to prevent an isolated German solution to problems connected with the export of pesticides.

strengthens its position and at the same time renders nonbinding norms capable of being adjudicated and enforced; on the other hand, such a general reference might contravene principles of non-delegation[59] and of definiteness of the wording of enactments. In addition, dynamic references pose a problem of legal clarity and security, as for its addressees it is unclear which rules are binding and currently in force. It might also be uncertain to what extent the international norm is referred to.[60]

As opposed to static references where the legislature incorporates a known and defined body of law into national law, dynamic references open the national legal order to changes that are not undertaken by the national legislature but by representatives of the governing branch on the international level.[61] The extent of future modifications is often not even foreseeable. Thus, parliamentary control and responsibility for the precise content is lost and the question of democratic legitimacy is even more crucial than in cases where international soft-law norms are directly transferred into municipal law.[62] From the perspective of German constitutional law, however, these aspects are only problematic in two situations: first, if the subject at stake constitutionally requires a parliamentary decision, for example when fundamental rights are concerned, and second, if the reference is so vague that the international legislator is completely free in enacting and modifying the international instrument.[63]

In any case, a dynamic reference to an international instrument also poses the kind of legitimacy questions already hinted at in relation to programmed legislation, but with more urgency. While programmed legislation, although possibly shifting the debate to the international level, guarantees a legislative approval of the instrument, a dynamic reference surrenders even the possibility of a veto and therefore curtails the role of the parliament and in particular that of the opposition which loses the possibility to contest particular developments.

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[59] For this principle as a basis of American administrative law, see **J.M. BEERMAN**, *Administrative Law*, New York, 2006, pp. 9-14.
[60] For German law, see **Federal Administrative Court**, BVerfGE 47, 285, 311.
[61] **C. TIETJE**, *Internationalisiertes Verwaltungshandeln, supra* note 4, p. 601 and pp. 603-616.
[62] This problem has been widely discussed in German constitutional law; see, for further references, **C. ENGEL**, *Völkerrecht*, *supra* note 51, pp. 41-43; **C. TIETJE**, *Internationalisiertes Verwaltungshandeln, supra* note 4.
[63] **C. ENGEL**, *Völkerrecht*, *supra* note 51, p. 42.

4. Implementation through nonbinding national codes of conduct

So far, we have only looked at transposition by legislative acts that consequently alter the content and structure of national legal orders by incorporating norms of international provenience. Particularly codes of conduct may enter the 'legal' sphere of the national legal order through yet another gateway. Following a trend to move beyond mere command-and-control regulation, municipal legislatures refrain from enacting legislation in accordance with the codes, but rather extrapolate the voluntary, flexible, bottom-up approach of international codes of conduct, which count on the participation and support of local private actors, by encouraging or even relying on national private codes of conduct. One interesting example from another issue area is the German implementation of the European Code of Conduct for European firms operating in South Africa[64], where the parliament expressly refrained from legislative implementation.[65]

With respect to the CCRF, the Canadian Code of Conduct for Responsible Fishing Operations[66] is a grassroots initiative designed by fishermen and prompted by the Canadian government in order to address the diverse needs of Canadian fisheries by encouraging a non-regulatory approach.[67] The implementation and ratification were overseen by the Canadian Responsible Fisheries Board and a secretariat until 2003.[68] Surprisingly, the national code of conduct does not only mirror the content of the CCRF, but also its elaboration process was quite comparable to that of international agreements or parliamentary acts in a federal system. A consensus code was agreed upon by sixty representatives from all fishing industry sectors in 1998 and had then to be ratified by the local fisheries organisations; mainly by direct voting

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[64] **Ministers of Foreign Affairs of the Member States of the EEC**, *Code of Conduct for Companies with Subsidiaries, Branches or Representations in South Africa*, 20 Sept. 1977, **Bull. EC 9-1977**, pp. 46-47; this Code provided guidelines on how to do business in an apartheid environment; it included measures on equal pay, access to education, non-discrimination in the workplace and the recognition of trade unions.

[65] See **H.-J. VON BÜLOW**, "Schwierigkeiten mit dem Südafrika-Kodex", *Recht der Internationalen Wirtschaft (RIW/AWD)*, 1979, pp. 600-603, at p. 601.

[66] **Canadian Code of Conduct for Responsible Fishing Operations 1998**, http://www.dfo-mpo.gc.ca/communic/fish_man/publication_e.htm.

[67] **Parliament of Canada,** *Proceedings of the Standing Senate Committee on Fisheries, Issue 1 – Evidence*, 20 Mar. 2001, www.parl.gc.ca.

[68] See **Canadian Fisheries**, *Responsible Fisheries Summary: Code of Conduct for Responsible Fishing Operations*, Dec. 2003, available through the Department of Fisheries and Oceans of Canada; in May 2003, the Canadian government withdrew funding and staff support for the Responsible Fisheries Board; since then, the execution of the Canadian Code of Conduct lies solely with the Responsible Fisheries Federation, a private board composed of representatives of different Canadian fisheries and fishery associations without any involvement by the state; see **Parliament of Canada**, *Briefing session with the Canadian Responsible Fisheries Federation*, 37th Parliament, 3d Session, 27 Apr. 2004, http://cmte.parl.gc.ca.

of fishermen within their organisation.[69] Thus, its enactment followed a quasi-parliamentary process, which surely added to its legitimacy and credibility. So far, the Canadian Code of Conduct has been ratified by sixty Canadian fisheries organisations representing eighty percent of the landings. This reliance on private self-regulation is seen as a fundamental change in Canadian fisheries management.[70]

In the context of the reform of the Common Fisheries Policy, the EC Commission has developed a voluntary European Code of Sustainable and Responsible Fisheries Practices directed at its fishing sector which is based on the framework of the CCRF[71] and, thereby, encourages responsible fishery practices within the EU with the enhanced authority of the EC Commission.

C. Administrative implementation in absence of code-specific parliamentary legislation

Although it carries the advantages spelled out above, specific legislative action is not the only way through which nonbinding norms can enter the domestic legal sphere. In fact, one of the distinctive characteristics of nonbinding instruments remains the possibility of implementation without ratification and a corresponding legislative act, through administrative activity. Provisions of the international codes of conduct then directly serve as guiding norms for administrative action without any legislative basis.[72] This may in particular occur in legal orders where there are no or insufficient laws regulating a particular issue area,[73] since in this case administrative action might be the only way to implement the ideas of the codes of conduct.[74]

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[69] *Proceedings of the Standing Senate Committee on Fisheries*, *supra* note 67; **Canadian Code of Conduct for Responsible Fisheries**, 1998, Annex 1, Article 2, www.dfo-mpo.gc.ca.

[70] **Fisheries and Oceans Canada/ Pêches et Océans Canada**, "Backgrounder: United Nations Food and Agriculture Organization, Code of Conduct for Responsible Fisheries", www.dfo-mpo.gc.ca/overfishing-surpeche/media/bk_fao_e.htm.

[71] **European Commission**, *European Code of Sustainable and Responsible Fisheries Practices*, 11 Sept. 2003, http://govdocs.aquake.org/cgi/reprint/2004/1017/10170060.pdf.

[72] **B.R. PALIKHE**, "Report on Nepal", in **FAO, Regional Office for Asia and the Pacific**, *Proceedings of the Asia Regional Workshop on the Implementation, Monitoring and Observance, International Code of Conduct on the Distribution and Use of Pesticides, Bangkok, Thailand, 26-28 July 2005*, RAP Publication 2005/29, Bangkok, 2005, www.fao.org/docrep/008/af340e/af340e0i.htm; "particularly where there is no or an inadequate national law to regulate pesticides".

[73] *Cf* **D.M. PALLANGYO**, "Environmental Law in Tanzania: How Far Have We Gone?", 3/1 *Law, Environment and Development Journal*, 2007, http://www.lead-journal.org/content/07026.pdf, pp. 26-35, at p. 34; on the state of Tanzanian environmental protection laws in 2007; see also **FAO**, *Analysis of Government*

At least from the perspective of a German lawyer who is accustomed to the requirement or *proviso* of parliamentary authorisation for any administrative activity, direct implementation of international codes of conduct by administrators is largely a question of the width of the margin of discretion left to the administrator in the relevant legal system and culture.[75] In legal orders like the German, which are foremost based on material criteria,[76] administrative action has to be mostly conditioned by legislation, whereas in legal orders like the French or the English, which rely on procedural justice, the requirements of the codes of conduct are more easily introduced directly via administrative discretion.[77] Some form of 'permission' by the legislator -even if not necessarily code-specific- to take international standards as a basis of administrative decision-making is thus a precondition for administrative implementation from a German perspective. Yet, these permissions can be rather vague or not directly aimed at introducing international codes of conduct. As a result, and in contrast to treaty law implementation which always requires the specific legislative act of ratification, the administrative branch may implement codes of conduct on their own discretion even if the parliament has never considered the issue. In consequence, international soft law -if compared to treaty law- allows for a growing emancipation of the administrative branch from the legislative branch since it is enabled to recur to international standards and thus its basis for decisions is broadened.[78] A growing reliance on nonbinding international instruments as a form of international cooperation therefore challenges traditional conceptions of legitimacy of international acts at the national level.

Responses, *supra* note 23, Article 7; "forty-three percent of developing countries […] did not have any regulations in force to be able to restrict the availability of pesticides […]".

[74] The FAO states that "several developing countries indicated that they were actively relying on the provisions of the Code and the Technical Guidelines concerned for guidance in controlling the introduction and use of pesticides" in *Analysis of Government Responses*, *supra* note 23.

[75] For the European context, see **R. BREUER**, "Zunehmende Vielgestaltigkeit der Instrumente im deutschen und europäischen Umweltrecht – Probleme der Stimmigkeit und des Zusammenwirkens", *Neue Zeitschrift für Verwaltungsrecht*, 1997, pp. 833-845, at p. 837; who points out that, different from Germany, most states, like England or France, rely on a wide margin of discretion for the administration and a minimum of material requirements for administrative action.

[76] **R. BREUER**, *ibid*., p. 836.

[77] See also **J.M. BEERMAN**, *Administrative Law*, *supra* note 59, pp. 3-4; "congress often instructs an agency in very broad terms and leaves important matters to agency discretion, including […] the requirements for obtaining the various benefits, licenses, and permits administered or required by federal law in numerous areas".

[78] **C. TIETJE**, *Die Internationalität des Verwaltungsstaates – Vom internationalen Verwaltungsrecht des Lorenz von Stein zum heutigen Verwaltungshandeln*, Lorenz-von-Stein-Gedächtnisvorlesung No 4, Kiel, 2001, p. 22; who talks about internationalisation in general; however, the influence of soft-law norms could even be stronger, as contrary to treaties they do not have to be transposed and thus stay on the international level.

Given the interest of this paper in different modes of implementation which may each trigger distinct legitimacy challenges, one should distinguish between the adoption of legal acts or internal guidelines by the administration, and further between regulative, distributive and non-regulative or informal modes of implementation in individual decisions as used in the following analysis.

1. Implementation through administrative law-making

In most states, the executive branch is entitled to enact its own regulations in order to concretise parliamentary acts, specify technical requirements or regulate a limited area. Based on an authorisation by law, those decrees, regulations or ordinances can mirror international codes of conduct.

For example, Article 27 of the 2007 Canadian Bill for the Fisheries Act entitles the minister to enact regulations that specify eligibility criteria for a fishing licence. As Article 25 § 2 (g) allows the minister to take into account "any other consideration that the minister considers relevant" when exercising his powers, he can include ideas of the CCRF into binding administrative law and thus make adherence to the CCRF a condition for the granting of licences.[79]

In Cambodia, the implementation of a pesticides management scheme compliant with the Pesticides Code was mainly effectuated by Sub-decree No 69 on the standard and management of agricultural material[80], which regulates -together with the Prakas No 245-[81] detailed procedures of registration, import, export, permits, packages, labels, disposal of empty containers, sale, advertisement, trader obligations, control and management.[82]

As already indicated above, this mode of influence may result in implementation of a code of conduct without specific parliamentary approval. If the ordinances are closely worded

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[79] **House of Commons of Canada**, *Bill C-45*, 1st Session, 39th Parliament, 55 Elizabeth II, 2006.
[80] **Sub-decree No 69**, *supra* note 49, Annex 1.
[81] **Prakas [Ministerial Declaration] No 245 on the implementation of Sub-decree No 69**, 21 Oct. 2002, Ministry of Agriculture, Forestry and Fisheries 2002.
[82] The same is true in Viet Nam, where the **Ordinance on Plant Protection and Quarantine**, *Công Báo No 37*, 8 Oct. 2001, pp. 3-10, http://faolex.fao.org/docs/pdf/vie35158.pdf, has been revised in order to include pesticide regulations and **Decision No 121/1999**, 25 Aug. 25 1999, *Official Gazette* No 44 (30-11-1999), pp. 13-18, on permitted pesticides, has been enacted due to the FAO Pesticides Code; see also **DO VAN HOE**, "Report on Viet Nam", *supra* note 47.

after the codes of conduct,[83] or make use of dynamic references, the administration may even leave the delegated law-making power *de facto* to an international organisation. This may foster trans-national unification of administrative knowledge and action, as the ideas behind the ordinances stem from the same source.

2. Implementation through regulative administrative action

An important administrative task is to regulate public life by responding to and preventing individual dangers to public safety. This is mainly done by means of control, licenses and prohibitions, but also by administrative sanctions and other measures that take place after an infringement has occurred.

The international codes of conduct refer surprisingly often to these traditional administrative means, for even though the codes are nonbinding, control of private actors by the state appears to be the most effective way of realising the goals manifested therein.[84] For example, Article 7 § 1 (7) of the CCRF reads:

> "States should establish […] effective mechanisms for fisheries monitoring, surveillance, control and enforcement to ensure compliance with their conservation and management measures".[85]

a. Use of margins of discretion

If the legislature has not programmed administrative action by material legal requirements, implementation of codes of conduct is up to the discretion of the administrator within the margin opened by law. Since the administration is granted scopes of decision in order to optimise administrative decisions,[86] sufficiently precise provisions of international codes of conduct could and should serve as a benchmark for an internationally agreed-upon optimum. Exercise of discretion in the light of the codes of conduct -for example, requiring

[83] See, for example, Article 20 of the **Sub-decree No 69**, *supra* note 49; where Cambodia uses nearly the exact wording as Article 8 § 1 (2) of the Pesticides Code.
[84] See also **U.S. Department of Commerce**, *Implementation Plan for the Code of Conduct for Responsible Fisheries*, *supra* note 30; "to reach its objectives, NMFS has to carry out […] mainly […] regulatory activities".
[85] Other examples include **CCRF**, Articles 7 § 7 (2-3) and 8 § 4 (1-2); **Pesticides Code**, Articles 5 § 1 (1) -introduction of a registration and control system-, 5 § 1 (3) and 6 § 1 (2).
[86] See **D. EHLERS**, *supra* note 6, § 1 V 6, No 51.

fishers to use only environmentally safe fishing gear[87] or distributors of pesticides to reduce risks to human health-[88] is valid, even if there is no transposing law.

Regulation of private behaviour can for instance be realised by conditional permits that allow an (environmentally) risky undertaking only if requirements under the code of conduct are met, as long as, within its discretion,[89] the administration deems this necessary to meet the legal requirements for a permit. For instance, the OECD Guidelines have been inserted in state contracts or licence requests.

Codes of conduct can further be of use for administrative risk evaluation as they set an international standard of not yet environmentally risky behaviour as well as of actions suitable to prevent the occurrence of a hazard. They might also serve as a yardstick when an authorising agency conducts an environment impact assessment. An undertaking in accordance with the requirements of a specific code of conduct can be deemed not to constitute a hazardous impact on the environment. However, the code of conduct only indicates that the undertaking is not harmful to the environment, but is not binding for the administrative agency in the sense that compliance with the code of conduct would be sufficient for the applicant. In order to reach this effect some kind of legislative approval of the code of conduct as a standard is needed.[90]

b. Interpretation of indeterminate legal terms

Even if there is no explicit margin of discretion, codes of conduct can serve as new principles for interpretation and concretisation of indeterminate legal terms.[91] Whenever statutes make use of wide and indeterminate concepts like 'state of the art',[92] 'detrimental

[87] **CCRF**, Article 6 § 6.
[88] **Pesticides Code**, Article 3 § 10.
[89] Under German law, **Federal Administrative Procedure Act** (Verwaltungsverfahrensgesetz), 23 Jan. 2002, *Bundesgesetzblatt*, 2002, p. I-102, § 36; **German Federal Pollution Control Act** (Bundesimmissionsschutzgesetz), 26 Sept. 2002, *Bundesgesetzblatt*, 2002, p. I-3830, § 12; **Federal Water Resources Act (**Wasserhaushaltsgesetz), 19 Aug. 2002, *Bundesgesetzblatt*, 2002, p. I-3245, § 4; allow that conditions and obligations may be attached to a permit in order to make an undertaking licensable. It lies with the administrative discretion to decide whether a condition is indispensable and what the content of such a condition might be as long as it is not disproportionate.
[90] See also **W. ERBGUTH and A. SCHINK**, *Kommentar zum Gesetz über die Umweltverträglichkeitsprüfung*, 2nd ed., München, 1996, pp. 194-195.
[91] **FAO**, *Analysis of Government Responses*, *supra* note 23, Articles 3-5, relying on the Code of Conduct for guidance; see also **Pesticides Code**, Article 1 § 2; "may judge whether their proposed actions and the actions of others constitute acceptable practices".
[92] **German Federal Pollution Control Act**, *supra* note 89, § 5 (1) No 2; "Stand der Technik".

impacts on the environment',[93] 'good practice'[94] or 'protection of the common good',[95] the administration is called upon to interpret these concepts when applying the law and might do so in conformity with international codes of conduct. This interpretation might be standardised nationally by internal regulations or instructions, which play an important part in the uniform application of the law.[96]

One example is § 6 of the German Plant Protection Act that authorises the competent agency to implement measures in order to guarantee that pesticides are only applied with "best practice".[97] The provision reflects Article 3 § 10 and Article 5 § 5 (1-2) of the Pesticides Code, which demand the reduction of health and environment hazards by state action. However, it is difficult to prove that the advice given for best practice by the Federal Ministry for Food, Agriculture and Forestry[98] in order to guide users of pesticides is actually meant to implement the Pesticides Code, as no direct reference has been made. Likewise, it is not clear, if administrative authorities interpret best practice as 'following the pertinent articles of the Pesticides Code'.

Overall, an interpretation in the light of international codes of conduct may be legitimate and valid under constitutional law if such international norms are only used as an additional source of inspiration and a supplementary argument in a balanced administrative decision.[99] In other words, there is nothing wrong if the administrator looks for expert opinion

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[93] *Ibid.,* § 5 (1) No 1; "schädliche Umwelteinwirkungen".
[94] **German Plant Protection Act**, *supra* note 55, § 2 (a) (1) (1); "gute fachliche Praxis".
[95] **Police Functions Act of Bavaria** (Bayerisches Polizeiaufgabengesetz), 14 Sept. 1990, *Gesetz- und Verordnungsblatt*, 1990, p. 397, Article 2 § 1; "Gefahren für die öffentliche Sicherheit und Ordnung".
[96] See *infra*: Section III, C, 4.
[97] **Plant Protection Act**, *supra* note 55, § 6 (1) reads: "bei der Anwendung von Pflanzenschutzmitteln ist nach *guter fachlicher Praxis* zu verfahren; Pflanzenschutzmittel dürfen nicht angewandt werden, soweit der Anwender damit rechnen muss, dass ihre Anwendung im Einzelfall schädliche Auswirkungen auf die Gesundheit von Mensch und Tier oder auf Grundwasser oder sonstige erhebliche schädliche Auswirkungen, insbesondere auf den Naturhaushalt, hat; die zuständige Behörde kann Maßnahmen anordnen, die zur Erfüllung der in den Sätzen 1 und 2 genannten Anforderungen erforderlich sind" [the use of pesticides should be guided by *good practice*; pesticides must not be used if it is foreseeable for the user that this might cause detriment for human or animal health or groundwater or other severe harm, especially to nature; the competent authority may order measures to ensure the fulfilment of the above-mentioned requirements] [emphasis added].
[98] **Federal Ministry for Food, Agriculture and Forestry**, *Notification of the principles fort he implementation of good practise in plant protection* (Bekanntmachung der Grundsätze für die Durchführung der guten fachlichen Praxis im Pflanzenschutz), 30 Sept. 1998, *Bundesanzeiger vom 21. November 1998*, Beilage No 220 a.
[99] This has been the outcome of several judgments of German administrative courts; see, *e.g.*, **Administrative Court Frankfurt**, 19 June 1988, *Neue Juristische Wochenschrift*, 1988, pp. 3032-3035, at p. 3033, concerning the UN Charter of the Rights of the Child, which only entered into force as a binding convention in 1990; where the Court stated that soft-law can be taken into account as an additional means of interpretation; **Administrative Court Berlin**, 22 Jan. 1996, *Supplement to the Neue Zeitschrift für Verwaltungsrecht*, 1996, p. 51; see also, for an analysis, **C. TIETJE**, *Internationalisiertes Verwaltungshandeln*, *supra* note 4, pp. 633-637.

at the international level when taking its decision. This has been stressed by the Swiss *Rekurskommision für Chemikalien.* It found that an agency is entitled to recur to nonbinding international norms -in this case the manual on development and use of FAO and WHO specifications for pesticides-[100] in order to guarantee a consistent interpretation of the law, since they reflect an international consent on the latest state of scientific and technical knowledge.[101]

A decision, however, that exclusively refers to a nonbinding international standard as the only permissible standard without regard to (differing) national requirements may raise more difficult questions, since the codes of conduct are not binding national law and have not been enacted by the national legislator. As they are nonbinding principles, they cannot be used to restrict individual freedom and civil rights without some kind of legislative basis.[102] This would contravene principles of legal clarity and security, as the citizen has no authoritative source of the nonbinding law and does not know whether and to what extent national administrative decisions will be based on it. National fundamental rights and their influence on administrative balancing of interests override the indicative effect of codes of conduct.[103] Therefore, in order to ensure an effective implementation, parliaments will have to enact constitutionally valid legislation that permits justified interference with fundamental freedoms such as the right to property or to exercise a profession.

3. Implementation through distributive administration and policy

Apart from restricting the individual freedom to act by licensing schemes and sanctions, administrations may also -partly without being specifically authorised to do so- promote compliance with codes through distributive administration; for example, by granting subsidies. Such "distributive policy supports private activities that are beneficial to society but would usually not be undertaken".[104] Following internal guidelines or legislative acts, a subsidy may thus be only granted to those individuals and corporations who respect the

[100] **FAO**, *Manual on Development and Use of FAO and WHO Specifications for Pesticides*, FAO/WHO Joint Meeting on Pesticide Specifications (JMPS), Rome 2002; which has been incorporated into the FAO Pesticides Code.
[101] **Eidgenössische Rekurskommission für Chemikalien**, 28 Feb. 2006, CHEM 05.002, p. 16.
[102] See mainly **C. TIETJE**, *Internationalisiertes Verwaltungshandeln*, *supra* note 4, pp. 632-640.
[103] See also **P. KUNIG**, "Relevance of Resolutions", *supra* note 50, p. 66; "Deutsches Verwaltungshandeln und Empfehlungen internationaler Organisationen", in **K. HAILBRONNER, G. RESS and T. STEIN**, *Staat und Völkerrechtsordnung*, Festschrift für Karl Doehring, Heidelberg, 1989, pp. 529-549, at p. 540, as far as decisions of an international organisation are concerned; **K.M. MEESSEN**, "Internationale Verhaltenskodizes", *supra* note 44, p. 1132.
[104] **J. BUCK**, *Understanding Environmental Administration and Law*, 3d ed., London, 2006, p. 42.

principles of a code of conduct. For example, the U.S. Fishing Capacity Reduction Program provides funding for a vessel and permit buyback program in order to reduce excess fishing capacity according to Article 7 § 6 of the CCRF.[105]

The same is true wherever national administration does not directly subsidise individuals, but uses public funds to (co-)finance the infrastructure that is needed by private actors in order to implement requirements of the codes of conducts like facilities for safe-landing in the fisheries sector or collecting points for empty pesticides containers; for instance, Article 8 § 9 (1) of the CCRF and Article 10 § 7 of the Pesticides Code.[106] Moreover, the administration can be influenced by codes of conduct in a way that it abolishes previously existing subsidies for behaviour 'outlawed' by the code of conduct like the use of pesticides.[107]

Among the various forms of distributive administration, the granting of export credits for external trade to the exporting industry provides one of the rare tools with which administrations may be able to influence private companies abroad. According to the OECD, twenty-nine out of thirty-nine states adhering to the OECD Guidelines for Multinational Corporations used them in the context of export credits and investment guarantees as of 2007.[108] Remarkable as they are, these linkages are comparatively loose. The granting of export credits is not specifically conditioned upon compliance with the OECD Guidelines. Export credit agencies in various countries rather call the attention of exporters to the OECD Guidelines in a more or less systematic way.

In some cases, however, the linkages are more formalised. For instance, applicants to export credits or investment guarantees in the Netherlands only qualify for these benefits if they state that they are aware of the OECD Guidelines and that they will endeavour to comply with them to the best of their ability.[109] Even in this case, a clear conditionality is not established, since the granting of the credits or guarantees is not conditioned upon actual compliance. But the example illustrates nevertheless how nonbinding instruments, which were

[105] **U.S. Department of Commerce**, *Implementation Plan for the Code of Conduct for Responsible Fisheries*, *supra* note 30, D (3) (1).
[106] See **Indian Government**, *Annual Report 2004-2005*, *supra* note 39, § 5 (5) (2) (3).
[107] **M. SINGH**, "Report on India", *supra* note 29; "policy support: phasing out of subsidy on pesticides".
[108] **OECD**, *Annual Meeting of National Contact Points 2007, Report of the Chair*, 19-20 June 2007, § 23 and Table 1, available at: http://www.oecd.org/dataoecd/23/26/39319743.pdf.
[109] **OECD**, *Annual Meeting of National Contact Points 2007*, *supra* note 108, Table 1.

developed without this specific purpose, may over time enter distributive administrative practices. Even though a statement as the one required of applicants by the Dutch export credit agency may not carry legal consequences if it is not part of the contract, a company is certainly well advised to comply if it intends to gain continuous support in the future.

A clear linkage between export credits and a nonbinding environmental law instrument can be observed with respect to OECD recommendations on common approaches to export credit policy. Distributive administration -at least, in Germany- must not necessarily be pre-structured and based on a legislative act.[110] The annual parliamentary decision on the general budget allocates the funds to the responsible ministry, but otherwise remains silent on the substantive issues. Questionable as this lack of a parliamentary act may be in light of the fact that the denial of subsidies can amount to an equally strong interference with civil rights as the denial of a license or the prohibition of an undertaking,[111] the administration of export credits is therefore almost completely left to the discretion of the administration. It can decide over the substantive criteria for the allocation of funds.

In Germany, the criteria for granting an export credit are laid down in Guidelines for Granting Export Credits and Other Securities[112] adopted by a multi-ministerial committee under the chairmanship of the Ministry for Economy and Technology. The environmental acceptability of a project is assessed on the basis of the OECD Recommendation on Common Approaches on Environment and Officially Supported Export Credits adopted in 2007.[113] They have largely replaced the German Guidelines for the Observance of Ecological, Social and Sustainable Development Aspects,[114] which now only play a supplementary role.

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[110] See *supra*; **P. KUNIG**, "Relevance of Resolutions", *supra* note 50, p. 68.
[111] **B.-O. BRYDE**, *Internationale Verhaltensregeln*, *supra* note 4, p. 39; who, on the contrary, sees the limits in the equal treatment-clause of the Constitution; thus, the preferential treatment of 'followers' of the code is not arbitrary.
[112] **Federal Ministry for Economy and Technology**, *Guidelines for Export Credits* (Richtlinien über die Übernahme von Ausfuhrgewährleistungen), 30 Dec. 1983, last modified 31 Jan. 2002, *Bundesanzeiger No 59* (26 Mar. 2002), p. 6077.
[113] See, for the latest revised version, **OECD**, **Trade and Agriculture Directorate**, *Revised Recommendation on Common Approaches on Environment and Officially Supported Export Credits*, http://www.olis.oecd.org/olis/2007doc.nsf/linkto/tad-ecg(2007)9.
[114] **Federal Ministry for Economy and Technology**, *Guidelines for the Observance of Ecological, Social and Sustainable Development Aspects* (Leitlinien Umwelt, Berücksichtigung von ökologischen, sozialen und entwicklungspolitischen Gesichtspunkten), 26 Apr. 2001, http://www.agaportal.de/pages/aga/download-center.html.

Although not binding upon members, the OECD Recommendation is thus directly implemented by the administration without any substantive parliamentary participation.[115]

4. Implementation through administrative guidelines and instructions

In order to guarantee a consistent application of law, higher administrative bodies issue internal regulations and instructions to all agencies. They can embody provisions of the international codes of conduct in order to keep the flexible approach of the codes of conduct; the administration recurs to individual decisions based on internal instructions that can be modified more easily than an official legal act.[116]

One example of such a mode of implementation can be seen in the implementation of the CCRF in Brazil. Empowered by Article 23 of Law No 10.683,[117] the Brazilian Special Secretary for Aquaculture and Fisheries -*Secretaria Especial de Aqüicultura e Pesca*- has the power to formulate policies and directives for the development of fisheries and aquaculture production. The Special Secretary has recently enacted an internal administrative directive -*Instrução Normativa*- establishing the criteria for the development of local plans for marine protected areas. The directive includes a specific reference to the CCRF. The code of conduct thus determines the conditions and restrictions which these planned areas should meet.[118] Other internal administrative Brazilian directives specifically refer to all recommendations or to one article of the CCRF in their preambles.[119]

Although internal guidelines are not directly addressed to the citizen, they have *de facto* implications for private actors as they unify the interpretation of indefinite legal terms. Using such internal guidelines, administrators have at their disposal an important tool to push the uniform implementation of the codes of conduct even if a legislative transposition has not occurred. This is particularly interesting, as often representatives of higher administrative

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[115] It is telling when the German export credit agency on its website speaks of "the Common Approaches as internationally binding set of rules dealing with the subject of environment and officially supported export credits"; *cf* http://www.agaportal.de/en/aga/grundzuege/umweltaspekte.html.

[116] This had been the case with the **European Code of Conduct for European firms operating in South Africa**, *supra* note 64; where the German government did not make use of the authorisation to enact an ordinance in the **Foreign Trade Act** (Außenhandelsgesetz), 9 June 2005, *Bundesgesetzblatt* 50/2005, § 7 (1); *cf* **H.-J. VON BÜLOW**, "Schwierigkeiten", *supra* note 65, p. 601.

[117] **Law 10.683**, http://www.panalto.gov.br/CCIVIL/leis/2003/L10.683.htm.

[118] Article 2 IX of the **Instrução Normativa No 17**, 23 Sept. 2005, http://www.ipaam.br/legislacao.

[119] Compare, *e.g.*, **Portaria No 145-N**, 29 Oct. 1998; **Instrução Normativa No 125**, 18 Oct. 2006, referring specifically to Article 8 of the CCRF; **Instrução Normativa No 14**, 18 Feb. 2004, referring to the principles of the CCRF; http://www.ipaam.br/legislacao.

bodies have participated in the elaboration of codes of conduct on the international level and can therefore ensure that the ideas of the code of conduct are disseminated via lower agencies while filling in margins of discretion.

5. Implementation through non-regulatory and informal administration

Administrative tasks include non-regulatory measures, mainly information, guidance, recommendations, warnings, awareness-raising and reports, which influence the options for action and decisions of the citizens by making the administrative sources of knowledge accessible to them.[120] This aspect is important, as codes of conduct are partly addressed to private actors.[121] States follow an increasingly self- or non-regulative approach, based on the responsible and free decision of the private actor, to reduce the risks to the public good in the same or even a better way than through regulation. This change in paradigms -particularly in legal orders that traditionally rely to a large extent on regulatory administration-[122] is fostered by the international codes of conduct as they promote a multi-stakeholder approach through cooperation with the informed public and do not simply rely on state-run management measures.[123] In the long run, non-regulatory measures are necessary in order to ensure that industry complies voluntarily with the codes of conduct, which will make enforcement more cost-effective.[124] Yet, this also means that a strong regulatory tradition might hinder the success of the codes in that particular legal order.

In order to leave space for private decisions, private actors must have the opportunity of access to good information about the proposals of the codes of conduct. This is recognised by national governments who launched different kinds of informational programs. Effective means are the dissemination of translated versions of the code of conduct and awareness-raising measures such as posters, brochures and workshops.[125] This has, for instance, been attempted by the government program called Safe and Responsible Use of Pesticides

[120] **B. REMMERT**, in **H.-U. ERICHSEN and D. EHLERS**, *Allgemeines Verwaltungsrecht*, Berlin, 2006, pp. 761 and 771.
[121] **FAO**, "National jurisdiction and the governance of fisheries", http://www.fao.org/fishery/topic/14747; **D.J. DOULMAN**, *Requirement for Structural Change*, *supra* note 19, Headings V and VII.
[122] See **R. BREUER**, "Zunehmende Vielgestaltigkeit", *supra* note 75, p. 835.
[123] **CCRF**, Articles 1 § 2 and 2 (j); **Pesticides Code**, Article 1 § 2.
[124] **D.J. DOULMAN**, *Requirement for Structural Change*, *supra* note 19, Heading V.
[125] See **M. SINGH**, "Report on India", *supra* note 29.

(SARUP) in Cambodia; however, such campaigns often face financial restraints.[126] Often governments publish guidelines for interpretation of the codes of conduct in order to render imprecise or unclear provisions comprehensible for private actors. In doing so, the administration can set a national standard of private, codex-conform behaviour, not leaving the interpretation to private actors alone.[127]

The executive may also warn consumers against the use of certain products or certain practices which have been declared harmful to health or environment by the codes of conduct and thus put into effect the goals of the codes. Furthermore, by refraining from warnings against products for which the industry meets the requirements of the codes of conduct, private compliance is enhanced.[128]

Governments have also resorted to market mechanisms as means of implementation. For example, they create public labelling programs. The German Federal Ministry for Food, Agriculture and Consumer Protection, for instance, aspires to introduce an environmental label on the basis of the FAO Guidelines for the Eco-Labelling of Fish and Fishery Products from Marine Capture Fisheries,[129] which are to a large extent based on the CCRF.[130] An innovative approach to promote compliance with the CCRF has been taken in Canada, where each year a national award is presented to commercial fish harvesters by the national fisheries authority in recognition of their outstanding contribution to responsible fishing.[131] Instead of regulating commercial fishing, the government gives an incentive to fish harvesters to adhere to the CCRF and to serve as a role model to other fish harvesters and at the same time safeguards the voluntary and multi-stakeholder approach of the CCRF. In doing so, the public concerned is enabled and motivated to adhere to the codes of conduct and consumers can

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[126] **L. SOCHEATA**, "Report on Cambodia", *supra* note 23; **Royal Government of Cambodia**, **Ministry of Environment**, *National Implementation Plan for the Stockholm Convention on Persistent Organic Pollutants*, 2 June 2006, p. 28, http://www.pops.int/documents/implementation/nips/submissions/nip-cambodia-eng.pdf.
[127] See **H.-J. VON BÜLOW**, "Schwierigkeiten", *supra* note 65, p. 603.
[128] **D. EHLERS**, *supra* note 6, § 1, IX, No 73.
[129] Compare: www.portal-fischerei.de.
[130] **FAO**, *Guidelines for the Eco-labeling of Fish and Fishery Products from Marine Capture Fisheries*, adopted at twenty-sixth session of the Committee on Fisheries, Rome, 7-11 Mar. 2005; references to the CCRF are frequently made throughout the document, and it is stressed in § 2 (1) that eco-labelling schemes should generally be consistent with -*inter alia*- the CCRF.
[131] **Fisheries and Oceans Canada / Pêches et Océans Canada**, "Backgrounder: 2001 Recipients of the National Awards and the Roméo LeBlanc Medal for Responsible Fishing", May 2001, www.dfo-mpo.gc.ca/media/backgrou/2001/hq-ac37-162_e.htm; equally, the U.S. National Oceanic and Atmospheric Administration (NOAA) has created the Sustainable Fisheries Leadership Award, http://www.nmfs.noaa.gov/awards/index.htm, in cooperation with a contracted non-profit organisation.

control the action of the private sector, while at the same time the state guarantees an impartial assessment of compliance with the code; thus, combining legal and market mechanisms.

D. Implementation through private actors: A diminished role of the state

The increasing influence of private actors in international affairs is reflected in the rapid and ubiquitous emergence of private governance or private standard-setting initiatives; a development that has been described as "administration beyond the state".[132] In this part, we want to highlight how international codes of conduct -although adopted in international organisations by governments- also contribute to broadening the realm of private actor governance or administration and, therefore, to the general trend of a diminishing the role of the state.

The adoption of codes of conduct explicitly or implicitly encourages the implementation and administration through private actors -like industry, NGO's and consumers- which rely on such codes to increase their own leverage and governance potential by drawing on the acceptance of the internationally legitimised codes. This often volitional distribution of regulative power to private actors and loss of control traditionally vested in the state is one of the remarkable effects of internationalisation of national law and administration through international codes of conduct.

As indicated, private implementation activities are premeditated in the development of codes of conduct which are also directly addressed to private business actors and deliberately integrate civil society in monitoring and reporting. For example, Article 4 § 1 of the CCRF provides that:

> "All members and non-members of FAO, fishing entities and relevant sub-regional, regional and global organizations, whether governmental or nongovernmental, and all persons concerned with the conservation, management and utilization of fisheries resources and trade in fish and fishery products should collaborate in the fulfilment and implementation of the objectives and principles contained in this Code".

[132] See only **B. KINGSBURY, N. KRISCH and R. STEWART**, *The Emergence of Global Administrative Law*, IILJ Working Paper 2004/1, Global Administrative Law Series, www.iilj.org.

In other words:

> "It was recognised from the outset that industry and international non-governmental organisations (NGOs) would play an important role in its implementation".[133]

Private implementation of the codes of conduct unfolds in numerous ways. Generally speaking, self-regulation can hereby be distinguished from private regulation of other private actors.

First, as indicated, codes of conduct encourage self-regulatory mechanisms and private business initiatives. Industry associations, for example, have a strong interest in safeguarding a positive reputation of their industry. The Australian Seafood Industry Council is one of these organisations which have established a code of conduct based on the CCRF.[134] Another example has already been given above by quoting the Canadian Code of Conduct for Responsible Fisheries.[135] Especially in developing countries, industry initiatives like CropLife, an international stewardship project by pesticide-producing companies, provide programs for and solutions to safe and responsible use of pesticides.[136] They adhere to the Pesticides Code and replace state action where national governments fail to enact or enforce effective legislation.[137] For example, CropLife Mauritius initiated Code of Conduct reinforcement workshops for its members, thus helping to disseminate the principles with private stakeholders.[138] Also the OECD guidelines have been incorporated into national codes of conduct by the industry several times; often initiated by NGOs and due to market reasons.[139]

Second, private actors, in particular NGOs, as well as multi-stakeholder initiatives draw on the international norms to establish implementation mechanisms *vis-à-vis* third party

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[133] **D.J. DOULMAN**, *Requirement for Structural Change*, *supra* note 19, Heading II.
[134] See for this **Australian Seafood Industry Council**, *Seafood Industry Code of Conduct*, http://www.pir.sa.gov.au/fisheries/pdf_equivalents/seafood_industry_code_of_conduct.
[135] See *supra*: Section III, B, 4.
[136] Stewardship of crop protection products, www.croplife.org. For the problems of effectively enforcing container management in the Asian region, compare: **L. SOCHEATA**, "Report on Cambodia", *supra* note 23.
[137] See, on the other hand, **M. SINGH**, "Report on India", *supra* note 29; who complains that "most of the chemical pesticides manufactures/firms/dealers are not coming forward in strength in creating awareness among general masses about hazardous effects of chemical pesticides and are still advocating the advantages of their product just to sell them in the market for their own profits".
[138] Country Fact Sheet Mauritius, www.croplifeafrica.org.
[139] **E. KOCHER**, "Unternehmerische Selbstverpflichtungen zur sozialen Verantwortung: Erfahrungen mit sozialen Verhaltenskodizes in der transnationalen Produktion", *Recht der Arbeit*, 2004, pp. 27-31, at p. 27.

private actors. NGOs thereby pressure industry as they often feel that self-regulation is simply adopted by the industry as a window-dressing exercise and "as means of avoiding more stringent regulation by the public sector".[140] In pursuing the objective of counterbalancing such tendencies, NGOs and multi-stakeholder initiatives rely on market mechanisms. An outstanding example is the eco-labelling initiative of the Marine Stewardship Council which follows the example of the successful Forest Stewardship Council. The Principles and Criteria for Sustainable Fishing of the Marine Stewardship Council represent the leading standard against which fisheries are assessed before being certified; the label being a main market tool for an informed consumers' choice based on the CCRF.[141] This means that the provisions of the CCRF are indirectly impacting the fisheries methods of a considerable part of the industry.

Similarly, non-governmental organisations like the Pesticide Action Network control private industry and its compliance with international codes of conduct, whenever in their opinion self-regulating mechanisms fail. Naming and shaming hereby draws on the need and interest of the industry in safeguarding a good reputation and in avoiding damages from negative media coverage. A prominent example is the case of Syngenta, a leading Swiss company in the production of agrochemicals, which as a member of CropLife International promotes adherence to the Pesticides Code. A group of non-governmental organisations accused them of advertising Paraquat -a widely used pesticide that is not on the PIC-list, but banned in several countries including Switzerland-[142] in Thailand in a manner that contravened Article 11 § 2 (18) of the Pesticides Code.[143] Since the public announcement of this contravention was not successful, an online-court against Syngenta, where public opinion could be expressed by voting 'guilty' or 'non-guilty' as a form of 'naming and shaming', was established.[144] National administrative or criminal sanctions would probably have been

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[140] **F.A. SCHENDEL**, "Selbstverpflichtungen der Industrie als Steuerungsinstrument im Umweltschutz", *Neue Zeitschrift für Verwaltungsrecht*, 2001, pp. 494-500, at p. 495; **D. SHELTON**, "Compliance with International Human Rights Soft Law", *Studies of Transnational Legal Policy*, 1997, pp. 119-143, at p. 129.

[141] Compare: Marine Stewardship Council, http://eng.msc.org; according to MSC information, about six percent of the world's total wild capture fisheries are now engaged in this programme, including forty-two percent of the global wild salmon catch.

[142] *Cf Question to the Swiss National Council* (Nationalrat), 24 Sept. 2002, **Postulat No 02.3477**; *Statement of the Swiss Federal Council* (Bundesrat), 20 Nov. 2002; http://search.parlament.ch.

[143] **Erklärung von Bern (EvB)**, "Syngenta verstösst gegen den Verhaltenskodex der FAO", Zürich, 28 Apr. 2004, http://www.evb.ch/p25003086.html.

[144] *Cf* **Erklärung von Bern (EvB)**, "Öffentliche Verhandlung: Der Fall Paraquat: Das Pflanzengift von Syngenta vergiftet jedes Jahr Zehntausende von Menschen", http://www.paraquat.ch/home.cfm; For a critical report on the online court, see **R. SUTER**, "Online-Justiz gegen Syngenta-Pflanzengift", 26 Sept. 2006, http://www.onlinereports.ch/2006/SyngentaParaquat.htm.

ineffective in this case; especially as Syngenta violated nonbinding international law out of reach of Swiss as well as Thai authorities.

Although effective, this kind of private control runs the risk of not respecting constitutional principles like due process and neutrality and of manipulating its outcome, while interference with civil rights -like property or the right to exercise a profession- through "plebiscitary created loss of reputation"[145] can amount to an encroachment similar to that classically attributed to state action. In other words, if the state and international codes of conduct rely on private control, it has to be considered whether some kind of procedural security can be provided; either through state measures or by international bodies. Seen in this light, the OECD specific instances procedure provides a formalised alternative where NGOs and labour is to some extent given a voice while at the same time providing procedural safeguards such as a kind of a 'right to be heard' and a sort of appeal possibility through which decisions at the national level can be reviewed at the international level.

Finally, private actors also contribute to the monitoring of compliance by public and private addressees. NGOs monitor state action mainly through political pressure. The Secretariat of the FAO, for example, sends questionnaires to NGOs as part of the international reporting mechanism established to further the implementation of the codes of conduct by both states and private actors. The FAO then relies on their reports for developing further instruments or adapting their strategies and compliance assistance programs.

Interestingly enough, support of companies does not stop at efforts to demonstrate compliance and thereby safeguard their reputation, but also includes capacity building measures. For example, when the PIC principle was adopted, it was added as one element of the capacity building initiatives of the so-called 'Safe Use Project' which was financed and conducted by the International Group of National Associations of Manufacturers of Agrochemical Products (GIFAP).[146]

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[145] **R. SUTER**, *ibid.*

[146] The 'Safe Use Project' also included education, provision of protective clothing as well as the distribution of pesticide antidotes; Compare **D.G. VICTOR**, "'Learning by Doing' in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides", in **D.G. VICTOR** *et. al.*, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice*, Cambridge, 1998, pp. 221-281, at p. 255.

The illustrated structural change in administrative law and action away from state regulation towards support of self-regulation mechanisms and public-private-partnerships is a process that occurs increasingly in all areas of public administration.[147] Although at first sight appearing to be formal intergovernmental instruments, international codes of conduct directed towards a collaboration of all stakeholders[148] contribute to this process. At the same time, this shows the particular potential of such instruments in contrast to purely private initiatives. International codes of conduct represent a form of cooperation or division of labour between increasingly powerful private actors and states. They could thus serve as a model for integrating private actors in ways unknown to treaty law while at the same time keeping some government control and state-induced legitimacy.

E. Implementation through international administrative procedures

Some codes of conduct, especially in the field of social corporate responsibility, mainly aim to directly change the behaviour of private actors. They not only almost exclusively address business actors, but also establish international administrative procedures to directly implement such norms. An example in this respect is the specific instances procedure of the OECD Guidelines.[149] According to this procedure, anyone may bring 'specific instances' assumed to constitute an act of violation of the Guidelines by an enterprise to the attention of the National Contact Points (NCPs).[150] Following an initial assessment whether to consider the issue, and a subsequent attempt to mediate between the enterprise and the complainant, an NCP may issue statements and make recommendations on how the Guidelines should be understood and implemented. The results of the procedure are published, thereby raising the pressure on companies which have an interest in avoiding 'reputational' costs. The procedure therefore foremost relies on the initiative of private actors to bring complaints. The NCPs are national governmental or private-public agencies -often situated within a ministry-, which then serve as mere administrative agents for the international procedure, because they have to follow international procedural rules established in a binding decision of the OECD Council. Moreover, the activities of the NCPs take place

[147] Compare **D. EHLERS**, *supra* note 6, § 1, IX; who refers to the necessity for such forms of action in order to secure effective protection of common goods; namely, by making use of a sense of community as well as the self-interest of citizens.
[148] Compare **CCRF**, Article 4 § 1.
[149] Such a procedure also exists for the implementation of the ILO Tripartite Declaration by which labour standards are established.
[150] **OECD**, *Council Decision C (2000) 96*, Procedural Guidance, Section I, C.

under the oversight by the OECD Investment Committee. A review procedure can be triggered by a request for assistance in the interpretation of the Guidelines and the Committee will consider giving a clarification on whether an NCP has correctly interpreted the Guidelines. This review procedure resembles appeal procedures on issues of law which can be seen as indicators for the emergence of global administrative law.[151]

Although such procedures do not completely bypass the state, the approach is not foremost directed at legislative or other implementation by nation states. The difference to traditional international law is striking. The implication is (again) a changing role of the state in some fields from the main regulatory entity to a mere implementing agency that is determined by international administrative law in its decision-making.

IV. Conclusion

Although our analysis generally supports claims regarding the importance and compliance-inducing capacity of nonbinding international norms,[152] it likewise points to the need for differentiation. The degree of impact of nonbinding norms not only depends on the nature of the specific regulatory issue, interest structures as well as the specific formal characteristics of the instrument such as source, participating actors, addressees and compliance mechanisms. Our analysis illustrates that it also depends to a considerable degree on the specific characteristics of the various domestic legal orders that respond to such normative impulses. Thus, the degree of institutional organisation, the density of domestic regulation of the matter and the underlying legal culture of a particular domestic legal order may lead to different degrees and different ways of implementation. Although one should be careful with generalisations, it seems as if in less densely regulated legal orders -possibly combined with less regulatory capacity-, nonbinding international norms often find a broader field for application and reception. Developing countries with lower regulatory capacity may also have a stronger dependency on international and private actors for implementation. And a legal culture that does not know a strict separation of governing and administrating bodies or

[151] On the phenomenon of Global Administrative Law, see **B. KINGSBURY, N. KRISCH and R. STEWART**, *Global Administrative Law*, *supra* note 132.
[152] See, on this issue, the collection of papers in **D. SHELTON**, *Commitment and Compliance: The Role of Nonbinding Norms in the International Legal System*, Oxford, 2000.

leaves more discretionary leeway to the executive[153] should be generally more conducive to implementing international codes of conduct directly through administrators who network with their trans-national counterparts even without a specific legislative act.

Our analysis has further identified some of the main junctures of the international and the domestic administrative spaces that serve as pathways of influence for the analysed international instruments. As already hinted at, we believe that such an analysis of the functions and potential impact of such instruments is a precondition for considerations on specific legitimacy requirements.

On the basis of this taxonomy, we would now like to point to some legitimacy challenges that specifically arise in the context of nonbinding instruments wherever such instruments trigger a deviation from traditional legitimacy safeguards. Simply pointing to the international and domestic legality of implementation processes is hereby not sufficient, since legality merely mirrors the actual state of legal development. In our view, the question of legitimacy, by asking whether such exercise of public authority is sufficiently justified and therefore acceptable,[154] goes beyond mere questions of legality. It identifies the particular challenges for future doctrinal but also domestic and international legal developments. This may in particular include future development and adjustment of international institutional law and domestic constitutional and administrative law.

First, it has been observed that nonbinding norms contribute to the privatisation of the exercise of public functions such as the protection of the environment. In such cases, where states not only rely on private actors as agents who supplement their own efforts, legitimacy challenges arise from the factual retreat of the states from exercising public authority. Naturally, such a statement assumes the continuing importance of the state as a legitimating factor in times of the proliferation of other actors that cannot build on any generally agreed

[153] As do the US; *cf* **O. LEPSIUS**, *Verwaltungsrecht unter dem Common Law*, Tübingen, 1997, p. 16; who states that "in the USA administration and governance are not strictly distinguished"; **W. DURNER**, "Rechtspolitische Spielräume im Bereich der dritten Säule: Prüfungsumfang, Kontrolldichte, prozessuale Ausgestaltung und Fehlerfolgen", in **W. DURNER and C. WALTER**, *Rechtspolitische Spielräume bei der Umsetzung der Arhus-Konvention*, Berlin, 2005, pp. 64-ff., at p. 66.

[154] **D. BODANSKY**, "Legitimacy", in **D. BODANSKY, J. BRUNNÉE and E. HEY**, *Oxford Handbook of International Environmental Law*, 2007, pp. 704-723, at p. 705; **R. WOLFRUM**, "Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations", in **R. WOLFRUM and V. RÖBEN**, *Legitimacy in International Law*, Heidelberg, 2008, pp. 1-24, at p. 6; **J. DELBRÜCK**, "Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?" *Indiana Journal of Global Legal Studies*, 2003, pp. 29-43, at pp. 31-32.

source of legitimacy. In the end, private actors, be it industry or NGOs, are responsible to particular constituencies and not to the general public.[155] Assuming a superior legitimacy base at least of democratic states and a responsibility of states to protect human rights of their citizens, states can only legitimately retreat as long as they ensure the effectiveness and legitimacy of privatising mechanisms. This includes safeguarding fundamental freedoms from infringement by private actors, but also environmental stewardship in a way that ensures the livelihood of citizens and sufficient balancing of interests.

In contrast to purely private forms of governance, international codes of conduct provide a tool to ensure government input into the main decisions while acknowledging the importance of private actors. One legitimacy challenge is thus to acknowledge the supplementary character of such endeavour and to secure a meaningful balancing of interests at the international level and the on-going guarantee of certain fundamental safeguards on the domestic level.

Regarding implementation by states, a general distinction appears to directly flow from the international approach of a particular code of conduct. Instruments which largely build on state implementation must be distinguished from those which almost exclusively aim at regulating private actors but use states as administrative agents, as in the case of the OECD Guidelines.

In the latter case, the role of the state is reduced to that of an administrator in the international compliance or review procedures. Nonbinding norms are then supported by domestic administrators -as in the case of the National Contact Points- without implicating a legitimisation by domestic administrative law or the domestic legislator. Although states may continue to regulate private entities, the approach starkly contrasts with the perceivable international alternative of an international treaty directed at internationally harmonised state implementation through domestically legitimated procedures ensuring a balance of interests and state-backed enforcement. From the perspective of both effectiveness and legitimacy, the diminished role of the state in the general approach of such codes thus becomes problematic if they are used as alternatives to treaty making. Even if only used in a supplementary way, the need for procedural law ensuring the balance of interests, participation of stakeholders as well

[155] **D. BODANSKY**, "Legitimacy", *ibid*., p. 718.

as room for political discourse appears to be a necessity. The new procedural rules providing for a review of decisions of National Contact Points and the employment of notice-and-comment procedures in the last revision of the OECD Guidelines in the year 2000 appear as a positive development in that regard.

In cases where instruments are mainly directed at and implemented through national domestic law and administrative action based on domestic administrative law, the different modes of implementation point to various legitimacy challenges. One hereby needs to roughly distinguish between specific legislative implementation and the possibility of direct implementation by administrators without such a specific legislative act.

Although it seems at first sight that specific legislative acts sufficiently legitimise the implementation of international norms, the particularities of nonbinding instruments may require additional safeguards in the case of programmed legislation and dynamic references. Dynamic references enable the direct incorporation of changes that have not and could not be foreseen by the national legislature when enacting the original law. Thus, the legislature leaves decision-making to international bodies which -in the case of nonbinding instruments- do not necessarily decide on the basis of consent. A transparent and inclusive procedure at the international level as well as control and review mechanisms at the national level seem therefore important to grant legitimacy to such references.[156] Although less problematic than dynamic references, programmed legislation that rubberstamps international norms also contributes to a shift of the democratic discourse to the international level, thereby restricting the influence of national constituencies and in particular of the opposition in a parliament.

The remedy cannot be to prescribe legislative self-restraint. The standard setting exercise at the international level only makes sense if the instrument is implemented without calling into question its content, process of elaboration, *etc*. Thus, programmed legislation is paramount if one aims to avoid upsetting the balance of different economic, environmental and social aspects reached at the international level, and in order to provide a reliable and legitimate source of norms in particular to those (developing) countries with limited capacities. Consequently, it is in the interest of all participants in the norm setting endeavour to provide for additional legitimating procedures already at the international level. This must

[156] **B.-O. BRYDE**, *Internationale Verhaltensregeln*, *supra* note 4, p. 37.

include procedures which ensure that national publics and the political opposition are linked to these processes, in order to uphold the legitimating function of the national public discourse which is essential for the legitimacy of both international norm production and -for the above-mentioned reason- of national implementation.

One possible means to achieve this could be improved access to information and participation of the public in environmental policy-making and administration. A recommendation to this effect has been adopted by the Meeting of the Parties of the Aarhus Convention in the Almaty Guidelines in 2005. They call for the application of the principles of the Aarhus Convention; public participation and access to information at the level of international institutions.[157] International institutional procedures should also ensure the equal participation of developing and developed countries, as well as regional groups, since the adoption of nonbinding instruments at the international level may deviate from the principle of consent which safeguards the sovereign equality of states.

Such procedures are even more pertinent if one considers direct implementation through administrative action without a specific legislative act. Of course, the issue is not simply one of circumventing the parliament. Administrative action can only take place within the margins left for action by the national legislator. Still, as already observed by Tomuschat in 1978, the use of nonbinding instruments increases the weight of the executive as opposed to the legislator.[158] As could be seen in the analysis, the shift to nonbinding international norms enables the executive to -directly or through internal guidelines and instructions- implement norms within their margin of discretion without any specific parliamentary act on the issue. To the extent that nonbinding norms become increasingly important in the process of internationalisation, this development raises the concern that the increasing use of nonbinding norms increases executive power to the detriment of parliamentary participation and control.[159] In addition to the already mentioned procedures, the particular potential of nonbinding norms to be directly implemented points to the need to reinforce the control of the

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[157] **U.N. ECONOMIC COMMISSION FOR EUROPE**, *Report of the Second Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters held in Almaty, Kazakhstan, 25-27 May 2005, Decision II/4 entitled "Promoting the Application of the Principles of the Aarhus Convention in International Forums"*, 20 June 2005, **ECE/MP.PP/2005/2/Add.5**.

[158] **C. TOMUSCHAT**, "Der Verfassungsstaat im Geflecht der internationalen Beziehungen", *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1978, pp. 7-63.

[159] For early warnings, consider **B.-O. BRYDE**, *Internationale Verhaltensregeln für Private*, *supra* note 4, p. 36; **C. TOMUSCHAT**, "Verfassungsstaat", *ibid*.

executive branch by the legislature before the adoption of the instrument at the international level. In Germany, parliament disposes of important possibilities to control the executive in the said sense besides approval through legislative acts.[160] These may include the right of the parliament to ask the federal government to report on international developments, discuss issues publicly or the power of the parliament to issue resolutions regarding specific legal positions.[161] Such control through transparency and public debate is not equivalent to a legislative act, but carries important controlling potential and should therefore not be underestimated.[162]

Taking all the outlined challenges seriously is paramount in ensuring long-term legitimacy and therefore effective sustainable governance by means of these new voluntary approaches. In identifying challenges and in putting forward our propositions, we are of course aware of our underlying -and perhaps biased- motivation to 'keep the state in'. To be sure, this should not be understood as a backlash of traditionalism which does not acknowledge the changing nature of the international system and the rising importance of other actors. The opposite is true. Especially in times where 'voluntary' and 'private' seem to be *en vogue*, cautious remarks seem to be in order not to simply give up established and internationally agreed upon categories and factors of legitimacy, including the importance of a meaningful role of the state as the guarantor of effectiveness and legitimacy, before alternative mechanisms have been developed. Our propositions for reform and further research outlined briefly in this conclusion accordingly strive to take the new opportunities and challenges into account but attempt to avoid the danger which lies in simply discarding what has been achieved in the ordering of society so far.

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[160] This is stressed by **C. TOMUSCHAT**, "Verfassungsstaat", *ibid.*, pp. 34-36; **R. WOLFRUM**, "Kontrolle der auswärtigen Gewalt", in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, 1997, pp. 38-66, at p. 55.

[161] **German Constitution**, Article 43 § 1.

[162] **U. DIECKERT**, *Die Bedeutung unverbindlicher Entschließungen internationaler Organisationen für das innerstaatliche Recht der Bundesrepublik Deutschland*, 1993, p. 164; **C. TOMUSCHAT**, "Verfassungsstaat", *supra* note 158, p. 36.