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Introduction

1.1. FROM NEW YORK TO BANGLADESH: THE CHANGING SOCIETAL ROLE OF COMPANIES

THE SOCIAL ROLE of companies has changed profoundly over the past centuries. To illustrate this, let me contrast two events that proved to have a significant influence on the societal debate on the regulation of workplace standards.

In March 1911, a disastrous fire occurred in the Triangle Shirtwaist Factory in New York that caused the death of almost 150 garment workers. It became known as one of the deadliest industrial events in US history at that time.¹ The fire was caused not only by grave problems in the fire safety of the building, but also by the fact that easily inflammable material was stored at the premises. Another important reason for the high death rate was the bad working conditions in the garment factory, such as locked doors and stairwells that aimed to prevent workers, mostly migrant women working for low wages on a 72-hour week working schedule, from taking unauthorised breaks or leaving the building freely.² Jumping ahead in time to March 2013, the media across the world spread the news that an accident had occurred when a building in Savar, Bangladesh collapsed, causing the deaths of a still-unknown number of people who worked in the clothing factories that the building accommodated. The death toll eventually exceeded 1,100, with more than 2,500 people being injured. The catastrophe was equally described as ‘Bangladesh’s worst industrial disaster’.³ Only a few days after the tragedy, one major cause of the collapse was identified in the substandard construction and safety of the building; a couple of days later, it was added that the high number of deaths was presumably also caused by inadequate working conditions, including the attitude of factory managers to pressure people to come to work in the building despite observed and reported cracks in the days before the collapse.⁴

Comparing these two events, it is not only the actual event and the scale of the catastrophe in its respective historical setting that is remarkably similar—the events also share as a common ground the following debate. After both catastrophes, a wider debate took place about what is colloquially described as ‘sweatshops’,

¹ Greenwald (2005) 127.

² Greenwald (2005) 129ff.

³ See BBC News, 3 May 2013, www.bbc.co.uk/news/world-asia-22394094.

⁴ The facts of this catastrophe have been reconstructed with the material available at the Business and Human Rights Resource Centre, available at: <http://business-humanrights.org/Documents/Bangladeshbuildingcollapse>.

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where claims were made about the necessity of improving the building safety of garment factories. Yet, both tragedies also triggered a general debate on labour rights, covering issues of child labour as well as minimum wages, and helped the trade unions movement to become organised. Back in 1911, the fire resulted in a growing influence of the International Ladies' Garment Workers' Union, which in part pushed the development of safety laws, but the recent accident also triggered organised protests among factory workers who campaigned for fixed minimum wages and better working conditions in Bangladesh.

Based on this comparison, one could interpret both accidents simply as tragic events for countries while they climb the ladder of economic prosperity. The US climbed this ladder in the last century and it is now in developing countries that such events inevitably occur as part of their industrial development.⁵ However, history does never repeat itself entirely. The many parallels of these two events notwithstanding, there is one crucial aspect in which the 1911 disaster differs from the recent tragedy in Savar: the societal discourse about the responsible actors and who is in charge to prevent future accidents differed for each tragedy. One of the main reactions to the factory fire in New York was that a state commission was set up and given the task of investigating the safety of buildings in other garment factories.⁶ The reports of this commission, which indicated that a similar fire could as easily occur in other factories, eventually resulted in the adoption of different labour laws that dealt not only with fire safety requirements but also with other labour standards, such as maximum hours of work and the conditions under which children might be employed. As an observer put it, 'The real meaning of the fire rested ... in the view of "innocent" victims needing a strong state to protect them' and had the result that 'the state remade itself ... with the creation of new policies and laws'.⁷ Hence, retrospectively, the fire can be read as a tipping point that eventually resulted in stricter statutory regulation of workplace standards and a stronger role of the state. The building collapse in Bangladesh, in contrast, also focused on a different actor. Although appeals were made to the government to improve domestic regulation concerning workplace standards and building safety, and the government equally set up a commission to further investigate the tragedy, claims were also made against private actors to take over responsibility for the building collapse and help to improve workplace standards.⁸ The discussions on the disaster in particular addressed the role of large companies that sourced their garments from Bangladesh. In the immediate aftermath of the tragedy, consumers accused retailers of having tolerated these conditions⁹ and non-governmental organisations (NGOs) demanded that large retailers take over responsibility and contribute to the long-term compensation

⁵ See especially for this argument in the debate on sweatshops Norberg (2003) 192ff.

⁶ Greenwald (2005) 154ff.

⁷ *ibid* 153.

⁸ See also on this perspective Nolan (2014) 11, text and note 20.

⁹ Emily Jane Fox, 'Shoppers Lash Out at Stores over Bangladesh', CNN Money online, 2 May 2013, www.money.cnn.com/2013/05/01/news/companies/bangladesh-factory-shoppers/index.html.

of the victims and their families.¹⁰ Interestingly, companies were not pressured into abandoning their production in this country; instead, they were called upon to take over responsibility proactively by helping to prevent such failures in the future.¹¹ It became one of the short-term successes that resulted from the tragedy that several, mainly European, clothing retailers and textile brands signed an agreement with international trade unions that contains concrete minimum fire and safety standards and a commitment by companies to continue sourcing from this country and, while doing so, to take an active organisational and financial role in improving working conditions in garment factories in Bangladesh.¹²

In short, while the 1911 fire can retrospectively be interpreted as an event that gave rise to a stronger role of the state in developing mandatory standards of social protection and in intensifying regulatory intervention, the building collapse in 2013 introduced companies as additional actors that should play an active role in the improvement of fundamental workplace standards. It is the current attempts of the companies to fulfil this role in the form of voluntary codes of conduct and the interaction of such codes with the legal system that will be the focus of this study.

1.2. CORPORATE SOCIAL RESPONSIBILITY AND THE LAW

The decision to focus on the voluntary initiatives of companies and their relevance in the law in the first place raises the question why such contributions have become so prominent. Why do these calls for companies to take a proactive role towards other members of society occur so frequently and why are they mentioned simultaneously with the obligation of states to enact mandatory laws? And why do the evolving voluntary corporate social responsibility initiatives also begin to interest legal researchers and practitioners? In the following, I seek to develop an answer to these questions by means of explaining the current emphasis on voluntary initiatives with the changes in the legal debate on the corporate social responsibilities.¹³ In so doing, I seek to show that the shift from the state to corporations did not

¹⁰ See, eg, the joint call for compensation from the Clean Clothes Campaign and the International Labour Rights Forum, 'Still Waiting: Six Months after History's Deadliest Apparel Industry Disaster, Workers Continue to Fight for Compensation', www.cleanclothes.org/resources/publications/still-waiting/view.

¹¹ See prominently Statement by the National Contact Points for the OECD Guidelines on Multinational Enterprises, Paris, 25 June 2013, www.mneguidelines.oecd.org/NCPStatementBangladesh-25June2013.pdf.

¹² Accord on Fire and Building Safety in Bangladesh, www.bangladeshaccord.org. In this context, it is important to also mention the Alliance for Bangladesh Worker Safety (www.bangladeshworker-safety.org), a rival plan of mainly US American retailers that was, however, criticised for being less strict than the Accord and for failing to sufficiently address the issue of financial assistance from the side of retailers for necessary improvements in the building safety that suppliers are expected to make. In addition, the catastrophe has resulted in efforts by the ILO to help improving the safety at garment factories through government funds and capacity-building. For a detailed overview of all these three initiatives, see also Nolan (2014) 11.

¹³ Corporate *social* responsibilities are pursuant to the prevailing understanding in the corporate social responsibility literature substantively understood here as covering the Triple-P Bottom Line: People, Planet and Profit. See fundamentally on this distinction Elkington (1997).

appear out of nowhere. On the contrary, the current attention given to voluntary efforts follows a general change of the social role of companies that proved in the past to be mainly dealt with by the legal system in the form of mandatory laws, in particular corporate law (section 1.2.1). It is in this context particularly due to globalisation and the changing organisation of the corporate entity that the role of the state proves to become less strong and new regulatory initiatives come to the fore (section 1.2.2). This applies in particular to public and private codes of conduct that currently represent viable candidates to fill the regulatory gap (section 1.2.3).

1.2.1. The Past: Corporate Social Responsibility and Legal Obligations

Although the notion of corporate social responsibility is, particularly in economics and business ethics as well as in parts in the legal debate, deemed an entirely voluntary undertaking of companies beyond the law, this study perceives corporate social responsibility in line with the position of several legal and sociological scholars as consisting of legal and non-legal elements.¹⁴ Pursuant to this understanding, the social responsibilities of companies are not understood as a purely ethical or philanthropic responsibility of companies beyond the law; corporate social responsibility can also take the form of genuine legal obligations. In fact, the legal system proved in the past to be a core instance that determined whether a broader social role for companies was obligatory or remained voluntary, and it did so by constituting and regulating the company as a legal actor with a separate legal personality.

This strong role of the law in shaping the corporate actor and its responsibilities can be traced back to the early understandings of corporate personality that deemed the corporate entity merely as a fiction that, in order to exist and have personality, was entirely dependent on the legal system.¹⁵ It was then the strong role

¹⁴ See, eg, McBarnet (2007), who describes CSR as 'beyond the law' as well as 'through the law', and Gunningham (2007), who defines corporate environmental responsibilities as the 'multi-faceted license to operate' consisting of economic, legal and social licenses. See also Kerr, Janda and Pitts (2009) 103, who hold that the debate on whether social responsibilities are mandatory or voluntary is 'futile' and suggest treating voluntary and mandatory elements as having a 'complementary role to play'; Eijssbouts (2011) 26ff; Mares (2010), who suggests an 'interactive regulatory perspective' on CSR. See also in this context the recent shift in the European Commission's definition of CSR from 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis' (Green Paper, Promoting a European Framework for Corporate Social Responsibility COM (2001) 366 final 6) to 'the responsibility of enterprises for their impacts on society' that consist of voluntary and regulatory elements (Communication, A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM (2011) 681 final 6).

¹⁵ The strong link between corporate personality and the law can be identified in the early decisions and debates on corporate legal personality. For the US, see *Trustees of Dartmouth College v Woodward* (1819) 17 US (4 Wheat) 518, at 636: 'a corporation is an artificial being, invisible, intangible and existing only in contemplation of law'; for England, see *Salomon v Salomon* [1897] AC 22, 51 (per Lord Macnaghten): 'the company is at law a different person altogether from the subscribers to the memorandum'. In the German debate, this understanding can be traced to fiction theory developed by Savigny (1840) vol II, at 277: 'Der einzelne Mensch trägt seinen Anspruch auf Rechtsfähigkeit schon in seiner leiblichen Erscheinung in sich; ... Wird nun die natürlich Rechtsfähigkeit des einzelnen Menschen durch Fiction auf ein ideales Subjekt übertragen, so fehlt jene natürliche Beglaubigung gänzlich; nur der Wille der höchsten Gewalt kann dieselbe ersetzen.'

of the legal system to create corporations that rendered the decision about its social obligations a matter of the law. The importance of the law to specify the social role of companies did not even diminish when the understanding of the corporate entity shifted towards an emphasis on the 'real' rather than the legal elements of the corporate entity. One could have predicted a move away from the legal components against the background of evolving approaches that emphasised the limits of the law in regulating corporations, such as Gierke's approach on the real personality of the collective that the law is not capable of regulating,¹⁶ or the shift in the US from treating the company as a legally created entity towards viewing it as a 'natural entity' that consisted merely of an accumulation of capital.¹⁷ If the law was able to create legal personality, but had a limited position in influencing the real elements of collective human organisation and the accumulation of capital that underlies classifying corporations as legal actors, it could have equally been a consequence that the law's influence on creating the corporate actor and its social role would also diminish. Yet the emphasis on the real elements of corporate personality turned out not to result in a diminishing role for the law; instead, a change in the legal focus occurred. The legal regulation of companies and their social role transformed from a question of the legal personality and the act of incorporation into how to regulate the underlying essence of companies, eg, the owners of the capital. It was now the discussion on the social obligations of economic capital, the underlying 'collective interest' of shareholders and, with the rise of large companies that were characterised by a separation of ownership and control,¹⁸ the obligations of managers in their decision making where the legal debate on the social role of companies remained vital. These debates took different directions in the national political economies and resulted in what later became known as the ideal typical distinction between *shareholder* and *stakeholder* approaches within corporate law.

In the US context, which is taken here as the prime example for a shareholder-oriented corporate model, the debate on the social responsibilities was strongly influenced by the perception of companies as an accumulation of private property.¹⁹ Being essentially private property, companies were considered to receive primarily constitutional protection and not to have obligations towards society. This understanding became particularly apparent in the prominent legal controversy between Berle and Dodd that dealt specifically with the obligations of managers and, more concretely, with whether managers were trustees of the owners only or also of other

¹⁶ Gierke (1887) 22: 'Hat nun aber das Recht die Macht, die Eigenschaft der Rechtssubjektivität zu erzeugen, so ist es doch schlechthin nicht im Stande, die tatsächliche Unterlage dieser Eigenschaft zu erschaffen. Mag es in seinem Bereiche allmächtig sein: hier liegen die Grenzen seines Bereichs.'

¹⁷ See generally on this development Millon (1990) 211ff.

¹⁸ Berle and Means (1933) 47ff.

¹⁹ See fundamentally *The Railroad Tax Cases* 13 F 772 (CCD 1882) at 748: 'The courts will look through the ideal entity and name of the corporation to the person who compose it, and protect them, though the process be in its name ... All the guarantees and safeguards of the constitution for the protection of property by individual may, therefore, be invoked for the protection of the property of corporations.' See also pointedly Millon (1990) 214: 'In other words, the fact that private individuals had chosen to do business as a corporation should not be a basis for subjecting their financial interests to regulation that otherwise would not apply.'

social groups.²⁰ Berle put forth the understanding of managers as trustees of the private capital of owners and saw the role of the law mainly in restricting the power of managers in order to protect the property of the owners. Dodd, in contrast, advocated that managers ought to be viewed as trustees of other social groups. Challenging the very understanding of the company as solely private property, he proposed an alternative legal approach that focuses on the corporate entity essentially as an institution with distinct social responsibilities.²¹ In responding to Dodd, it was again Berle who emphasised that, although such a wider responsibility might be a desirable development, it would require a constitutional law reform that allowed restricting private property,²² and it is this perspective on corporations upon which further developments in corporate law were built. Departing from the perspective of companies as private property, corporate theory culminated in the legal understanding of the company not as an entity in its own right, but rather as a nexus of contracts,²³ and the core social obligations of managers became translated into a contractual obligation to act profitably in the interest of the members. Or, to quote the famous claim of Milton Friedman that was made at that time, it became a prevailing understanding that 'the social responsibility of companies is to increase its profits'.²⁴ Thus, the specific legal understanding of the company as merely an accumulation of capital gave rise within corporate law to the understanding that a broader social role beyond the interest of capital must remain merely philanthropic and subordinated under the shareholder value.

Notwithstanding important socio-economic differences, a similar development towards a shareholder-oriented role of companies can be observed in the UK.²⁵ Also based on an understanding of the corporate entity as private capital, the focus in corporate law was equally set on the duties of managers to protect the property of the owners and maximise profits in their interest.²⁶ Although framed as a duty that is owed to the corporate entity, the traditional understanding was that 'the corporate entity is a vehicle for benefiting the interests of a specified group', namely the interests of shareholders.²⁷ In particular in the UK, one can, however, also identify a recent shift in corporate law away from strict shareholder primacy towards a stronger emphasis on the interests of other social groups.²⁸ It was here again the concept of the legal duties that managers owed to the corporation that became particularly important for this development, resulting most prominently

²⁰ Berle (1931); Berle (1932); Dodd (1932).

²¹ Dodd (1932) 1160: 'But we are not bound to treat the corporation as a mere aggregate of stockholders.'

²² Berle (1932) 1371f.

²³ For this theoretical approach, see Coase (1937); Jensen and Meckling (1976) 310f.

²⁴ Milton Friedman, 'The Social Responsibility of Companies is to Increase its Profits', *New York Times Magazine*, 13 September 1970.

²⁵ For an emphasis on the similarities between the US and the UK understanding of corporate law leading to their conceptualisation as the 'Anglo-American model ... that is distinguishable from models prevalent in Continental Europe', cf Campbell and Vick (2007) 241ff (quote at 242, note 5).

²⁶ Parry (2005) 75.

²⁷ Parkinson (1993) 76ff (quote at 77).

²⁸ For this development with further references, see, eg, Campbell and Vick (2007) 249ff; Kerr, Janda and Pitts (2009) 130f.

in the 2006 reform of the Companies Act that made the interests of employees, business partners and the environment relevant factors that managers had to take into account.²⁹

This specific perspective of conceptualising the social role of companies as voluntary and permissive with only recently introduced obligatory elements can be contrasted with developments in a different national context. As an indicative example, one can refer here to the development of corporate law in the Rhineland capitalism, where a different understanding of the social role of companies evolved. Within the national context of Germany, already at the beginning of the twentieth century, it became an important element in the debate that the rise of large companies would need to be accompanied by strong social obligations.³⁰ Thus, with the increasing power of large companies, the calls became stronger to assign companies a special role in society that encompassed not only rights, but also obligations. In addition, the development of corporate law was strongly influenced by a conceptually different understanding of the underlying 'essence' of the company. While it was clear that the company was ultimately based on shareholders and their capital investment, in the debate on the managerial duties, an important starting point represented the distinction between the financial interests of individual shareholders and the interests of the shareholders as a collective.³¹ Based on the perception that these two interests could also collide, the debate became directed towards introducing legal regulation that ensured that the collective interest of all shareholders was appropriately protected. In the course of the debate, this focus on the collective interests of the shareholder transformed gradually into an understanding of the collective interest of the corporation, resulting in 1937 with the legal reform of the Corporate Stock Act. In the reformed Act, a provision was introduced that obliged corporate managers to act in the interests of the corporation. The period during which the legislative process took place already indicates that this particular provision was also influenced by the Nazi ideology and consequently contained connotations, such as *Volk* and *Reich*, that became later controversially debated. This influence had the result that the provision was removed from the Corporate Stock Act in 1965. Yet, notwithstanding the elimination of this codified provision, the underlying idea of a legal obligation for managers to act in the interests of the company and explicitly not only the interests of shareholders prevailed and continued to shape the debate in corporate law and corporate theory. It, in turn, gave rise to the prominent legal debate on

²⁹ UK Companies Act 2006, s 172. *cf* also on this aspect its predecessor, s 309 of the UK Companies Act 1985: 'The matter to which the directors of a company are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members.' For a slightly different and less strict development in the US towards recognising social interests as relevant for managerial decision making, one can in particular mention the development of Constituency Statutes that were enacted in several states. These statutes generally permit (not oblige) managers to take into consideration non-shareholder interests; see on this development more in detail Kerr, Janda and Pitts (2009) 138ff.

³⁰ See especially Rathenau (1922).

³¹ The participants of this debate were Netter, Landsberger and Geisler. See generally on this debate Gelter (2011) 686ff, who also discusses the related developments in the case law.

the 'interest of the enterprise' that was deemed to be constituted by the different societal interests and explicitly not exclusively the interest of shareholders.³² An influential participant of the debate put it as follows: 'If we remove the influence of national socialist ideology from this formula, we see in it nothing less than the separation of ownership and control and the public responsibility of the enterprise management vis-a-vis employees, state, and society.'³³ However, in the legal debate on the underlying 'corporate interest' and its influence on the legal regulation of the company, the target was not only the duties of managers; the debate on the company interest became a broader debate that also focused on the legally required structure of the company and the representation of interest groups. The most prominent and important development here certainly represents the debate on co-determination in companies and the Co-determination Act that gave the interest group of employees a strong role to control managers by constituting an obligation to have them represented on the supervisory board.³⁴ The embedding of employee interests in the company structure had the result that the company policy was not solely oriented on short-term profitability, but was also taking into consideration the objective of long-term prosperity with a view to the security of employment.³⁵ Interestingly, when deciding whether the Co-determination Act was a constitutional restriction of the private property of shareholders, the Constitutional Court once again emphasised the difference between private property and capital in shares. The latter was considered a specific form of indirectly awarded property that differs from ordinary private property and could be subject to higher restrictions.³⁶ Hence, based on an initial perspective between shareholder interest and the interest of the collective as fundamentally different, a legal approach evolved in this stakeholder-oriented corporate law that not only made it an obligation to conduct companies in the interest of shareholders, but also to consider the interests of society.³⁷ As a result, within this national corporate law development, companies were assigned a wider social role that differed from serving solely the interest of owners.

To conclude, when determining the social role of companies, in the past it was also the legal system, in particular the field of corporate law, that proved to be important. By means of specifying the duties of corporate managers and setting rules as to the legally required company structure, corporate law effectively decided to a large extent the social role that companies would have. In national socio-political contexts that derived from a shareholder-oriented understanding of the company, this legally codified social role was generally narrowly defined as a legal obligation to protect the capital interests of owners and, even in light of recent

³² cf further on this debate with extensive references Raiser (1988) 122ff.

³³ Raiser (1988) 117.

³⁴ See instructively on this debate Wiethölter (1968) 263ff.

³⁵ Hoffmann (2004) 990.

³⁶ BVerfGE 50, 290, at 339ff.

³⁷ See pointedly Calliess and Zumbansen (2010) 189: 'The ... "stakeholder"-oriented approach considers the actors in and around the firm and its business with regard to their vested interests in the firm. It sees the firm as *embedded* in a specific legal, economic and political culture, in which it occupies a place as a societal actor' (emphasis in original).

changes, to treat other social interests as merely subordinate to this shareholder value. Conversely, as could be observed on the basis of Germany, there are also different national evolutionary patterns in corporate law where a broader social role and respect for the interests of several societal groups evolved as a mandatory obligation.

1.2.2. Recent Transformations: Globalisation and the Rise of Transnational Corporations

The strong role played in the past by the legal system in defining the social role of companies is currently challenged by two important developments. First, the national corporate law models are confronted with the current transformation of society from territorial to global organisation. This challenges corporate law insofar as this area of law remains, in major parts, based on the ideal of a corporate entity that operates within a particular national territory. Second, the regulatory field of corporate law is currently also confronted with transformations of the corporate entity as the regulatory object. In particular, the character of large companies changed quite significantly from a hierarchical unit into a complex heterarchically structured fragmented structure with subsidiaries and networks of distributors and suppliers. It is in particular these two developments that brought to the fore different voluntary initiatives developed by actors other than states, which began to deal specifically with global standards of societally expected corporate conduct with regard to the specifics of such complex corporate structures.

To start with the first aspect, the regulation of companies by corporate law is quite significantly influenced by what is broadly framed as globalisation, ie, the general development in society that is characterised by an intensification and increasing relevance of cross-border social relations caused by, amongst others, the deregulation tendencies of politics, rapid technological developments, increase in cross-border migration, intensification of cross-border trade and foreign investment, and the emergence of genuine global risks.³⁸ In corporate law and theory, a controversial debate has already taken place as to whether the increasing cross-border transactions and investment, and thus the freedom of companies to choose their preferred legal system, would eventually put sufficiently strong pressure on stakeholder-oriented legal systems to make them converge with the more liberal and less regulatory shareholder model.³⁹ Yet even if one considers the prediction

³⁸ Scherer and Palazzo (2008) 415ff.

³⁹ This is of course a matter of controversy. A further development in corporate law towards the shareholder model due to regulatory competition is in the legal debate advocated by, eg, Hansmann and Kraakman (2001). A sceptical position on the survival of the Rhineland capitalism and its corporatist company structure under globalisation is also partly taken in the sociological debate, without, however, equalising this with a necessary adaption to the shareholder model; cf prominently Streeck (2009) 260ff. For observations towards hybridisation of corporate governance rules, eg, a transformation with remaining influence of national socio-economic institutions, but significant influence of global elements, see from the perspective of sociology Höpner (2003); Hoffmann (2004) 999ff and from the perspective of law Calliess and Zumbansen (2010) 194ff. For a more critical perspective on the adaption of the corporatist stakeholder model to the shareholder model, see, eg, Abelshauser (2003) 188ff.

of convergence to be not very likely, globalisation has nonetheless affected the regulation of companies quite profoundly. Due to globalisation, a comprehensive additional regulatory layer is required. Under the new premise of globally operating companies, the social role of companies would not only need to be specified for the national operations, and thus by national corporate laws, but also for global operations, in particular cross-border trade and foreign investment. However, the cumbersome law-making processes on an international level, the current lack of political feasibility of creating binding obligations for companies by an international treaty and the many practical and legal obstacles to enforcing any envisaged international obligations have effectively resulted in a situation in which the global operations of companies remain to a large extent unregulated today. According to the orthodox and so far still-prevailing understanding, international law does not lay down general obligations of companies towards society. In fact, today it still remains a fundamental principle in international law that it is states and individuals but not companies that are the subjects of international law.⁴⁰ The few international legally binding documents that provide for a specific legal position of companies equip them, leaving aside the few exceptions in the field of environmental protection,⁴¹ primarily with rights, but they do not impose obligations on them. The prime examples in this context are the rights in bilateral investment treaties to fair, equal and most-favoured-nation treatment.⁴² The United Nations Draft Norms on the Responsibilities of Transnational Corporations can be mentioned here as the most prominent attempt to change this situation. In the form of obliging 'transnational corporations and other business enterprises, as organs of society' to protect human rights,⁴³ the Norms pursued the ambitious project to assign to companies on an international level a position almost akin to states and to oblige them to protect human rights. The result of this attempt is very well known: the strong resistance of influential states and the business community, but also problems related to the legal concepts used in the Norms, in particular the notion of the spheres of influence and the open questions about an effective enforcement of the norms, led this effort eventually to fail. The Norms were never adopted. Instead, what remained from this attempt, at least in the first place, was a tense atmosphere in the United Nations among the actors involved that rendered comparable regulatory efforts a utopian vision rather than a practically viable option

Evidence in support of the survival and success of, in particular, the German model in light of the recent global economic crisis can also be found at, eg, Dustmann et al (2014).

⁴⁰ Brownlie (2008) 66ff.

⁴¹ In the field of environmental protection, some noteworthy conventions exist on civil (including corporate) liability for environmental pollution, such as the civil liability conventions concerning nuclear energy (1960, the so-called Paris Convention), oil pollution (the 1969 International Convention) and transboundary movements of hazardous substances (1989, the so-called Basel Convention); see generally on these conventions and their narrowly confined role in establishing international corporate environmental obligations Zerk (2006) 284ff; Ratner (2008).

⁴² See generally on BITs and the rights of investors Muchlinski (2007b) 682ff.

⁴³ UN Economic and Social Council, Sub-Committee on the Promotion and Protection of Human Rights, Economic, Social and Cultural Rights: Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12, quote taken from the preamble.

for the years to come.⁴⁴ Instead, the lacking political feasibility of developing a regulatory framework for cross-border activities resulted in a focus on alternative, more informal forms of regulation and it is here that codes of conduct, both from the public and the private side, evolved as important elements that specified the social role of globally operating companies.

In addition to the difficulty of setting up a regulatory framework for globally operating companies, the national legal frameworks that regulated companies were also challenged by the transformation of the company as the regulatory object. Naturally, a legal system that lays down legal obligations for the corporate entity reaches its limits when having to deal with the increasing complex organisation of companies, in particular the rise of transnational corporations. So far, no clear-cut definition exists of what would qualify as a transnational corporation, but it seems at least to be a common thread in the debate that these entities are understood as broader than their legal personality under corporate law. From the different definitions of transnational corporations,⁴⁵ one can identify at least two essential components that characterise these organisations. Next to their operation in more than one country, these entities are understood as having a specific organisational structure. Transnational corporations normally consist of several units with separate legal personality within different jurisdictions, where one entity in the group can exercise economic, managerial, factual or other influence over the other; however, there is still a remaining autonomy of each of the entities in the group.⁴⁶ Under the umbrella of this broad definition fall a variety of different forms of corporate structures, such as companies that invest directly in foreign countries by means of establishing subsidiaries that are separately incorporated and the company holds the majority or even 100 per cent of the shares in the subsidiary. Furthermore, it is equally possible that no such strong direct shareholder influence is present, but a dominant position of one company can be identified on the managerial level or where the financial means are to a major extent provided by the parent making the subsidiary economically dependent from the parent.⁴⁷ Yet, even where the parent company exercises influence in one way or another, the degree of influence can

⁴⁴ Instructively on the discussion surrounding the Norms and the fundamental conflicts between the business community and NGOs, see Ruggie (2013) 37ff. See also Kinley, Nolan and Zerial (2007).

⁴⁵ A detailed analysis and evaluation of the various attempts on the international level to give the transnational corporation a legal meaning has been conducted by Nowrot (2006) 52ff.

⁴⁶ See especially the definition in the 2011 OECD Guidelines for Multinational Enterprises, I, para 4: 'They usually comprise companies or other entities established in more than one country and *so linked that they may co-ordinate their operations* in various ways. While one or more of these entities may be able to exercise a *significant influence* over the activities of others, *their degree of autonomy within the enterprise may vary widely* from one multinational enterprise to another.' See also the definition in the 1990 UN Draft Code of Conduct on Transnational Corporations, No 1(a): 'enterprises ... which operate under a system of decision-making, *permitting coherent policies and a common strategy through one or more decision-making centres*, in which the entities are *so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others* and, in particular, to share knowledge, resources and responsibilities with the others' (emphases added).

⁴⁷ See extensively on these different forms Muchlinski (2007b) 56ff, who also emphasises the differences between corporate groups from different countries. Interestingly, he demonstrates how, for instance, US companies seem to favour control in the form of a shareholder position, whereas this formal voting power is less important in Japanese companies where influence is created by strong managerial coordination of different entities.

also differ depending on the particular area in which the managerial decisions are taken. While there are aspects that are directly decided at the top-management level of the parent and are literally imposed on the subsidiary, there are equally areas in which the latter is given a high degree of autonomy. However, it is these flexible corporate group structures that directly challenge corporate law. This new form of corporate organisation requires expanding the regulatory scope of corporate law from the singular legally incorporated entity to the complex corporate group structure, with elements of hierarchical organisation as well as a remaining degree of autonomy. Certainly, the legal system has already developed some strategies to extend the regulatory focus of corporate law to corporate groups. Here one can mention the evolution of specific corporate group laws and the developments in several legal fields towards lifting the corporate veil and holding one entity within a corporate group liable for the behaviour of another entity.⁴⁸ Yet, in spite of these different efforts, the responsibilities of corporate groups, in particular the parent companies, towards outsiders are so far mainly accepted when the corporate group relation is characterised by a strong degree of control of one entity over the other.⁴⁹ With respect to more flexible forms, the fundamental legal principle of separate legal personality still prevails and thus prevents more flexible legal rules on legal responsibility towards outsiders of the different entities within corporate groups.

An additional development that currently challenges the legal system represents the increasing reliance of companies on the contract rather than incorporation as the organising paradigm. Increasingly, companies not only operate in different countries in the form of subsidiaries, but they are also beginning to outsource production to independent trading partners and, on the distribution side, to contract with retailers or independent distributors when seeking to place their products on foreign markets. In economics and sociology, these new forms of contracting on the supply and distribution side have already received some attention as new forms of network organisations.⁵⁰ Pursuant to this understanding, the network describes a social relation that is organised as a contract, but where

⁴⁸ In this context, one may first and foremost refer to the corporate law doctrine of ‘piercing the corporate veil’ that under exceptional circumstances recognises shareholder liability. In relation to parent–subsidiary constellations, this aims at holding the parent company liable for the wrongdoing of its subsidiary in its capacity as a shareholder. See on this concept of liability with a view to different legal systems Joseph (2004) 128ff; Glinski (2011) 310ff; Enneking (2012) 182ff. A development towards parent company liability in its capacity as a shareholder can also be identified in other areas, such as European anti-trust law, where a rebuttable presumption exists for liability of the parent companies for competition law infringements of the subsidiary in case of a 100 per cent shareholder position: European Court of Justice C-97/08 P *Akzo Nobel NV and others v Commission* [2009] ECR I-8237; and Case C-90/09 *General Química v Commission* [2011] ECR I-0000. See for this form of liability Cauffman and Olaerts (2011). An evolving model towards liability in corporate groups based on control is also discussed in tort law; for the different approaches, see, eg, Zerk (2006) 215ff; Enneking (2012) 176ff. Since this form of liability can also be influenced by corporate codes of conduct, aspects of this liability form will be discussed more in detail in section 4.1.2.2. (p 167) in text and accompanying footnotes. Finally, there are other theories of parent company liability that are discussed on occasion, in particular liability based on agency, vicarious liability or even a new concept of enterprise liability; see, eg, on these forms of liability Joseph (2004) 132ff; Zerk (2006) 223ff, 228ff.

⁴⁹ Zerk (2006) 235; Enneking (2012) 175.

⁵⁰ Cf, fundamentally, Williamson (1985) for economics and Powell (1990) for sociology.

elements, such as mutual cooperation, exchange of technological expertise or tailored manufacturing processes between the trading partners, render the contract different from the orthodox contractual relation based on arm's-length negotiation. It is only recently that these new forms of contractual networks have also received attention in the legal debate.⁵¹ However, the current legal debate seems so far to be primarily concerned with the internal structure of these networks and the rights and obligations of different members of the network. Conversely, so far, less attention has been paid to the obligations of these new network relations towards third parties and their external liability.⁵² One of the core hindrances for developing a regulatory framework that also deals with the social responsibilities of these networks relates to the fact that these evolving forms of economic organisation do not fall within the ambit of corporate law and the mandatory obligations specified therein. These contractual networks rely on the contract as their organising paradigm, which, as a result, means that constituting principles in contract law rather than corporate law become applicable. The privity of contracts prevents parties external to the network from holding liable members other than those that they have contractual affiliations with and, conversely, the general autonomy of the parties to a contract prevents the establishment of a general responsibility of the lead firm for the socially irresponsible behaviour in the network. It is again specifically this responsibility of contractual networks that public as well as private codes of conduct address and where they can consequently be of value.

To conclude, the identified national mandatory regulation of the corporate responsibilities towards society currently leaves specific gaps, particularly with regard to the obligations of companies towards society in the specific constellations of foreign investment and cross-border trade, and insofar as responsibilities of companies for their subsidiaries and business partners are concerned.

1.2.3. Evolving Global Regulation: Public and Private Codes of Conduct

For these constellations, voluntary public and private codes represent important instances that seek to fill the regulatory gap. These codes of conduct specify responsibilities of companies towards society, with a particular focus on the worldwide operation of companies and, in so doing, also address the responsibilities of entities in corporate groups and in distribution or supplier networks. When looking in more detail on the contribution of these codes of conduct, a first distinction needs to be made between the two different types of codes. There are, on the one hand,

⁵¹ However, see with differences as to the proposed legal consequences for networks Grundmann (2007); Amstutz and Teubner (2008); Cafaggi (2008); Teubner and Collins (2011).

⁵² So far, the main attempts to conceptualise a 'social responsibility' of contractual networks are made by Collins (1990); and Teubner and Collins (2011) ch 6, 235ff. *cf* also the analysis of Cafaggi, who observes a tendency in national law towards using non-contractual liability to deal with the negative external effects of bilateral contracts: Cafaggi (2008) 40ff. A first very recent attempt to conceptualise network liability for the case of human rights violations by transnational supply chains has been made by Osieka (2014) (with a view to the specifics of German law).

the codes of conduct that have been developed in international organisations as recommendations and guidelines of the international community for transnational corporations. On the other hand, companies and other private actors, such as business organisations and civil society actors, increasingly develop their own benchmark standards for decent and socially responsible business conduct. Both types of codes have also become important in legal scholarship where debates prominently surround their respective potential to become genuine legal obligations.

1.2.3.1. Public Codes of Conduct

1.2.3.1.1. Introducing Core Public Codes of Conduct

An important element in the current debate concerns the initiatives of international political institutions that, rather than regulating companies by developing international legally binding norms, have begun to develop recommendations that specify guidelines on socially responsible corporate conduct. The most prominent initiatives are, in this regard, the recently developed UN Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and the different declarations of the International Labour Organization (ILO), all of which will be introduced briefly.

The UN Guiding Principles on Business and Human Rights occupy, in this enumeration, the most prominent position. It is certainly not an exaggeration to declare them so far to be the most important document of the UN that deals with the relations between companies and human rights. The Guiding Principles are the result of a long-standing process at the UN that began after the failure of the UN Draft Norms with the appointment of John Ruggie as Special Representative for Business and Human Rights. After a phase of consultations and research, Ruggie developed and presented to the Human Rights Council the 'Protect, Respect, and Remedy' framework.⁵³ Described as a result of what Ruggie himself declared 'principled pragmatism', the framework was envisaged as an attempt to re-state the status quo on an international level concerning the human rights responsibilities of corporations that were presented as resting on three well-known core elements: the international hard law duty of states to protect human rights; the corporate responsibility to respect human rights understood as a social expectation towards companies to avoid infringing upon the rights of others and to address adverse impacts of their own activities and the activities that are linked to them through business relationships; and, finally, the necessity of greater access to effective judicial and non-judicial remedies for victims of human rights abuses. The three pillars of this framework provided the basis for further corporate-related human rights discourse in the UN, which was eventually operationalised in the form of the UN

⁵³ Human Rights Council, Eighth Session: Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other businesses, John Ruggie, A/HRC/8/5, 7 April 2008.

Guiding Principles that the UN Human Rights Council unanimously endorsed in 2011. In the UN Guiding Principles, a direct responsibility of companies to respect human rights is laid down in the form of a 'global standard of expected conduct to all businesses wherever they operate'.⁵⁴ The International Bill of Human Rights and the ILO's Declaration on Fundamental Principles and Rights at Work are mentioned as the baseline of internationally recognised human rights that companies have to respect.⁵⁵ Hence, the UN Guiding Principles re-state that the absence of an internationally mandatory framework concerning human rights obligations for companies cannot have the result that no responsibilities of corporations exist whatsoever. On the contrary, what remains is a global social expectation towards companies to respect fundamental human rights that are independent of the country in which they operate and whether the respective state fulfils its obligation to protect human rights. In addition, the Guiding Principles also contain rules that specify what this social expectation entails. Companies are expected to avoid causing and contributing to adverse human rights impacts, but they are also expected to mitigate such impacts if the impact is directly linked to their operations, products and services in the form of a business relationship.⁵⁶ Thus, the Principles not only specify a global standard concerning the human rights responsibilities of companies, they also set out rules on the responsibilities of large and complex multinational companies, including the responsibility for the human rights impact of business partners.⁵⁷ In order to fulfil the responsibility to respect human rights, the UN Guiding Principles concretely require companies to have in place a policy commitment on human rights compliance, carry out a process to assess their adverse impacts, integrate these findings in their business operations, communicate the findings and provide effective grievance mechanisms for victims.⁵⁸ Thus, the UN Guiding Principles have at least provided a first step towards filling the regulatory gap for globally operating multinational corporations by means of specifying concrete expectations as to the human rights responsibilities of companies on a global level, with a view not only to the responsibility of the corporate entity but also the responsibilities within corporate groups should they cause or contribute to adverse impacts or even should they solely be linked to it in the form of a business relationship.

The second important public code of conduct is the OECD Guidelines, which, in contrast to the UN Guiding Principles, have a significantly longer history and a broader scope. These guidelines not only deal with the human rights responsibilities of companies, but also address several issues that are relevant aspects for socially responsible corporate conduct. In fact, the Guidelines represent the

⁵⁴ UN Guiding Principles on Business and Human Rights, Principle 11, Commentary: 'The responsibility to respect human rights is a global standard of expected conduct for all business. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.'

⁵⁵ UN Guiding Principles on Business and Human Rights, Principle 12.

⁵⁶ *ibid*, Principle 13.

⁵⁷ See especially Ruggie (2014) 13f.

⁵⁸ This is the so-called due diligence process that is laid down in Principles 16–22.

most comprehensive attempt so far to codify the global responsibilities of companies towards society and, following the latest update in 2011 that incorporated the standards laid down in the UN Guiding Principles, comprise standards on transparency, human rights, employment and industrial relations, the environment, combating bribery, consumer interests, science and technology, competition and taxation.⁵⁹ When it comes to the addressees of the standards, it should be emphasised that the Guidelines not only deal with the role of companies in their cross-border relations, but that they also place particular emphasis on the responsibility of the above-described complex forms of corporate organisation. In so doing, they determine the responsibility to safeguard adherence to the Guidelines within corporate groups by deeming each and every entity in the group responsible for adherence of the standards and, on top of that, require the entities in a group to 'co-operate and to assist one another to facilitate observance of the guidelines'.⁶⁰ Moreover, the Guidelines also pay attention to the responsibility of companies for their supply chain by means of expecting companies to mitigate the adverse impacts on the matters covered by the Guidelines 'where they have not contributed to this impact, when this impact is nevertheless directly linked to their operations, products or services by a business relationship'.⁶¹ The Guidelines have been explicitly adopted as 'recommendations jointly addressed by governments to multinational enterprises'⁶² that consist of principles and standards of good business practice.

Finally, in an enumeration of the most important public initiatives on corporate social responsibility, one also needs to mention the declarations of the ILO that, in addition to being integrated into other frameworks, also have to be read as a separate and self-standing framework that provides recommendations to companies. Although the ILO conventions primarily address the ratifying Member States by obliging their governments to transpose the conventions into national law, they also have a role to play as guidelines that are addressed to companies. This already became visible in the Tripartite Declaration of Principles on Multinationals and Social Policy that was adopted in 1976 in the form of a codified consensus among the different representatives in the ILO that was also directed towards companies. The Tripartite Declaration emphasised that companies should pursue social policies that promote adherence to national law and a variety of ILO conventions in their global operations.⁶³ The idea of deeming the existing ILO conventions the core international guidance for companies in relation to social policy continued in the 1998 Declaration on Fundamental Principles and Rights at Work, which

⁵⁹ OECD Guidelines for Multinational Enterprises 2011, chs III–XI.

⁶⁰ *ibid*, ch II, Part A, No 4.

⁶¹ *ibid*, ch II, Part A, No 12. In fact, the exact phrasing of this recommendation is equally a result of the incorporation of the UN Guiding Principles. One can in this context also refer to other elements of supply-chain responsibility in the Guidelines, in particular ch II, Part A, No 13 (encourage business partners to apply principles of responsible business conduct) and ch II, Part B, No 2 (engage in or support initiatives on responsible supply-chain management) and following the incorporation of the UN Guiding Principles, ch IV, No 3 (mitigate adverse human rights impacts of business partners).

⁶² *ibid*, ch I, No 1.

⁶³ 17 ILM 422 (1978), adopted 16 November 1977.

contained as a minimum standard the 'core' principles on employment relations. The principles laid down in the Declaration were promoted as expressing the universal global consensus on fundamental and globally accepted labour standards, which amounted specifically to the freedom from forced labour, the prohibition of child labour, the right to non-discrimination in employment, and the freedom of association and collective bargaining.⁶⁴ Although the strategy of promoting specific labour rights as general principles rather than legal rights was a matter of controversy,⁶⁵ the approach to promote the ILO conventions as a global consensus that also aims to provide authoritative guidance for companies prevailed. The declaration of the ILO to treat particular labour rights as the core of what is expected from companies in their global operation remains one of the most important documents that specify minimum expectations towards globally operating companies with a particular emphasis on workplace standards. Yet, in contrast to the UN Guiding Principles and the OECD Guidelines, it has to be clear that these ILO instruments primarily fulfil the role of constituting substantive standards for multinational corporations, but do not provide specific guidance on the responsibilities of members within corporate groups or concerning suppliers.

In order to complete this overview on public codes of conduct, it is necessary to at least mention the UN Global Compact, which is a forum initiated by the UN in which companies can participate by signing up and committing themselves to adhere to the 10 principles on human rights protection, fundamental workplace standards, environmental protection and anti-bribery.⁶⁶

It is these frameworks that the European Commission describes in its recent strategy on corporate social responsibility as the core of internationally recognised principles and guidelines that specify rules on the responsibilities of companies towards society.⁶⁷

1.2.3.1.2. A Transformation into Hard Law?

The interest of legal scholars in public codes of conduct currently surrounds, in particular, the question whether these guidelines are capable of truly filling the regulatory void on a global level by means of serving as new forms of legal obligations for globally operating corporations. While it seems to be quite uncontroversial to describe these codes of conduct as a form of international 'soft law',⁶⁸

⁶⁴ ILO Declaration on Fundamental Principles and Rights at Work, 37 ILM 1233 (1998), 86th Session, Geneva, June 1998.

⁶⁵ cf in particular the debate between Alston (2004), Langille (2004) and Alston (2005).

⁶⁶ www.unglobalcompact.org. See generally on the functioning of this particular framework the concise overview of Murphy (2005) 411ff.

⁶⁷ European Commission, A Renewed EU Strategy 2011–14 for Corporate Social Responsibility COM (2011) 681 final, at 6, where, in addition to the aforementioned frameworks, the ISO 26000 Standard on Social Responsibility is mentioned.

⁶⁸ The term 'soft law' is used here in a colloquially rather than a strictly legal or technical sense. It is of course recognised that the question whether all of the presented public codes would qualify as soft law remains a matter of controversy and depends highly on what concept of law one follows. The use of the term 'soft law' here should not be understood as taking a clear position in the debate that is characterised by so manifold qualifications. In particular, for the UN Guiding Principles, a variety of descriptions are offered, ranging from the endorsed Principles as already an 'authoritative instrument

their potential to be transformed into hard law obligations for companies is still a matter of controversy. In this context, one can identify two main directions in the legal debate concerning the potential of the codes.

In this context, it is necessary first to mention the debates that discuss the potential of public codes to partake in the development of a self-standing system of global law that is furthered by an autonomous application and interpretation of the standards in the autonomous conflict-solving instances that are part of these codes. From this perspective, the transformation of the public codes into hard law is viewed as conceptually similar to the understanding of *lex mercatoria*, *lex digitalis* or *lex sportiva* as a global law. Specific attention in this respect is given to the procedure that is in place to solve conflicts under the OECD Guidelines, eg, the National Contact Points (NCP) that governments have to set up in order to further the effectiveness of the Guidelines and to provide a form in which to resolve disputes between different actors about whether companies have in fact adhered to the guidelines.⁶⁹ With a view to this dispute-solving role of the so-called specific instance procedure, it is argued that, with the increase of cases brought before the NCPs, the likelihood increases that these procedures also gradually transform into quasi-judicial procedures that assist in transforming the Guidelines into an autonomous system of customary international law.⁷⁰ It should be noted that even proponents of this approach admit that this process, in the current form of the NCPs, is still far from a fully juridified system on international legal responsibilities.⁷¹ Yet, this perspective on the public codes as an autonomous legal system can nonetheless be read as signposting the potential future direction of these public codes where ‘under the guise of soft law, the OECD may be able to construct a system of customary law and practice as binding as any hard law system’.⁷²

A different approach towards a transformation of these public codes of conduct into binding hard law is to focus on the potential reference of these public codes by national courts and their potential recognition as legally relevant standards.⁷³ In this regard, general tort law is viewed as a promising angle for this undertaking, but the discussions also surround the area of law relating to unfair commercial practices. Of particular importance in this discussion is the Alien Tort Statute,

of soft law’ (Nolan (2013) 158), as a ‘non-legal universal baseline expectation’ that ‘has become soft law’ by means of its adoption by the OECD (Eijsbouts (2011) 46) or even as ‘law in force but without legal sanctions’ (Teubner (2011) 34).

⁶⁹ OECD Guidelines for Multinational Enterprises 2011, Part B, Procedural Guidance.

⁷⁰ Backer (2009); Calliess and Renner (2009) 274f; Eijsbouts (2011) 46.

⁷¹ Backer (2009) 305; Calliess and Renner (2009) 275, who contrast this nascent form of juridification with the more advanced systems of the Internet Corporation for Assigned Names and Numbers (ICANN) and commercial arbitration.

⁷² Backer (2009) 284.

⁷³ See (with conceptual differences as to the potential angles in national and international hard law) Genugten and Bijsterveld (1998) 170ff; Kocher (2005); Muchlinski (2007a) (pointedly at 433: ‘emerging consensus on the social obligations of companies’); Jäger and Heijden (2008) 857ff; Calliess and Renner (2009) 274; Eijsbouts (2011) 19; Spießhofer (2014). *cf* also the extensive references provided by Backer (2009) 259f, notes 5, 6.

a unique provision in the US that provides jurisdiction for foreigners to remedy the violations of a small set of customary international laws.⁷⁴ This provision also proved important in relation to corporate liability and the potential use of public codes in this respect.⁷⁵ Such transformations of public codes of conduct into binding obligations are certainly considered a conceivable option; yet, based on the current developments, this option currently seems rather limited. In particular, it must be taken into consideration that the proposal that public codes of conduct can be transformed into hard law when judges use open-ended concepts departs from a particular understanding on how courts can interpret such open-ended norms. In this context, one must also take into consideration the fact that there are equally restrictions for courts on how to use international documents in order to interpret open norms.⁷⁶ In relation to the public codes, two core arguments in fact suggest that a more reluctant attitude on the side of the courts is likely to be taken. First, in the course of discussing the character of public codes of conduct, it still needs to be taken into consideration that they have explicitly been adopted as guidelines and recommendations, and not as documents that should be read as binding treaties or resolutions. To use an explicitly non-binding document in the court to justify a legal obligation seems against this background to be, at the very least, difficult to justify. Second, it must still be taken into consideration that corporations are not subjects of international law and thus it is difficult to hold them liable for violations of customary international law in general.⁷⁷ The prediction that the transformation of public codes of conduct into hard law with the help of domestic courts remains a cumbersome process is particularly evidenced in the recent development in relation to the Alien Tort Statute. In issuing the judgment in *Kiobel v Shell*, the US Supreme Court delivered a long-expected decision on the future possibility of corporate liability concerning violations of international law under US law and, in doing so, narrowed down the scope of potential corporate

⁷⁴ 28 United States Code, § 1350. For the evolution of the Alien Tort Statute as a provision that provides jurisdiction to remedy violations of a small set of customary international laws (including violations committed by private actors), see *Filartiga v Penala-Irala* 630 F 2d 876 (2d Cir 1980); *Kardic v Karadzic* 70 F 3rd 232 (2nd Cir 1995); *Sosa v Alvarez-Machain* 124 S Ct 2739 (2004).

⁷⁵ See, eg, Revak (2012) 1665f, who discusses the potential use of the ILO conventions in the context of the Alien Tort Statute.

⁷⁶ See for this argument Klösel (2012) 33f. For sceptical positions on the transformation of particularly ILO core labour conventions into hard law in German case law, see especially BGH NJW 1980, 2018 (in relation to unfair commercial practices law, further discussed in section 5.3.2.2. (p 202) in text and accompanying footnotes), and recently BVerwG NVwZ 2014, 527 (in relation to municipal law). An instructive and prominent case, however, where a court referred to the OECD Guidelines is the Dutch *Batco* case (NJ 1978, 220). Yet it should also be mentioned that, in this case, it was also not the OECD Guidelines per se that were treated as binding, but 'the fact that Batco Industries had accepted the OECD Guidelines as guidelines for its policy' by including a commitment on compliance with the OECD Guidelines in its annual report (see Genugten and Bijsterveld (1998) 173f, quote at 174). Thus, the decision could arguably equally be read as rendering the OECD Guidelines binding on the ground of commitment and reliance rather than on direct reference to the OECD Guidelines as hard law obligations.

⁷⁷ cf for these two aspects Baade (1980) 7ff, 12.

liability under the Alien Tort Statute quite significantly.⁷⁸ The rather reluctant position as to a court-initiated transformation of public codes of conduct into hard law certainly does not mean that this possibility is generally rejected. Yet, it is nevertheless predicted that this potential transformation of the above-mentioned public codes into binding hard law needs to be understood as a cumbersome and long process, which is probably also one of the reasons why the approach to developing international guidelines instead of hard law still receives criticism.⁷⁹

The direct transformation of the public codes into domestic hard law with the help of national courts is accordingly deemed to be a highly uncertain option, the success of which can only be assessed in the future. Equally, the transformation of these public codes of conduct into or their replacement by international hard law obligations for corporations must at this stage be viewed as a long-term process with an open end.⁸⁰ However, these guidelines and recommendations still remain in their current form a valuable instance to trigger other processes through which the legal system might eventually come into play. Next to the possible integration of these codes within national legislation and policies,⁸¹ their current potential lies particularly in their effect on private actors.⁸² In fact, these public codes prove to

⁷⁸ 133 S Ct 1659 (2013). See also *Balintulo v Daimler AG*, No 09-2778-cv(L), 2013 WL 4437057 (2nd Cir, 21 August 2013). It has to be emphasised of course that the claim was not dismissed on the ground that corporations do not have obligations under international law, but mainly by declaring that the general presumption against extraterritorial application of US law also applies to the Alien Tort Statute. Thus, the recent development mainly imposes a hindrance on bringing to court violations of customary international law that occurred outside the US and involved non-US companies. However, even to the extent that the restrictions as to the extraterritorial Alien Tort Statute could be surmounted, several legal obstacles remain. It still remains questionable whether the Alien Tort Statute applies to companies. And even if this is answered in the affirmative, its use remains restricted to violations of a small set of human rights obligations and probably does not apply to all provisions in public codes of conduct concerning workplace standards and environmental protection. On this latter aspect, see also Revak (2012) 1666f.

⁷⁹ See, amongst the critical positions towards the regulatory approach taken by the UN Guiding Principles, especially Massoud (2013); Deva and Bilchitz (2013).

⁸⁰ See for the current discussions on an international treaty on business and human rights the very recent developments in the UN Human Rights Council. At its 26th session on 26 June 2014, the Council adopted with a highly divided vote (20 countries voting in favour, 14 countries voting against and 13 countries abstaining) a resolution by Ecuador and South Africa (A/HRC/26/L.22/Rev.1) that requests to 'establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to Human Rights whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises'. At this session, the Council also approved by consensus a resolution by Norway (A/HRC/26/L.1) that is directed, among other things, 'to launch an inclusive and transparent consultative process with States ... to explore and facilitate the sharing of legal and practical measures to improve access to remedy ... including the benefits and limitations of a legally binding instrument, and to prepare a report thereon'.

⁸¹ For examples, see Ruggie (2014) 11f. Probably the most prominent integration of the UN Guiding Principles' due diligence concept into national legislation so far is the conflict mineral reporting under the US Dodd Frank Act, s 1502. Yet, it is currently a matter of controversy whether the provision is unconstitutional as a breach of First Amendment Protection; see especially the recent decision of the US Court of Appeals for the District of Columbia Circuit arguing in favour of First Amendment Protection, *National Association of Manufacturers et al v Securities and Exchange Commission et al*, No 13-5252, decided 14 April 2014.

⁸² See, eg, Marrella (2007) 293: 'The real question then becomes the following: are codes elaborated by IGOs completely useless? My answer is no. I believe that such IGO-generated Codes of Conduct have a unique and very important value as external *benchmarks* for business-generated codes' (empha-

play an important role in shaping, influencing and further specifying the general debate on social responsibilities and, in so doing, they have had a considerable effect on another trend: the self-regulation in the private sphere and, more specifically, the development of private codes of conduct.

1.2.3.2. *Private Codes of Conduct*

The focus of the analysis so far has been set on codes of conduct that have been created by or at least with the significant participation of states as members of international organisations. Yet, the development towards codes of conduct on the level of international organisations is only one side of the coin; on the other side are the codes of conduct that are developed by the private sector. In specifying different forms of these codes, one can refer to model codes of business associations and NGOs that have as their aim to serve as a benchmark standard upon which companies can model their own policies. On the NGO side, one can refer in this context to, for instance, the Amnesty International Human Rights Principles for Companies or the Worker' Rights Consortium Model Code of Conduct. On the business side, famous examples of such model codes represent the sector-specific initiatives, such as the Chemical Industry's initiative Responsible Care, the Electronic Industry's Code of Conduct or initiatives addressing business in general, such as the International Chamber of Commerce Charter for Sustainable Development.⁸³ In addition, a plethora of different monitoring and certification programmes evolved that certify compliance with codes of conduct on workplace standards and environmental protection. However, at the core of the private codes of conduct development lie the codes that companies develop with the objective of setting benchmarks for their own global conduct and the conduct of subsidiaries and suppliers, and the following section will specifically focus on these corporate codes of conduct.

1.2.3.2.1. Global Guidelines on Socially Responsible Corporate Conduct

Corporate codes of conduct have been developed as a reaction to changing demands in society concerning their social role as well as a strategic response of companies to the emerging public codes of conduct in international organisations and the claims therein to take over social and environmental responsibility. The 1990s are frequently mentioned as a starting point when the first corporate scandals received media attention, such as Shell's planned sinking of the Brent Spar

sis in original); Ruggie (2007) 839: 'any successful regime needs to motivate, activate, and benefit from all the moral, social, and economic rationales that can affect the behaviour of corporations'; Teubner (2011) 34f: 'The Codes of the United Nations, the ILO, the OECD, and the European Union are mere constitutional impulses, which—*certainly with great influence*—international organizations send toward TNC' (emphasis added).

⁸³ A general collection of these and other influential codes of conduct from the private sphere is provided in the compendium of McKague and Cragg (2007).

platform in the North Sea or the sweatshop conditions in several garment factories. In reaction to these scandals, but also as a reaction to the increasing recommendations on corporate social responsibility as expressed in the public codes, companies began to develop their own responsibility codes.⁸⁴ Although initially subject to strong criticism as merely public relations campaigns, the corporate codes have evolved into an important part of the codification of aspects of corporate social responsibilities.

Since these corporate codes of conduct are expressions of the vision, culture and functioning of a particular company, it comes as no surprise that these corporate codes can differ quite significantly with regard to their content.⁸⁵ Differences can be identified between companies in different sectors. Labour issues tended to play a more important role in the codes of labour-intensive industries, such as the apparel, footwear and light manufacturing sectors,⁸⁶ whereas the extractive industries seemed in the first place to focus more on environmental standards.⁸⁷ Yet, this focus becomes understandable when taking into consideration that there are production-specific differences in companies. Companies in the garment industry, as a labour-intensive industry, were in the first place more vulnerable to the violations of labour standards of their huge network of suppliers. The extractive industries, in contrast, focused on the specifics of their operations to address issues of technical safety, such as healthy workplace conditions for employees, the risk of environmental pollution and the negative effect on communities.⁸⁸ An important additional reason for the difference in the codes is the different social pressures that companies encounter.⁸⁹ It is therefore no coincidence that the content of the code is also subject to change, particularly in situations where a company or even an entire sector is exposed to the public for not behaving in a socially responsible fashion. There are other elements that result in differences in the codes, such as

⁸⁴ cf the instructive diagram provided by Kolk and Tulder (2005) 6 on the explosion of corporate codes in the 1990s.

⁸⁵ For this observation, see initially Organisation for Economic Co-operation and Development (2001) 2: 'The codes examined differ considerably in terms of their content and degree of detail'; and Hepple (2000) 6.

⁸⁶ For this observation, see initially Organisation for Economic Co-operation and Development (2001) 2f: 'The content of the apparel codes, all of which cover labour issues, is quite different from the "average" content of the labour codes in the inventory. All of the apparel codes deal with child labour and the majority deal with bond labour, working environment and compensation. Codes from the extractive industry typically deal with a diverse array of issues and are much more likely to deal with the environment and the labour than the "average" code in the inventory'. See also subsequently with further references to empirical studies Kolk and Tulder (2005) 7; and World Bank Group (2003) Part I (Apparel, Footwear and Light Manufacturing, Agribusiness, Tourism) 6ff.

⁸⁷ World Bank Group (2003) Part II (Oil, Gas, Mining) 5ff (emphasising the less concise focus in these industries on issues such as child or forced labour) and 14ff (analysing the commitments concerning environmental aspects).

⁸⁸ On these sector-specific human rights impacts with an emphasis on the distinction between extractive industries on the one hand and the footwear and apparel industries on the other hand, see also Ruggie (2013) 23ff, in particular at 24.

⁸⁹ For this observation, see, eg, Organisation for Economic Co-operation and Development (2001) 2: 'The codes address a variety of issues, many appearing to arise from concerns of the general public'; Jenkins (2001) 28; Kolk and Tulder (2005) 7; McBarnet and Kurkchian (2007) 83.

the influence of the country of origin and thus the influence of the national political economy.⁹⁰ It is here that it is particularly noteworthy to mention the origin of codes of conduct as a development which is common in the US and that spilled over into Europe; a probable reason for this is the already broad reliance on voluntary social responsibility in this political-economic context and the structure of the system of corporate law as facilitating voluntary corporate philanthropy.⁹¹

Notwithstanding these differences between sectors, countries and individual companies, there seems to be at least a gradual development towards uniformity in terms of the substantive content. In general, the corporate codes of conduct can be broadly described as policy statements of companies that cover the three core substantive topics associated with corporate social responsibility, eg, decent profit making, responsibility for people in terms of human rights and labour, and responsibility for the environment.⁹² From this broad focus on these diverse topics, there are two main elements that have crystallised as the core substantive aspects that are mainly focused in on the debate on corporate codes: the first relates to environmental protection and impacts on communities, while the second relates to particularly fundamental workplace standards.⁹³ It can at least be anticipated that, in the evolving discourse on the international level concerning business and human rights, general human rights aspects will also become a more important topic within codes of conduct. In addition to these general similarities in terms of substantive content, empirical studies suggest that there is also a tendency towards standardisation in the codes in terms of the specific aspects that they cover. This is not so much the case in the field of environmental protection, but it becomes increasingly observable in the field of workplace standards. In a recent study, the European Commission has analysed the codes of large European companies and has identified the UN Global Compact, the Universal Declaration of Human Rights and the ILO core labour rights as those that are most often referred to in the corporate codes or used as guidance.⁹⁴ This observation is partly shared by other empirical studies that emphasise the ILO core labour rights as the international framework that is frequently referred to,⁹⁵ in particular, the issues of child

⁹⁰ Kolk and Tulder (2005) 20f. *cf* on the need of a comparative perspective on CSR practices Williams and Aguilera (2008).

⁹¹ See also on this aspect Hoffmann (2004) 1001, note 54: 'It is no accident that where a similar degree of security is *not* provided through institutional involvement, namely in LME forms of capitalism, multinational enterprises are taking the initiative themselves and adopting codes of conduct or corporate social responsibility' (emphasis in original).

⁹² Marrella (2007) 295: 'Topics commonly treated are employment and labour relations; human rights, the environment; consumer protection and fighting corruption'; McBarnet and Kurkchian (2007) 65: 'a sweep of issues including business ethics, environment and human rights'.

⁹³ For this classification into workplace standards on the one hand and environmental topics on the other hand, see, eg, World Bank Group (2003) Part I (Apparel, Footwear and Light Manufacturing, Agribusiness, Tourism) and Part II (Oil, Gas, Mining) where the codes are categorised into those dealing with 'human rights and labour rights' on the one hand and 'environmental standards' on the other hand.

⁹⁴ European Commission, 'An Analysis of Policy References Made by Large EU Companies to Internationally Recognised CSR Guidelines and Principles', March 2013, available at: http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/csr-guide-princ-2013_en.pdf, at 7.

⁹⁵ eg, McBarnet and Kurkchian (2007) 66; Kocher (2008) 70; Kocher (2009) 419; Lin (2009) 720; Vytopil (2012) 166.

labour and forced labour.⁹⁶ Conversely, the OECD Guidelines and the UN Guiding Principles are less frequently referred to, although, in particular, with respect to the latter framework, the only recent adoption could be an important factor that might explain the reluctance of companies towards integrating it into their codes. Finally, an additional common aspect in corporate codes is the reference to compliance with national laws.⁹⁷

As a result, one could indeed define corporate codes in their current form as voluntary declarations of companies that contain substantive standards on specific corporate social responsibility aspects. These codes represent policies that companies develop autonomously as their own applicable global standards on socially responsible conduct. While it is recognised that the corporate codes remain quite a diverse phenomenon with differences between sectors, countries and individual companies, there are nevertheless several common denominators. Corporate codes typically contain commitments to respect fundamental workplace standards, partly also broader human rights of communities and specific aspects related to environmental protection. In particular, in relation to workplace standards, a further standardisation can be observed where the ILO core labour rights play an important role as well as commitments to respect national law.

1.2.3.2.2. Guidelines for Corporate Groups and Supply Chains

However, the suggested importance of corporate codes does not simply rest on their status as corporate policies that specify substantive aspects concerning labour, human rights and environmental protection for the global operations. These codes are also important in specifying responsibilities in relation to corporate groups and contractual networks. It is emphasised as a common thread that these corporate codes are developed as group policies that are not only applicable to the head company; instead, companies generally present these codes as the underlying fundamental policy of the entire corporate group that also includes foreign subsidiaries.⁹⁸ In addition to the broad scope of worldwide operations of corporate groups, the corporate codes also became tools that addressed the responsibility of the contractual networks. By means of developing so-called supplier codes of conduct as an integral part of the overall corporate policy towards social responsibility, companies effectively presented to the public their intention to take over proactive responsibility for the adherence of their trading partners to social and

⁹⁶ World Bank Group (2003) Part I (Apparel, Footwear and Light Manufacturing, Agribusiness, Tourism) 6: 'Perhaps the greatest point of uniformity on every code of conduct examined was the prohibition against the use of forced labour.' At 7: 'Among the "leadership" firms examined, there appears to be an emerging trend that the minimum age for child labour must be at least 15, or the age for completing compulsory education, whichever is greater.'

⁹⁷ Picciotto (2003) 142; McBarnet and Kurkchian (2007) 67; Kocher (2008) 73. *cf* also Lin (2009) 721f, who observes that not only is adherence to local law included, but, in parts, also the multinational company's home country law.

⁹⁸ See extensively on the relevance of environmental codes of companies in relation to foreign direct investment Herberg (2007); Herberg (2008); and the reference to empirical studies by Kocher (2008) 69.

environmental standards, which is supported by means of including these codes into their supplier contracts.⁹⁹

The corporate group standards as well as the supplier codes of conduct do not remain, in this regard, simply policy statements. On the contrary, the global policies are increasingly supported by dense internal control mechanisms and are thus integrated into the core operations of the company. In relation to the corporate group policies, specific auditing procedures exist that assign the parent company the role of a 'global executive organ' that implements global policies and attempts to identify and remedy breaches of the policies.¹⁰⁰ In the course of implementing these policies, concrete standards and norms are created, in particular standards concerning technical aspects of risk prevention.¹⁰¹ In relation to supplier codes of conduct, it is equally the auditing and monitoring procedure that has evolved as the core mechanism to identify and track non-compliance. As a matter of fact, companies frequently include in their supplier contracts a right to inspect the factories and specific actions to deter non-compliance.¹⁰² Monitoring the provision of the code is not only conducted by the company itself, it is also given into the hands of specialised auditors or NGOs.¹⁰³ Like the internal corporate policies, the supplier codes of conduct are equipped with specific procedures that aim to restore compliance and impose penalties on suppliers and, although seldom used, impose severe sanctions of termination or monetary penalties.¹⁰⁴ When it comes to the integration of the corporate policies into contractual networks, it is identified as a key component for the success of the codes that companies organise the code compliance in the spirit of collaborative partnership whereby both parties assist one another to safeguard and restore compliance with the code,¹⁰⁵ which is also how companies increasingly organise their supplier relations.¹⁰⁶ The relations between companies and their contractually affiliated suppliers have been described in this respect as a new form of corporate organisation whereby large companies begin to take over active responsibility for the behaviour of suppliers with respect to social and environmental standards.¹⁰⁷

Based on these observations, one can define these corporate codes as global private standards on specifically environmental protection and labour standards that are used as benchmarks for the companies' global operations. In addition, the

⁹⁹ See particularly on the practice of supplier codes of conduct as contractual mechanisms the empirical studies of McBarnet and Kurkchian (2007) and Vytopil (2012).

¹⁰⁰ Herberg (2008) 27ff (quote at 28).

¹⁰¹ *ibid*, 30ff.

¹⁰² McBarnet and Kurkchian (2007) 74f.

¹⁰³ *ibid*, 74ff; Cafaggi (2013) 1602f.

¹⁰⁴ McBarnet and Kurkchian (2007) 78ff.

¹⁰⁵ See, eg, the studies of Frenkel and Seongsu (2004); Locke, Qin and Brause (2006).

¹⁰⁶ McBarnet and Kurkchian (2007) 68ff and Phillips and Lim (2009) 342ff both observe in their empirical studies that companies frequently describe their relations with suppliers concerning CSR requirements as a collaborative partnership, although it is also emphasised that this partnership approach is not followed in all respects. In particular, financial arrangements for renovations and improvements of the safety standards or higher wages for employees remain controversial topics; see for these specific aspects in detail McBarnet and Kurkchian (2007) 86ff.

¹⁰⁷ Phillips and Lim (2009) 350, with further references to the debate.

codes are also developed as standards for globally operating corporate groups as well as an evolving mechanism to develop responsibility within supplier networks. Thus, the corporate codes and the internal monitoring and sanctioning systems establish standards on socially responsible conduct for novel and more fragmented forms of corporate organisation.

1.2.3.2.3. A Transformation into Legally Binding Obligations?

In quite a similar manner to the public codes of conduct, these new forms of corporate self-regulation in the area of social and environmental standards increasingly influence the work of legal scholars and practitioners. Initially, legal contributions on these private initiatives mainly addressed the question of whether these codes ought to play a vital role at all in the regulatory architecture for companies. Proponents discussed in this context the inherent potential of these codes to serve as rules that, by means of monitoring and standardisation, could effectively change corporate behaviour in the absence of internationally binding rules. Moreover, reliance on corporate self-regulation in this field was, from this perspective, seen as beneficial since it allowed companies to develop individual rules that were tailor-made to the specific company culture and organisation, the sector and the particular countries of operation.¹⁰⁸ This rather positive assessment was contrasted with critical positions that emphasised the inherent problems with these voluntary efforts. Corporate codes were partly accused of being ineffective and of being mere public relations campaigns that were directed at improving the reputation of the adopting company rather than leading to real and long-term changes for those affected by corporate behaviour. Keywords such as ‘smokescreens’, ‘paying lip-service’ or ‘public relations exercise’ became influential characterisations by the critics. In addition, it was also emphasised that, being mere unilateral commitments by private actors on matters of public interest, corporate codes would face serious problems with regard to their legitimacy.¹⁰⁹

However, more recently, this initial contrast between arguments for and against the value of these voluntary codes seemed to have moderated. Instead, in the more recent debate, a shift can be observed towards an amplified interest as to what the exact legal role is that these corporate codes could play. Discussions began to focus on questions of what possible legal effects such private codes could have and how these codes relate to hard law obligations of companies, and, like the public codes, there are two research perspectives that seem particularly promising. One can find, on the one hand, scholars who investigate corporate codes and the supporting auditing and sanctioning mechanisms from the perspective of whether these could qualify as emerging systems of non-state law and, quite differently from the public codes, tend to answer this question rather affirmatively.¹¹⁰ Taking

¹⁰⁸ From the vast literature on the codes, see, eg, Baker (1993); Baram (1994); Toftoy (1998).

¹⁰⁹ For a critical perspective, see, eg, Anderson (1999) 484ff; Hong (2000); Blackett (2000) 411f; Jenkins (2001) 26ff; Arthurs (2005); Doane (2005).

¹¹⁰ See especially Herberg (2005); Herberg (2007); Herberg (2008); Backer (2007); Backer (2008); Teubner (2009); Teubner (2011) and recently Podszun (2014). See also on the identified evolution of an

the concept of law in the tradition of legal pluralism or inter-legality respectively as a starting point, the codes and their internal control mechanism are described as an evolving autonomous non-state legal system that consists not only of primary norms that specify fundamental rules on socially responsible corporate behaviour, but also of secondary norms that consist of autonomous standards and specified requirements for particular constellations of corporate conduct. In this context, the auditing procedures and the internal operational standards in particular seem to play a crucial role.¹¹¹ On the other hand, the potential of these private codes to serve as the basis for legal obligations is also discussed with a view on whether they can become intertwined with the legal system, in particular the system of private law.¹¹² With respect to this research strand, this potential integration of corporate codes into formal law appears in the first place slightly less difficult in comparison to public codes. This is mainly due to the fact that private law recognises agreements and commitments of private actors as a valid source of legal obligations and, moreover, takes account of private self-regulatory standards that, even though treated as non-state social norms without direct legally binding effect, prove to be important for the interpretation of legal standards.¹¹³

The fundamentally different description of the codes as genuine non-state law and private self-regulation notwithstanding, one can still observe that both of these research perspectives share a common underlying assumption. The codes, so it is predicted amongst those who describe them as genuine systems of non-state law, can in the long term only be successful if they manage to interact with the formal legal system on a stable basis and make the legal system stabilise, and thus, to a certain extent, legitimise this autonomous legal order.¹¹⁴ This is the

autonomous transnational law on corporate governance (excluding, however, corporate codes of conduct) Calliess and Zumbansen (2010) 181ff.

¹¹¹ Herberg (2007), (2008) distinguishes three layers: the corporate guidelines that set the primary obligatory norms, the auditing procedure as an internal mechanism that enforces these norms and the operational internal standards that are concretely developed in the course of this internal auditing.

¹¹² From the many contributions that discuss the potential of corporate codes to transform into legal obligations, see, eg, Picciotto (2003) 144ff; Webb and Morrison (2004); Murphy (2005); Sobczak (2006); Glinski (2007); Glinski (2011); Glinski (2014); Marrella (2007); the contributions in Dilling, Herberg and Winter (2008b); Kerr, Janda and Pitts (2009) 330ff; Phillips and Lim (2009); Heijden (2011a); Heijden (2011b), chs 5 and 6; Henning-Bodewig and Liebenau (2013); Torrance (2011); the contributions in Cafaggi (2012); Enneking (2012) 443ff, in particular 519ff; Revak (2012); Vytopil (2012); Cafaggi (2013); the contributions in Hilty and Henning-Bodewig (2014); Peterkova (2014a); Peterkova (2014b); Scheltema (2014) 396f, 399ff. See also on the interaction between private regulation and legal enforcement with a view to codes of conduct in the area of advertising and food safety Verbruggen (2014a) 101ff, 214ff.

¹¹³ See generally on the different strategies of the law to deal with non-state law Michaels (2005) 1227ff, who distinguishes here between four different categories: Non-state private standards could serve as the applicable law (which is, however, currently rejected), they can be incorporated into state law as norms (incorporation), they can be treated as facts that are relevant for the legal decision-making (deference) and they can be recognised as subordinated law (delegation).

¹¹⁴ See Herberg (2007) 36ff, 236ff, who, based on the theoretical perspective of inter-legality (see fundamentally on this concept Sousa Santos (1995) 473), envisages the interaction as a form of re-embedding an autonomous legal order into state law; and Teubner (2009) 271, who, based on the theoretical perspective of legal pluralism, envisages the interaction of the codes with state law as a collision of two autonomous legal orders that is 'one important condition for the success of corporate codes'. See also recently in the same direction Podszun (2014) 73ff.

point where the position is in line with the underlying assumption of scholars that focus on the links between corporate codes and formal law. Within this research strand, it is equally emphasised that the interaction of private self-regulation with formal law and thus the specification of criteria under which the law could recognise them as valid private ordering is a crucial prerequisite to make them more effective and to achieve greater legitimacy.¹¹⁵ As Dilling, Herberg and Winter pointedly observe: 'By including the informal structures within its area of responsibility, formal law can enhance their degree of publicity, reliability, and substantial consistency and, therefore, their legitimacy.'¹¹⁶ As a result, it seems to be a common thread in the literature that the success of the corporate codes and their potential to become relevant components in the future legal architecture on corporate social responsibility remains in the first place a matter of their ability to interact with the formal legal system and become recognised as valid self-regulatory standards. If so, the corporate codes could indeed serve as the next successful example for the reliance of the legal system on the productive potential of self-regulation in the private sphere. The codes could embrace the long tradition of the legal system to make use of self-regulation, as is evident from technical standards and standards for particular professions that inform the open-ended standards of due care or the delegation of law-making competences to private actors that are particularly apparent in the law of associations (articles of association), collective bargaining agreements or the recognition of standard contract terms in contract law.¹¹⁷

However, in spite of the frequently mentioned similarities between corporate codes and other types of self-regulation that the legal system has made use of so far, there are still important differences that render the incorporation of corporate codes more difficult. Several studies that have already focused on the possible interaction between formal law and corporate codes bring to the fore a noteworthy problem. Although manifold concepts exist in formal law through which social norms become relevant, the law as it stands still partly hinders the successful transformation of the codes into legally accepted standards.¹¹⁸ Difficulties relate first

¹¹⁵ Glinski (2007) 120; Glinski (2011) 89ff; Glinski (2014) 45f; and the contributions in Dilling, Herberg and Winter (2008b). See also Bachmann (2006b) 204ff; Joerges and Rödl (2008) 776f; Joerges (2011) 498ff; Mares (2010), pointedly at 285: 'Once the polarised voluntary-mandatory view of dealing with MNEs [Multinational Enterprises] and the limiting concept of CSR as "beyond compliance" are overcome, a start can be made ... on the systematic examination of the mutual interaction between CSR and law through which responsible business practices strengthen the operation of regulatory regimes and law reinforces the CSR goal of respect for human rights.'

¹¹⁶ Dilling, Herberg and Winter (2008a) 7.

¹¹⁷ See, for these different forms of private self-regulation and their successful integration ('re-constitutionalisation') into the area of private law, especially Schepel (2005); Köndgen (2006) 481ff; Herberg (2007) 32f.

¹¹⁸ In the existing studies, see only Arthurs (2005) 58f ('codes may theoretically be used to pour meaning and content into state ... law even though they are not designed for that purpose. ... so far, ... the possibilities of creative interaction between state law and voluntary codes remain largely a matter of speculation'); Kenny (2007) 467 ('Ultimately ... Wal-Mart's Code of Conduct ... does not create a contractual obligation'); Estlund (2012) 262 ('Enforcement of lead firms' labour CSR commitments ... is hardly on the horizon in private transnational labour regulation'); Revak (2012) 1667 ('Corporate codes of conduct are self-imposed, self-regulated, and voluntary, and therefore lack a definitive enforcement mechanism').

to the strategic way in which companies use their codes, which seems different from other types of self-regulation. In contrast to, for instance, technical standards or standard contract terms, companies seem to develop self-regulatory standards with the objective to avoid having them recognised in the law. Companies keep their codes as informal as possible and deliberately opt for forms other than those recognised as legally binding. For instance, the public declaration rather than a bilateral contract is chosen as the appropriate form and, in some codes, disclaimers are included to signal that no legal obligation is intended. This strategy of leaving the corporate codes deliberately informal obviously already renders it quite difficult to integrate the codes into formal law. It requires not only identifying possible links in private law that are already used to integrate private self-regulation into the law but also the development of novel responses within the legal system to deal with the specific character of these corporate codes. Yet it is not only the attitude of companies towards their codes that makes legal integration difficult. Moreover, it is also the underlying assumptions in the legal debate and the apparent lack of a uniform approach on how to address this new phenomenon of corporate codes that comes into play here. To be more precise, existing studies on corporate codes in private law so far seem not to have a shared understanding on the actual role that the legal system should play when approaching these codes. Should the legal system remain restricted to facilitating this new phenomenon by means of constituting incentives for companies to adopt corporate codes and, for the rest, leave the enforcement to social sanctions? Or do these voluntary corporate codes also need to be regulated? And, in the case of the latter situation, what is the right direction of regulation? Should the focus be on enforcing the code obligations and thereby effectively equipping the breach of the corporate code with legal sanctions? Or is it more appropriate to maintain a certain degree of scepticism and treat the codes as having an inherent potential to mislead the public that would have to be prohibited if no effort to comply with the code is present? It is these two particular problems that inspired this research and for which it consequently seeks to develop solutions. The objective is to do so by means of providing theoretically informed recommendations for the legal system on how to deal with these private corporate codes. Hence, this research is envisaged as contributing to the legal debate on corporate codes in the form of adding suggestions for further discussion on how to react appropriately to the new social phenomenon of corporate codes from the legal perspective.

Yet the complexity of the topic and the wide range of legal areas involved require, of course, that the exact focus for which such suggestions are developed be narrowed down. To that end, in this study the focus will be placed on proposals relevant for the area of substantive private law. The main reason for this choice relates to the fact that private law remains the core area that deals with self-regulation in the private sphere and is therefore expected to play a pivotal role for the future development of the codes as such. This choice for the area of substantive private law will, however, also have the result that some emerging and certainly also important discussions on corporate codes are excluded insofar as they are related to other areas of law. This concerns, among other things, the relevance of the codes and their potential conflicts with public law, such as constitutional and

administrative law,¹¹⁹ international economic law,¹²⁰ competition and anti-trust laws,¹²¹ and the current proposals on the transformation of private international law in order to recognise the decisions of dispute-solving institutions that derive from the private sphere and their rules as the applicable law.¹²²

As such, with a focus on the general private law debate on these private codes of conduct, the study seeks to discuss and systematise the studies that have already conducted research on the possible private law effects of corporate codes. Building upon their findings, the debate is taken one step further by not only discussing the status quo but also evaluating these proposals from the perspective of legal theory. In so doing, this book seeks to conclude with proposals on legal reform for the area of private law that should be initiated with respect to the emerging phenomenon of voluntary corporate codes.

1.3. TAKING CORPORATE CODES SERIOUSLY: UNFOLDING THE ARGUMENT

How should substantive private law react to the increasing adoption of corporate codes by companies? This question will serve as the general question that frames this research and it will—as already anticipated by the heading of this section—be developed as the core argument throughout the various chapters, that private law needs to recognise these corporate codes as evolving serious unilateral forms of regulation that derive from the private sphere. To that end, it is proposed that private law needs to develop appropriate concepts that render private law enforcement of these codes possible. In this context, one further restriction is made as to the scope and validity of this argument. The private law enforcement of corporate codes as envisaged in this study is specifically developed in relation to the enforceable obligations on the side of the corporate entity that adopts and publishes a corporate code, insofar as these obligations arise towards the respective company's external social environment. More precisely, the commitments laid down in the corporate codes are analysed in order to discover whether they could become enforceable private law obligations of the corporate entity concerned towards consumers, business partners and code beneficiaries, which would include primarily employees of subsidiaries and suppliers, and third parties that are directly affected by corporate irresponsible conduct.

This, as a main consequence, implies that the commitments laid down in the corporate codes are not discussed with respect to the internal relations within a corporate organisation, in particular the impact of the codes on rights and obligations of managers, shareholders and employees. To exclude this legal dimension of the corporate codes, that is, the commitments laid down in the corporate codes

¹¹⁹ See especially Glinski (2011) 122ff.

¹²⁰ See Glinski (2014).

¹²¹ On this topic, see, eg, Dubbink and van der Putten (2008); Ackermann (2014).

¹²² See fundamentally on this question Fischer-Lescano and Teubner (2004); Michaels (2005); and with respect to particularly the corporate codes Teubner (2009) 271ff.