

# Non-state actors as standard setters: framing the issue in an interdisciplinary fashion

ANNE PETERS,<sup>\*</sup> LUCY KOECHLIN,<sup>\*\*</sup> AND  
 GRETTA FENNER ZINKERNAGEL<sup>\*\*\*</sup>

## 1. Background and context

On all levels of governance, standard setting (norm formation or regulation), is no longer the exclusive domain of states or governmental authorities. The role and the capacity of increasingly diverse and polymorphous non-state actors involved in standard setting are expanding.<sup>1</sup> Also, the processes by which norms are shaped are becoming more varied. Finally, the rapidly growing number of national, sub-national, and international standards has increased these standards' diversity, but also regulatory overlap and norm conflicts.

The context in which the proliferation of non-state actors' standard setting occurs is well known. Globalisation, liberalisation and privatisation waves which swept the globe in the 1980s and 1990s have contributed to shifting the focus away from the state as the sole source of regulation. The result is the often referenced blurring of the public and the private sectors.<sup>2</sup> The integration of national economies into a world economy has diminished or at least modified the authority of the state<sup>3</sup> and has pushed its regulatory capacity to its limits both in substance and

<sup>\*</sup> Prof Dr. iur., LL.M (Harvard), University of Basel; Basel Institute on Governance.  
<sup>\*\*</sup> Lic. phil., MSc (LSE), Basel Institute on Governance and Institute of Sociology, University of Basel.  
<sup>\*\*\*</sup> BA (Institut des Hautes Etudes de Sciences Politiques, Paris), BA, MA (Political Science, Free University Berlin), Basel Institute on Governance.  
<sup>1</sup> United Nations 2004, *We the Peoples: Civil Society, the United Nations and Global Governance, Report of the Panel of Eminent Persons on United Nations–Civil Society Relations* ('Cardoso Report'), A/58/817 (11 June 2004), paras 11–14.  
<sup>2</sup> See, e.g., Nye and Donahue (eds.), *Governance*; Peters, 'Privatisierung, Globalisierung'.  
<sup>3</sup> Strange, *The Retreat of the State*; but see for a reassertion of the states' role Weiss, *States in the Global Economy*; Paul, Ikenberry and Hall (eds.), *The Nation State in Question*.

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in terms of territorial scope. Policy issues that have formerly been treated at the level of nation states, for instance environmental pollution, migration, or organised crime, are increasingly understood as phenomena with global scope and global roots which cannot be tackled in a satisfactory manner through national standard setting.

One reaction to this has been standard setting in inter-state fora. Here states remain the principal standard-setting actors, but the international processes of standard setting differ from traditional unilateral regulation at the national level. Second, often triggered by regulatory attempts at governmental or inter-governmental level, standard setting is at least in part taken over by the private sector, in particular in areas where inter-governmental efforts fail, or where stakeholders, such as civil society or private business, feel that regulation by international treaty does not adequately take into account their concerns. Numerous initiatives have been established as Public Private Partnerships (PPPs<sup>4</sup>) between the public and private (business or civil society) sectors. An innovative example of a PPP in which governments play an active part in the standard-setting process is the Extractive Industries Transparency Initiative.<sup>5</sup> Conventionally, PPPs have described service-delivery and infrastructure projects. Hence EITI is an exceptional (and maybe indicative) example of a 'new' form of PPP – or multi-stakeholder initiative, as these forms of collaborations are increasingly being called (see Lucy Koechlin and Richard Calland, Chapter 4). This initiative brings together governments, companies, civil society groups, investors and international organisations with the aim of improving governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas and mining.

Some multi-stakeholder regulatory initiatives, such as the Partnership against Corruption Initiative (PACI) or the Wolfsberg Anti-Money Laundering Principles, are constituted without any direct participation of the State.<sup>6</sup> They move a step beyond the typical PPP towards private self-regulation. However, as these initiatives often principally serve to

<sup>4</sup> PPPs are defined by the UN General Assembly as follows: 'Voluntary and collaborative relationships between various parties, both State and non-state, in which all participants agree together to achieve a common purpose or undertake a specific task and to share risk and responsibilities, resources and benefits' (UN General Assembly 2005, *Enhanced Cooperation Between the United Nations and All Relevant Partners, in Particular the Private Sector. Report of the Secretary General* (A/60/214), para. 8). See in scholarship Börzel and Risse, 'Public-Private Partnerships'.

<sup>5</sup> [www.eiti.org](http://www.eiti.org). <sup>6</sup> See Pieth, 'Multi-Stakeholder Initiatives'.

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assist its member institutions in implementing or pre-empting (missing but anticipated) governmental norms, public entities are still indirectly involved in the standard-setting process, and certainly so when it comes to the hard enforcement of the norm by governmental action (as opposed to soft enforcement mechanisms as implemented by the initiatives themselves).

The standard-setting activity of both state and non-state actors, comprising voluntary agreements within the purely private sphere and multi-sectoral initiatives, seems to be driven by two main objectives: to solve problems more effectively and to gain public confidence (social legitimacy<sup>7</sup>), as illustrated by the financial institutions' environmental standards (analysed by Marcus Schaper in Chapter 11).<sup>8</sup>

These forms of regulation, novel in terms of actors and processes, testify that the effectiveness of national regulation has reached its limits and needs to be supplemented, though not necessarily replaced, by standards or norms originating from other processes and other actor constellations, in particular in policy areas which are linked to the globalisation of economic activity. The new standard setting appears to respond to the increasing complexity of societal steering functions and to reflect the (relatively or absolutely) diminishing power and resources of the state. Inversely, the new types of standard setting themselves affect the distribution of political decision-making power within and across societies, the relationship between public and private actors, and our established understandings of public functions.

All these developments are generally acknowledged and recounted in all academic disciplines which this volume represents, in particular law, sociology, and political science. However, it appears that we have not yet fully understood this phenomenon, and that there continues to be disagreement, within and among disciplines, about the actual importance of the development, and about the sustainability or, conversely, reversibility of the trend. In order to appreciate the nature as well as the extent and the impact of the novel standard-setting processes, we need to define more accurately the actual role of non-state actors therein. Further, we need a

<sup>7</sup> See for the notion of legitimacy below, 3.4.

<sup>8</sup> See for another manifestation of these intentions, e.g. IOE, ICC & BIAC (2006), *Business and Human Rights: The Role of Business in Weak Governance Zones – Business Proposals for Effective Ways of Addressing Dilemma Situations in Weak Governance Zones. Submission to the Special Representative of the UN Secretary-General for 'Business and Human Rights'* (December 2006); see also the *Voluntary Principles on Security and Human Rights* 2000, available at [www.voluntaryprinciples.org/](http://www.voluntaryprinciples.org/).

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better understanding of current standard-setting processes, and to find out how they differ from the more traditional public regulatory approach. We also need to assess how this influences the quality, accountability, and legitimacy of standards and their authors. This interdisciplinary endeavour requires a very brief overview of the state of the debates on standard setting by non-state actors in our three fields.

## 2. State of debates and emerging questions

### 2.1 Law

Standard setting by non-state actors has so far not been explicitly treated in international legal scholarship. There is, however, a solid body of legal literature on the creation of international law on the one hand, and on non-state actors, on the other hand. While traditional scholarship focused on the production of international rules in form of the traditional sources (treaty-making and the emergence of customary law), recent scholarship has paid some attention to the role of non-state actors in those processes.<sup>9</sup>

The currently burgeoning legal literature on non-state actors at least in passing deals with those actors' norm-making activity. Novel and comprehensive works on the first type of non-state-actors, international organisations, have recently been published, but only one monograph explicitly focuses on 'international organisations as law-makers'.<sup>10</sup>

Second, some international lawyers have studied the legal role of business actors as authors or co-producers of norms. A traditional field of interest for contract lawyers has been the so-called *lex mercatoria*,<sup>11</sup> whose *problématique* was in the 1990s linked to the globalisation debate.<sup>12</sup> A different strand of legal scholarship, notably in the 1970s and 1980s, examined state contracts between firms and states.<sup>13</sup> Later, lawyers have taken an interest in corporate self-regulation in the form of codes of conduct, often in the context of corporate social responsibility

<sup>9</sup> See Hofmann (ed.), *Non-State Actors as New Subjects of International Law*; Schuppert (ed.), *Global Governance*; Boyle and Chinkin, *The Making of International Law*, 46–52 on 'non-state actors and law-making'.

<sup>10</sup> Alvarez, *International Organizations*.

<sup>11</sup> See, e.g., López Rodríguez, *Lex Mercatoria*; Röthel, 'Lex Mercatoria'.

<sup>12</sup> The seminal work is Teubner (ed.), *Global Law without a State*. Within the discipline of international relations, see Cutler, *Private Power*.

<sup>13</sup> The seminal work is Böckstiegel, *Der Staat als Vertragspartner*. For a comprehensive discussion, see Kischel, *State Contracts*.

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and corporate citizenship.<sup>14</sup> Legal scholars have barely analysed the elaboration of technical or product standards by industrial sectors, professional associations, technical experts and government officials.<sup>15</sup> The role of transnational corporations (TNCs) as formants of ordinary international hard law has been studied only recently.<sup>16</sup>

Most academic attention has been devoted to the third group of non-state actors, NGOs.<sup>17</sup> There is abundant scholarship on the increasingly important role of NGOs in the international legal process, analysing their direct lobbying at intergovernmental conferences, the organisation of parallel non-state fora, and NGO involvement in compliance control (for example in the form of *amicus curiae* briefs in international judicial proceedings, or by furnishing shadow reports in human rights monitoring).<sup>18</sup> It is generally admitted that NGO-activism has been a decisive factor in the adoption of important recent multilateral treaties. Notably, the Anti-Torture Convention of 1984, the Landmines Convention of 1997, and the ICC-Statute of 1998 would have probably not come into being without the intense work of transnational NGO coalitions. Inversely, NGO resistance was a crucial contribution to the failure of the projected Multilateral Agreement on Investment (MAI) in 1998. Most scholarly contributions concentrate on the NGO activity in special fields of international law, notably in environmental law,<sup>19</sup> human rights law,<sup>20</sup> and – due to the unique legal role of the International Committee of the Red Cross – in international humanitarian law, and to a lesser extent in international labour law, international criminal law, trade law and peace and security law. The growing impact of NGOs on the formation of international law has also triggered investigation into their legitimacy in a legal and ethical perspective.<sup>21</sup>

<sup>14</sup> Mullerat (ed.), *Corporate Social Responsibility*; Zerk, *Multinationals and Corporate Social Responsibility*; Dilling, Herberg and Winter (eds.), *Responsible Business?*

<sup>15</sup> Schepel, *The Constitution of Private Governance*. For legal analysis of technical standards in the EU context, mostly in the 1990s, see below note 62.

<sup>16</sup> Nowrot, *Normative Ordnungsstruktur*; Tully, *Corporations and International Law-Making*.

<sup>17</sup> See Charnovitz, 'Nongovernmental Organizations'.

<sup>18</sup> See, on the impact of NGOs on international law-making, Breton-Le Goff, *L'Influence des Organisations*; Lindblom, *Non-Governmental Organisations*; Dupuy and Vierucci (eds.), *NGOs in International Law*. See also Boyle and Chinkin, *The Making of International Law*, 46–52.

<sup>19</sup> See, e.g., Oberthür et al., *Participation of Non-Governmental Organisations*.

<sup>20</sup> See, e.g., Schwittr Marsiaj, *The Role of International NGOs*; Cohen-Jonathan, and Flauss (eds.), *Les organisations non gouvernementales*.

<sup>21</sup> See, e.g., Vedder (ed.), *The Involvement of NGOs*. See also the University of Chicago Law School 2002, 'Symposium on NGOs and Democratic Accountability', *Chicago Journal of International Law*, vol. 2, 155–205 with contributions by P. Wapner, P. Spiro, D. Spar, J. Dail, and B. Kingsbury.

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International organisations have in the 1990s begun to concern themselves with the role of non-governmental international actors in the international political and legal process. Key documents in that regard have been issued by UN bodies, by the OECD, and on a regional level by the Council of Europe and the EU. These documents deal with NGOs (for example their registration or participatory status),<sup>22</sup> with transnational corporations (for example their environmental and human rights obligations,<sup>23</sup> notably in the context of corporate social responsibility),<sup>24</sup> and with PPPs.<sup>25</sup> Most of these texts are not legally binding. In political terms, however, they demonstrate how seriously non-state actors' involvement in global and European governance is being taken. Notably, the most powerful inter- and supranational organisations have made the integration of non-state actors into their law-making activity an integral feature of their broad strategies of institutional reform. During the recent UN reform debate, the UN Secretary General solicited an expert report on United Nations–civil society relations (the 2004 Cardoso Report).<sup>26</sup> Within the EU, self-regulation by business actors and co-regulation with the European institutions is a core element of the current attempts to improve European regulation.<sup>27</sup>

<sup>22</sup> UN ECOSOC, *Consultative Relationship Between the United Nations and Non-Governmental Organizations* (UN Doc A/RES/1996/31) (resolution passed at the 49th plenary meeting of 25 July 1996). For the Council of Europe, see the *Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations* of 24 April 1986 (ETS 124); CoE, *Fundamental Principles on the Status of Non-Governmental Organisations in Europe and Explanatory Memorandum* (November 2002); CoE, *Participatory Status for International Non-Governmental Organisations with the Council of Europe* (Res(2003)8 of 19 November 2003) (adopted by the Committee of Ministers at the 861st meeting of the Ministers' Deputies); CoE, *Status of Partnership Between the Council of Europe and National Non-Governmental Organisations* (Res(2003)9 of 19 November 2003) (adopted by the Committee of Ministers at the 861st meeting of the Ministers' Deputies).

<sup>23</sup> OECD Guidelines for Multinational Enterprises (DAFFE/IME/WPG(2000)15/FINAL); ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 17 November 2000, ILM, vol. 41, 186; UN ECOSOC Sub-Commission on the Promotion and Protection of Human Rights, *Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises*, 13 August 2003 (UN Doc E/CN.4/Sub.2/2003/12/Rev. 2).

<sup>24</sup> Commission of the European Communities, *Green Paper – Promoting a European Framework for Corporate Social Responsibility* (COM(2001) 366 final); Commission of the European Communities, *Communication Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility (European Alliance)* (COM(2006) 136 final).

<sup>25</sup> UN General Assembly 2005, above note 4. <sup>26</sup> Cardoso Report, above note 1.

<sup>27</sup> Mandelkern Group on Better Regulation 2001, *Final Report*, available at: [http://ec.europa.eu/governance/impact/docs/key\\_docs/mandelkern\\_report\\_en.pdf](http://ec.europa.eu/governance/impact/docs/key_docs/mandelkern_report_en.pdf); European Parliament, Council & Commission, *Interinstitutional Agreement on Better Law-making* (2003/C

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International legal scholarship naturally focuses on the production of international law, as opposed to non-legal norms. But since the emergence of the concept of international soft law in the 1970s, legal scholars have paid some attention to the creation of 'informal' or 'para-legal' norms, which are situated outside the realm of international law or in a grey zone between law and politics.<sup>28</sup> Crucially, most of the norms or standards made by or with the contribution of non-state actors fall into this group. They do not necessarily pertain to the traditional and 'official' sources of international law, escape typical legal categorisation and therefore pose an extraordinary challenge to legal analysis. Legal research on various types of extra- or para-legal norms<sup>29</sup> is therefore especially important for our theme.

## 2.2 Sociology

Sociological literature has long recognised the importance of extra- or para-legal norms. Classic sociology emanated from a prime interest in multiple and overlapping norm systems shaping and mediating societal tensions by analysing the emergence and functionality of specific integrative processes and the conditions for the generation of social order. The capacity of certain actors to exercise power over others and processes of (particularly state, but also non-state) domination are of central concern to understanding the resources, norms and patterns that shape social stratification and societal power.<sup>30</sup> An influential stream of current sociology seeks to understand the conditions and outcomes of specific institutional configurations, and to this end explores the embeddedness and relative autonomy of the state with regard to social networks and forces.<sup>31</sup> Drawing on comparative empirical research, the core issue is the robustness of state institutions in terms of generating social order in a

321/01), OJ C 321/1; Commission of the European Communities 2003, *Action Plan Simplifying and Improving the Regulatory Environment: Report from the Commission on European Governance*, Office for Official Publications of the European Communities, Luxembourg.

<sup>28</sup> The seminal work is Baxter, 'The Infinite Variety'; see, critically, Weil, 'Relative Normativity?'. See, notably, Brown-Weiss (ed.), *International Compliance*; Shelton (ed.), *Commitment and Compliance*; Kirton and Trebilcock (eds.), *Hard Choices*. See, on 'standards', below, 3.1.

<sup>30</sup> For an influential re-framing of classic sociological theory, see Giddens' theory of structuration in Giddens, *Central Problems*. For an exemplary contribution on the interplay between state and non-state political and economic groups see Rueschemeyer *et al.*, *Capitalist Development*.

<sup>31</sup> Importantly, see Granovetter, 'Economic Action'.

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globalising world. It is argued that '[a]utonomy complements embeddedness, protecting the state from piecemeal capture, which would destroy the cohesiveness of the state itself and eventually undermine the coherence of its social interlocutors. The state's corporate coherence enhances the cohesiveness of external networks and helps groups that share its vision overcome their own collective action problems. Just as predatory states deliberately disorganise society, developmental states help organise it.'<sup>32</sup> The underlying understanding is that the developmental outcomes of specific state-society dynamics are shaped by the capacity of the state to maintain its relative autonomy and organisational power in the context of transformed resource bases, the shifting influence of non-state actors, and the permeability of local, national and international norms.

The sites and patterns of these struggles are the object of sociological research, contributing to a contextualised understanding of power relations between the public and private sphere, and as such both shaping the conceptual public/private-divide as well as transcending it.<sup>33</sup> For instance, Joel Migdal's image of 'state in society' poignantly illustrates the dynamics and reciprocal constitution of state and society, not by putting the sovereignty, authority, or legitimacy of the state on centre-stage, but, by highlighting the 'actual practices of its multiple parts'.<sup>34</sup> Till Förster illuminates this point in his case study (Chapter 12).

The ultimate objective of these approaches is to gain a nuanced understanding of the actors, structures and processes shaping state-society relationships. They also seek to understand the conditions which produce stable and productive structures and agency relationships, or conversely lead to the fragmentation and implosion of state capacity and authority.<sup>35</sup> Drawing on insights from comparative social and political sciences, such antagonistic

<sup>32</sup> See Evans, *Embedded Autonomy*, 235. Seminal on state authority and embeddedness is Evans, Rueschemeyer and Skocpol, *Bringing the State Back In*.

<sup>33</sup> For a recent contribution on the current transformations of statehood and governance processes on local levels, see Corbridge *et al.*, *Seeing the State*; and (for states in advanced capitalism) Brenner, *New State Spaces*. For a case study on the actors and processes shaping the permeation of local and global standards, see Randeria, 'Domesticating Neo-Liberal Discipline'.

<sup>34</sup> Migdal, *State in Society*, 6.

<sup>35</sup> This issue is in more politicised terms discussed under the heading of failed states. See Zartmann (ed.), *Collapsed States*; Beissinger and Young (eds.), *Beyond State Crisis?*; Rotberg, *When States Fail*; Mason, 'Constructing Authority Relationships'; for further case studies, see Kaarsholm (ed.), *Violence, Political Culture*.

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forces of fragmentation and integration in contemporary governance dynamics have aptly been called 'framengrations'.<sup>36</sup>

Notably the analysis of seemingly extreme cases of disintegration of authority and social order and of a proliferation of 'new' licit and illicit actors (see Michael Miklaucic, Chapter 7) might illuminate core issues and reveal patterns which may be less visible, but nonetheless present in all contemporary state–society relationships in a globalised world. As Goran Hyden states, 'the question of how rules are handled and regimes established and sustained is an empirical question of universal validity'.<sup>37</sup> The central sociological issues of this book are the practices through which the rules of the political arena are formulated, enforced and managed, the arena in which the state and non-state actors operate and interact to make authoritative decisions. Essentially, the sociological concern is the 'who' and 'how' of rule-setting in the exercise of power and in the settlement of conflicts over such rules.

### 2.3 *Political science*

Among the three disciplines combined in this volume, political science has probably most extensively acknowledged and analysed the appearance of new (non-state) actors and their growing role at all levels of society.<sup>38</sup> Susan Strange and others have compared this development to the medieval to modern transition from feudal agriculture to capitalist industry.<sup>39</sup> Initially, the literature concentrated mainly on the potentially diminishing sovereignty of the state and on the shift away from the state as sole proprietor of power and authority. The role of non-state actors in regulation has more recently been addressed by a growing number of authors.<sup>40</sup> At first, the relevant political science literature focused on the transition from domestic governmental regulation to inter-governmental regimes.<sup>41</sup> Soon the growing importance of corporations and (financial) markets in replacing or complementing the state as source of power was

<sup>36</sup> Rosenau, *Distant Proximities*, 11.

<sup>37</sup> See Hyden, 'Governance and the Reconstitution', 186.

<sup>38</sup> E.g.: Keohane and Nye (eds.), *Transnational Relations*; Krasner, 'Structural Causes'; Rosenau and Czemieli (eds.), *Governance without Government*; Kooiman, *Modern Government*; Rosenau, *The Study of World Politics*.

<sup>39</sup> Strange, *The Retreat of the State*.

<sup>40</sup> See notably Cutler, Haufler and Porter (eds.), *Private Authority*; Haufler, *A Public Role*.

<sup>41</sup> E.g. Keohane and Nye (eds.), *Transnational Relations*; Krasner, 'Structural Causes'.

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noted.<sup>42</sup> But only in the late 1990s and early twenty-first century has a substantial body of political science literature begun to recognise the eminence of non-state actors other than international organisations and corporations, that is, global civil society and transnational NGOs, in global governance.<sup>43</sup> This analytical interest reflects the proliferation of NGOs and the increased economic power and concomitant level of professionalisation of civil society organisations. They have become pivotal agenda-setters for new policy issues such as human rights, bribery or climate change, and have accordingly acquired a key (if not always clearly defined) role in standard setting.<sup>44</sup>

However, political scientists still disagree on the degree of influence and importance of non-state actors in standard setting. It is controversial whether in some fields they come close to replacing the state as a source of regulation or whether they are simply complementing state regulation. Jan Kooiman, for instance, defines governance in modern societies as emerging from a plurality of governing actors rather than as a form of governmental control of society.<sup>45</sup> Robert Keohane and Joseph Nye formulated a theory of 'complex interdependence' for explaining this phenomenon both on the national and global level.<sup>46</sup> Growing interdependence between nation states and new, non-state actors is also how Charles Kegley and Eugene Wittkopf describe the development.<sup>47</sup> Thomas Biersteker has found the role of the state to be transformed by the appearance of non-state actors in the regulatory sphere, but rejects the suggestion that the state is eroding, as this would fail to adequately reflect the realities.<sup>48</sup>

Explicitly discussing the role of non-state actors in regulation, Bridget Hutter points out that our concept of regulation has been broadened. She explains this with the decreasing impact which public law can have on increasingly complex and internationalised policy issues, and with the ongoing decentralisation and outsourcing of public functions.<sup>49</sup> Finally,

<sup>42</sup> Strange, *Sterling and British Policy*; Strange, *The Retreat of the State*.

<sup>43</sup> Prakash and Hart (eds.), *Globalization and Governance*; Arts, Noortmann, and Reinalda (eds.), *Non-State Actors*; Hall and Biersteker (eds.), *The Emergence of Private Authority*.

<sup>44</sup> Hall, 'Private Authority'. <sup>45</sup> Kooiman, *Modern Government*.

<sup>46</sup> Keohane and Nye, *Power and Interdependence*.

<sup>47</sup> Kegley and Wittkopf (eds.), *The Global Agenda*.

<sup>48</sup> Biersteker, T. 2004, *The Emergence of Private Authority in Global Governance*, speech held at the Confederation of Indian Industry, New Delhi, on 31 March 2004 and published in part in the Financial Express of 6 April 2004: [www.financialexpress.com/old/fe\\_full\\_story.php?content\\_id=56416](http://www.financialexpress.com/old/fe_full_story.php?content_id=56416).

<sup>49</sup> Hutter, 'The Role of Non-State Actors'.