

The Democratic Legitimacy of Private Governance

An Analysis of the Ethical Trading Initiative

Susanne Schaller

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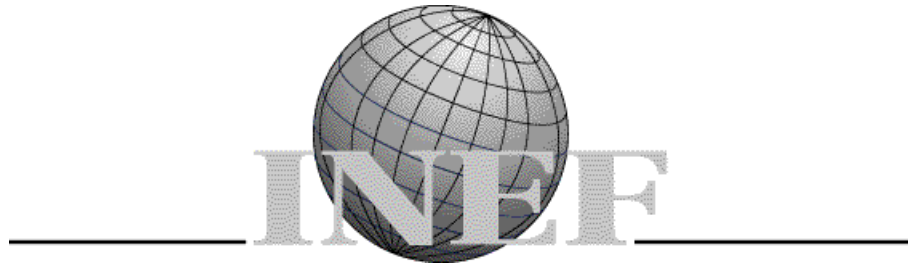
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ABSTRACT

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Private actors increasingly influence global governance and generate transnational rules and regulations. By creating soft law, they adopt governance tasks that were traditionally in the responsibility of sovereign states. These modes of “private governance” are quite disputed. Some hope that by including private actors, democracy on a global level can be enhanced. Others fear that private governance circumvents democratically legitimated governments and that private regulation competes with national and international law. Thus, questions arise about the legitimisation of private actors and about the democratic legitimacy of private governance.

This report explores whether private governance can be regarded as democratically legitimate. As a background, it discusses global democracy gaps and possibilities to conceptualise democratic legitimacy in relation to private regulation. The main part consists of a case study of the Ethical Trading Initiative (ETI), a private alliance of companies, non-governmental organisations and trade unions promoting the implementation of supply chain codes of conduct to improve labour standards. As a multi-stakeholder initiative, ETI stands for a special form of private governance characterised by the cooperation of different actors.

According to the analysis, ETI shows a relatively high degree of democratic legitimacy even though critical points can be observed. On the whole, ETI as an example of private governance neither poses a threat, nor can it fulfil all hopes in relation to global democracy. In a preliminary conclusion, the author identifies factors that potentially influence the democratic legitimacy of private governance, among others the organisational size, financial resources, the method of operation and specific characteristics of the sector in which private governance operates.

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1. Introduction

Denationalisation confronts states with new challenges. Global problems such as climate change or international terrorism cannot be solved in a national context. Additionally, states lose steering capacity, which implies less capacity to solve transnational problems (Beisheim 2004; Zürn 1998). States aim to find solutions through international cooperation, but many international institutions and organisations lack effectiveness. Besides, international organisations and rule-making processes are accused of showing democratic deficits in regard to inclusiveness, transparency or responsiveness, which are further aggravated through denationalisation (Grande 1997; Scharpf 1997; Wolf 2000).

Meanwhile, private actors such as nongovernmental organisations (NGOs) and transnational corporations (TNCs) are on the rise. TNCs are criticised of disregarding environmental, social and human rights standards when producing and sourcing worldwide. In countries with weak steering capacities, corporations are able to operate almost without effective legal restrictions. Their ability to shift production from one country to another constitutes an important power resource when dealing with developing countries that are increasingly dependent on foreign direct investments (Greven 2004; Risse 2002). To convince TNCs to accept their “corporate social responsibility” (CSR), NGOs no longer confine themselves to naming and shaming tactics, but work cooperatively with the former enemy. For instance, TNCs and NGOs are working jointly in multi-stakeholder initiatives to develop transnational standards, codes of conduct (CoCs) or certification schemes (Cashore 2002; Utting 2002). As they create soft law and adopt steering tasks that were classically in the sphere of states (O’Rourke 2003; Risse 2004), this phenomenon is usually captured as private governance.

Self-policing by private actors is controversially discussed. On the positive side, advocates hope that private governance will be able to regulate transnational problems more effectively and that through participation of a wide range of actors the global democracy gap might be reduced. On the negative side, it is feared that private rules are circumventing democratically legitimated governments and further undermine their steering capacity (Brühl 2002). To assess potentials and threats of private governance forms, it is crucial to analyse their democratic legitimacy carefully. This INEF report therefore explores whether private governance schemes can be regarded as democratically legitimate.

As a case study, this report analyses the Ethical Trading Initiative (ETI) - a special case of private rule-making in the field of global trade. As a membership organisation, it comprises TNCs, trade union (TU) organisations and NGOs. ETI promotes the implementation of corporate codes of practice and aims to improve companies’ overall compliance with labour standards.

After discussing the normative context in which ETI operates, the initiative is examined in relation to its strengths and weaknesses regarding six aspects of democratic legitimacy: scope and quality of participation, accountability, transparency, deliberativeness and reflexivity.



The report proceeds as follows: It first shows how denationalisation constitutes an enabling environment for the rise of private governance. It then discusses the role of private governance in the debate on global democratic deficits. Subsequently, the state of research on the legitimacy of private governance forms is presented, including an elaboration on the nature of private governance as well as a conceptualisation of democratic legitimacy. After discussing criteria for analysing the democratic legitimacy of ETI, information about applied methods and case selection is provided. The main part of the study consists of the analysis of ETI according to the criteria mentioned above. Finally, the report discusses implications of the analysis for the legitimacy of private governance forms.

2. Private Governance and Global Democracy

2.1 A Denationalised Context for Private Action

Denationalisation has led to a decrease in state steering capacity and constitutes an enabling environment for the increasing influence of transnational actors.¹ According to Zürn (2004: 265f), societal denationalisation can be described as a “process in which the boundaries of social transactions increasingly transcend national borders.” This implies - besides a restructuring of political contexts – an increase in exchange and production processes across borders, for instance in the fields of economy, environment or communication (Zürn 1998: 76). In issue areas in which the spatial scope of national regulations does not extend as far as the real boundaries of societal transactions, the effectiveness of state policies is restricted. In relation to the economic field, denationalising processes started in the 1980s, accompanied by an increasing development of foreign direct investments and transnational production chains.

In addition to trade liberalisation and the integration of global markets, these developments have implications for state capacity to intervene into market processes (Grande 1997: 354; Habermas 1998: 106; Haufler 1999: 125; Knill/Lehmkuhl 2002: 42). Among others, states adapt to the market in order to protect their economic competitiveness. This tendency is most notable in developing countries that are highly dependent on foreign direct investments and lower their labour standards or create export processing zones (EPZ) where the application of laws is restricted (Jenkins et al. 2002: 2; Wick 2005: 14).

The weakening of state capacity is not confined to the economic field. Transborder problems can no longer be adequately solved in a national context. In fact, the scope of national rules increasingly falls below the spatial scope of actual problems. This implies a decrease in the effectiveness of national policies (Beisheim 2004: 31). To address this problem, states create international institutions, but their development is not progressing in the same pace as the dena-

¹ As academic term, denationalisation is more precise than “globalisation” since many processes are in fact not global but confined to the OECD world. Cf. Zürn 1998; Beisheim et al. 1999.



tionalisation of problems. Despite these developments, it would be going too far to speak of a “retreat of the state” or the demise of national sovereignty. Rather, in some areas, a *weakening* of the role of state actors can be observed, whereas the relevance of transnational actors increases. Among these actors are TNCs and NGOs that affect the international agenda by influencing the creation of norms and rules (Brühl 2002: 371; Held 1995: 26).

Some authors speak of a “new power” of TNCs (Benner 2005: 3). Today, of the 100 largest economies in the world, 51 are TNCs and 49 are states (Gad 2004: 107). Besides, TNCs are able to choose countries with the most convenient environment and thereby to evade state control (Risse-Kappen 1995: 10). The threat to move production to other countries is an important instrument of power, especially when negotiating with economically weak states.

Compared to TNCs, transnational NGOs are weaker in relation to their resources. Nevertheless, their global influence is growing and their number has exploded in the last years (Roth 2001: 35). Research has shown how they contribute to the global spread of values, norms and ideas. Increasingly, transnational NGOs are involved in international politics, e.g. through lobbying or campaigns. Even though NGO’s overall influence cannot be measured quantitatively, it can neither be denied (Heins 2001: 78ff; Risse 2002: 268).

The weakening of state capacity and the increasing influence of transnational actors raise several problems for democracy. First, the accountability of TNCs and NGOs cannot be ensured. These actors are neither democratically elected, nor can they be held responsible by anyone except their members or shareholders (Brühl 2002: 378; Risse 2002: 269). Even if many NGOs define their goals in respect to their interpretation of the public good, they might serve the interests of a well-organised minority (Beisheim 2004: 94). Second, there are participation problems that can also be observed in the intergovernmental sphere: the influence of actors from developing states is inferior to that of industrialised states (Beisheim 2004: 337; Brühl 2002: 378; Roth 2001: 42). And third, as Kaiser (1971: 709) observed as early as in the 70s, non-state actors can circumvent democratically legitimated governments and thereby affect the democratic control of foreign policy choices. Nonetheless, there is the hope that integrating transnational actors might lessen democratic deficits of global governance. The next paragraph summarises the most prominent of these deficits.

2.2 Democratic Deficits of Global Governance

To escape steering deficits, states create international institutions and organisations. However, many lack effectiveness and are criticised of deficiencies in regard to transfer of powers, compliance and legitimacy (Dryzek 1999: 30; Zürn 2000: 183).

Besides, the decisions of one state can have cross-border effects and affect people that are excluded from the respective national decision-making process. This violates a central premise for democracy, namely the requirement of congruence. According to Zürn (1998: 237), on the one hand there should be congruence between people who are affected by a decision and those people that are able to influence this decision (*input congruence*). On the other hand, congru-



ence is needed between the scope of the rules and the affected context of action (*output congruence*). In a denationalised context, neither of these criteria is met.

One basis of democracy is the principle of collective self-determination, which relates to the inputs and outputs of a political system. On the output side, this implies effective policy formulation and implementation. On the input side, political choices are supposed to derive from the preferences of the citizens, who in turn hold rule-makers accountable. Democratic deficits of global governance cannot only be observed in relation to effectiveness, but also to input aspects. Longer legitimacy chains complicate the control of international decision-making processes (Beisheim 2004: 61; Grande 1997: 361; Risse 2004: 7). As global political processes become more complex, it is also difficult to determine who is responsible for a political decision and who should be held accountable. A lack of transparency in international political processes further restricts control possibilities (Zürn 1998: 244).

Another prerequisite for the democratic legitimisation of governance is the participation of potentially affected people in will-formation and decision procedures – not least to ensure public good orientation (Beisheim 2004: 54; Young 2005: 198). This requires equal representation; already difficult to realise in the national context, ensuring representativeness is even more problematic on the global level, due to longer representation chains and unequal power distribution between states. Even if there were adequate means of participation in international rule-making processes, there are other challenges. Due to their complexity, many global problems require high information and interpretation capacities that can hardly be expected from all citizens (Kaiser 1971: 718; Scharpf 1997: 31). Nevertheless, at least the *possibility* to participate in the discourse of relevant decision-making processes should be provided. According to deliberative theories of democracy, public forums should enable the exchange of arguments. According to Zürn (1998: 241), however, there are not enough of such forums beyond the nation state.

One fundamental question from a theoretical point of view is why affected people should accept a decision against their will. On the one hand, acceptance is difficult to achieve if those affected do not have the means to participate in the decision-making process (Young 2005: 198). On the other hand, the willingness to tolerate majority decisions is seen to be grounded in a sense of mutual solidarity in the national context, often described as a “sense of unity”. A collective identity of the community’s members should be given, in so far as they are not only interested in the enforcement of their own interests, but also in the advancement of the public good (Grande 1997: 356; Wolf 2000: 167). Often, this sense of mutual belonging is based on a shared culture and history (Scharpf 1997: 20). However, most contributors to the debate on democracy would agree that a shared identity does not exist beyond the nation state (Wolf 2000; Zürn 1998: 239). Since there is no transnational *demos*, the possibility of democracy beyond the state is questionable (Zürn 2000: 184).

2.3 Private Governance: Chance or Threat for Global Democracy?

Recapitulating, the most salient democratic deficits in global governance are the lack of a collective identity, the lack of transparency and accountability, insuffi-



cient means of participation, restricted representativeness and the absence of adequate deliberative forums. Moreover, the requirement of input and output congruence is violated. Consequently, there is broad agreement that global governance should be democratised (Dingwerth 2005: 7).

Despite democratic deficits of international rule-making processes, decision-makers are still representatives of sovereign states, which are – at least in the case of democracies – authorised by their people. This prerequisite does not hold for transnational actors. It is far from clear who authorises them and who can hold them responsible for their action. In relation to the requirement of congruence and adequate means of participation, similar problems that can be observed in the intergovernmental sphere could be expected for private governance. In contrast, private actors might also show better performance in some issue areas than state actors and integrating them into global rule-making might close the participation gap.

On the one hand, it might thus be desirable to include transnational actors in global governance to reduce democratic deficits, but on the other hand, their participation poses a number of problems in terms of democracy. Whether transnational actors and private governance are a chance or a threat for the democratisation of global rule-making can only be clarified in response to the question whether private governance forms can be democratically legitimised. The following chapters provide a short introduction to the concept of private governance and outline the state of research on its legitimacy.

3. The Legitimacy of Private Governance

3.1 Private Rule-Making

The phenomenon of private governance was first brought up in Rosenau's and Czempiel's publication on "governance without government". These forms of private regulation are defined as "regulatory mechanisms in a sphere of activity, which function effectively even though they are not endowed with formal authority" (Rosenau 1992: 5). Since then, a range of further studies has appeared. For instance, Cutler et al. (1999) refer to the "private authority" of corporations that create their own organisations, institutions and regulations, which have influence beyond the participating actors. Among others, private authority is exercised within "private regimes" (Cutler et al. 1999: 13).

Both terms, private authority and private regimes, refer exclusively to the economic sector, disregarding other issue areas and actors, such as for instance civil society. Cashore (2002) proposes a more integrative concept of "non-state market-driven (NSMD) governance systems". One of the characteristics of these systems is that they obtain their authority by manipulating global markets and consumer preferences. Thereby they produce rules in the social or environmental area that relate to the production and sale of products and services. Crucial drivers for compliance are market incentives (Cashore 2002: 503). NSMD systems are largely independent from state influence. Even though not mentioned among Cashore's examples, ETI shares some of the characteristics of this kind of system. It is – to a large extent – independent from state influence and



produces rules in the social area, and market incentives such as brand reputation are likely to be among the motivations for corporations to join ETI. However, in order to not reduce ETI to its “NSMD” functions and to draw attention to its specific actor constellation, the broader term “multi-stakeholder initiative” is more useful to characterise ETI.

With some exceptions, multi-stakeholder initiatives as examples of private self-regulation have gained little attention within political science debate (Pattberg 2005a: 177). These voluntary initiatives often emerge in the environmental or social area and create their own institutions to promote CSR. Besides ETI, other examples are the “Forest Stewardship Council” (FSC), the “Fair Labour Association” (FLA) or “Social Accountability International” (SAI) (Utting 2002: 75ff). Like other forms of private governance, multi-stakeholder initiatives often produce norms, rules and principles with global reach. This “soft law” is legally non-binding and thus does not include “hard” sanctioning mechanisms (Beisheim 2004: 90). One widespread form of regulation in relation to TNCs is standard-setting: “Standard setting (...) is conceptualised as the act of agreeing on regulative rules, which, although being voluntary in nature, require some degree of compliance to qualify as private regulation” (Pattberg 2005: 359). This, among other things, includes guidelines, product certification or voluntary commitments such as Code of Conducts (CoCs) (Beisheim 2004: 90).

CoCs can be broadly understood as written guidelines on the basis of which TNCs deal with their workforce, suppliers, state authorities and external stakeholders in their host country (Greven 2004: 142). However, there is broad variation between different CoCs in relation to their scope, content, binding force and means of control. At the core of the ETI’s work is such a voluntary code called the “Base Code” – on its basis, the initiative produces other forms of private rules such as guidelines or implementation tools, but does not provide certification. These ETI rules and norms will be elaborated on later in this report.

Among the advantages of private regulations is their capability to react more flexibly to changing conditions and the ability to include the skills and knowledge of different stakeholders (Beisheim 2004a: 173f). However, private rules carry risks. An often-heard complaint about voluntary regulations is that they potentially circumvent or undermine national and international law (Haufler 1999: 128; O’Rourke 2003: 4). In fact, many TNCs indeed see voluntary commitments as a more convenient alternative to restrictive state regulation. In contrast, most NGOs and TUs regard voluntary codes as a “second-best option” and at most as one step towards legally binding regulation (Beisheim 2004: 331; 2004a: 174). CoCs can potentially affect the formulation and the implementation of state regulation. Furthermore, codes can have external effects (Cutler et al. 1999: 6) and non-intended negative consequences. And even though it is desirable to improve company performance in relation to environmental and social standards, their influence is questionable as they often lack effective monitoring mechanisms. So far, there are no systematic analyses of the effectiveness of CoCs (Greven 2004: 158).

One of the central questions about soft law instruments is thus the question of their effectiveness. Since there are no hard sanctioning mechanisms, other factors must account for compliance. Risse (2004: 5f) defines two major non-



hierarchical steering modes in the realm of global governance: either actors' cost-benefit calculations are influenced by incentives and sanctions so that their preferences change, or actors comply voluntarily since they believe in the legitimacy of the respective regulation (Heap 2000: 128; Hurd 1999: 379; Steffek 2003: 254ff). Since private regulation may provide incentives, but cannot rely on strong sanctions, legitimacy might be a central driver for compliance. Beisheim and Dingwerth (2005) even hypothesise that the legitimacy of a private governance form might be one of the factors that account for the effectiveness of the respective regulation.

Legitimacy is thus a crucial factor concerning private governance. So far, however, research has concentrated on the prerequisites of private governance, its main characteristics and its consequences, while only few studies focus on legitimacy. Especially aspects of *democratic* legitimacy have largely been neglected (Dingwerth 2005: 5).

3.2 The Democratic Legitimacy of Private Governance

In the debate about global governance, many contributors state that we are experiencing a global legitimacy crisis. However, critics rarely specify what kind of legitimacy is required. As Steffek (2003: 249f) rightly notes, the current debate “explains a legitimacy crisis without really explaining legitimacy”. Relating to private governance schemes, legitimacy is seen as crucial factor, but it remains unclear which criteria should be applied. The following section includes a discussion on the meaning of legitimacy on the global level and an elaboration on the state of research on the legitimacy of private governance.

3.2.1 Conceptualising Democratic Legitimacy

There is a fundamental difference between prescriptive-normative and descriptive approaches to conceptualising legitimacy. Normative approaches refer to the conditions under which authority can be morally evaluated as legitimate, while descriptive approaches focus on the social acceptance of authority:

“From a normative perspective it [legitimacy] refers to the validity of political decisions and political orders and their claim to legitimacy. From a descriptive perspective, in contrast, the focus is on the societal acceptance of political decisions and political orders as well as the belief of the subjects of rule in legitimacy” (Zürn 2004: 260).

From a normative viewpoint, authority structures are legitimate if they conform to principles that can be morally justified - in the case of democratic legitimacy, if these structures respect basic principles of democracy (Beetham 1991: 5; Steffek 2003: 252). The question of *democratic* legitimacy is thus an essentially normative question about the structure of a political system.

What does legitimacy mean? Most authors refer to Weber's elaboration on the belief in legitimacy, hence on the confidence of social actors that a claim of authority is legitimate (Weber 1980: 122). Hurd (1999: 381), for instance, defines legitimacy as a “normative belief by an actor that a rule or institution ought to be obeyed”. Beetham, however, emphasises that legitimate authority has to relate to the norms and values of the subordinated: “A given power relationship is not legitimate because people believe in its legitimacy, but because it can



be *justified in terms of their beliefs*" (Beetham 1991: 11). Consequently, there should be a minimal consensus between the normative justification of authority and the moral concepts of the governed. Today, there is hardly a type of government as widely accepted as democracy, which is illustrated by the fact that even autocratic states justify their actions by referring to democratic goals (Dryzek 1999: 30). The legitimising power of democratic values can therefore be regarded as high.

Concerning the sources of democratic legitimacy, Scharpf's (1975: 21f) differentiation between input and output legitimacy can be referred to. The *input dimension* refers to the idea that political legitimacy should be based on the free will of the people and that political processes ought to respect specific criteria to assure legitimacy, for instance the principle of equality, the accountability of the governing, citizen participation and the control of decision making (Beisheim 2004: 54; Kaiser 1971: 707; Schimmelfennig 1996: 5). According to deliberative democracy theory, other crucial aspects are the communicative process of will-formation and the exchange of rational arguments (Steffek 2003: 257f). To specify the type of decision-making processes, Zürn (1998: 236) furthermore introduces the concept of *throughput legitimacy*, which refers to the characteristics of a political process and the terms of "communicative rationality" that must be fulfilled in the decision-making procedure.

The *output dimension* refers to the effectiveness of political authority. If problems are effectively solved and citizens' goals are met, the legitimacy of authority is enhanced (Schimmelfennig 1996: 13).² In spite of this, effectiveness alone can surely not be regarded as a satisfying criterion for democratic legitimacy. Autocratic forms of governing can sometimes be more effective than democracies that rely on participative processes. Thus, the input and throughput aspects of legitimacy are central for *democratic* legitimacy.

The question of legitimacy is crucial for any kind of governance on the global level, as many rules and regulations are voluntary and as there is no global authority to sanction non-compliance (Hurd 1999: 379). In the case of intergovernmental organisations, it is often argued that they can rely on a certain degree of effectiveness and thus on output legitimacy. Yet in the case of private governance, effectiveness is difficult to measure. Therefore, many authors focus on input and throughput dimensions of legitimacy when writing about private governance.

3.2.2 Private Governance as Legitimate Rule-Maker?

So far, there are few studies on the democratic legitimacy of private governance forms and most often they concentrate on the legitimacy of certain private actors such as NGOs (Schmidt/Take 1997) and less on coalitions such as multi-stakeholder initiatives. Among others, NGOs are criticised for the lack of democratic organisational structures and their "inner deficit of legitimisation"

2 Dahl (1994) however points to the fact that there can be conflicts between input aspects and the effectiveness of a political process.



(Beisheim 1997: 21). Risse (2004: 13) considers this problem as less relevant since NGOs' influence depends on moral authority and their legitimisation by the public. Certainly, this is an important control mechanism - but it does not hold in a global setting. Most powerful and financially strong NGOs are based in industrialised, western countries from which they source most of their funding. People outside of these countries who are nonetheless affected by NGO activity are usually not among the donors and hence cannot exercise control by withdrawing confidence. Thus, the external accountability of NGOs is restricted. Yet the relative influence of NGOs is certainly lower than that of TNCs. The latter have to be accountable towards the respective shareholders, but not necessarily to affected people outside of the company. Therefore, according to Risse (2004: 11ff), TNCs lack external accountability.

In multi-stakeholder initiatives like ETI, private actors are jointly trying to move TNCs towards accountability. But what criteria should such initiatives meet in order to be legitimate? One answer might be legitimisation through deliberation, which is based on arguing and persuasion as a non-hierarchical steering mechanism through which a consensus is to be achieved in contrast to a bargained compromise of opposing interests (Risse 2004: 16). In addition to deliberation, Risse (2004) specifies participation, transparency and accountability as important legitimising factors. Deliberation is closely connected to participation - as many affected stakeholders as possible should be part of the (deliberative) rule-making process. In many transnational governance arrangements, however, there are difficulties in determining which stakeholders have a legitimate claim of being involved (Dingwerth 2005: 228; Risse 2004: 17).

Beisheim (2004) provides a more comprehensive study of transnational interest groups influencing climate policy and the resulting implications for the democratic legitimacy of global governance. According to her, interest groups who are involved in the making or implementation of collectively binding decisions have to ensure their own democratic legitimacy (Beisheim 2004: 91). This includes transparency about access mechanisms and democratic processes. As far as output legitimacy is concerned, it should be assured that the goals of private rules are in accordance with the public good. Thus, monitoring mechanisms are essential. Beisheim comes to a mixed conclusion about the integration of interest groups in transnational rule making. As some kind of positive effect, she notes an increased participation in global governance and the mobilisation of a broad public. Additionally, interest groups demonstrate a relatively high accountability towards the interests of their stakeholders. On the other hand, however, transnational rule making processes seem to be at least as intransparent as their intergovernmental counterparts. As far as deliberative processes are concerned, Beisheim finds that cost-benefit analyses are central for interest groups; talks between associations and public relations seem to be primarily a tool for communicating and asserting their own interests (Beisheim 2004: 333). On the whole Beisheim argues that transnational private governance requires more transparency, accountability, representativeness and participation.

Concerning voluntary rules for TNCs and governance arrangements such as multi-stakeholder initiatives, the enquête commission of the German Bundestag "Globalisation of the World Economy" identifies similar normative requirements (cf. Beisheim 2004a: 178f). To facilitate broad participation, weakly organ-



ised Southern stakeholders should be provided with resources and be encouraged to take part in the process. Moreover, a high degree of transparency and the provision of comprehensive information about soft law instruments are crucial. To assure accountability, independent monitoring instruments are highly important. Finally, voluntary measures such as CoCs should preferably be based on international principles, e.g. ILO labour standards.

All these aspects of democratic legitimacy – participation, deliberation, accountability and transparency – should thus be included in the analysis of ETI. To operationalise these factors, the assessment of ETI's democratic legitimacy will be based on a model developed by Dingwerth (2005) to analyse three transnational rule making processes, the "World Commission on Dams" (WCD), the "Global Reporting Initiative" (GRI) and the FSC. The model and its basic assumptions about democratic legitimacy will be outlined in the next chapter along with the methods applied for this study.

4. Operationalisation and Methodological Approach

4.1 A Model for Analysing Democratic Legitimacy

The following analysis of the democratic legitimacy of ETI will be based on a model developed by Dingwerth (2005). As he assumes, transnational rule-making processes require different degrees of democratic legitimacy according to the normative context in which they operate. Thus Dingwerth (2005: 47f) defines four contextual factors to determine legitimacy requirements: authorisation, affectedness, quality of rule(s) and subsidiarity.

In relation to sources of *authorisation*, he refers to Wolf (2002) who differentiates between explicit authorisation by national or international law, implicit authorisation if states do not explicitly object to rule-making efforts, ex-post authorisation and self-authorisation (Dingwerth 2005: 44). Officially authorised processes require less legitimisation, whereas self-authorisation demands a high degree of legitimisation. The second contextual factor relates to the level of *affectedness* of individual citizens or groups by a transnational rule. Although it is difficult to determine which level of affectedness requires which level of legitimacy, it can be said that a higher degree of affectedness demands higher degrees of legitimisation (Dingwerth 2005: 45). A third contextual factor is the *quality of the rules*. This relates to questions about the obligatory character and the precision of a given rule, whether a rule applies only to the parties who have negotiated it or whether it can claim normative authority beyond this circle. If rules have obligatory character and apply to a broad range of actors, legitimacy requirements are regarded as high. The last contextual factor is based on the principle of *subsidiarity* and questions whether a global rule is necessary and on which political level problems should be solved: "In the light of the postulate of subsidiarity, where an argument for transnational or global rules cannot be formulated in a convincing manner, higher standards of democratic legitimacy will need to be applied" (ib.: 46).



After discussing contextual factors, further criteria are necessary to examine the democratic legitimacy of rule-making processes. Referring to constitutional, pluralistic and deliberative democracy theory, Dingwerth defines three dimensions of democratic legitimacy: participation, democratic control and discursive quality (ib.: 38).

Dingwerth differentiates between the *scope* and the *quality of participation*. Those affected by a specific decision should be part of the respective decision-making process. One central aspect is thus stakeholder selection and the question if this selection is convincing. As a related requirement, representativeness of stakeholders should be ensured. In theory, a higher *scope* of participation would imply more democratic legitimacy, even if there are trade-offs with other criteria such as for instance efficiency (ib. 38). The *quality* of participation relates to different levels and forms of participation. It can further be differentiated between rather passive forms of participation, e.g. receiving information from the media, or more active forms such as participation in a debate or selecting a representative (ib.: 39). According to Dingwerth, more active forms of participation contribute to the democratic legitimacy of rule-making even though universal standards cannot be determined. However, all potentially affected citizens or groups should have equal opportunities to participate in public discourses.

The second criterion is *democratic control*, further differentiated into democratic *accountability* and *transparency*. Transparent decision-making processes and information of potentially affected people can be seen as prerequisites for holding decision-makers accountable. In addition, means of control of decision-makers as well as possibilities to access control mechanisms are central. A high level of accountability leads to more responsiveness on the part of the governing and thereby to higher democratic legitimacy (ib.: 40).

Legitimacy through argumentative practice is Dingwerth's third criterion. First, the *deliberative quality* of a rule-making process is important. Decision-making processes should be characterised by the mode of arguing rather than the mode of bargaining. There should be no barriers that systematically exclude certain groups or individuals from deliberation, and rule-making process should be free from coercion (ib.: 42). Finally, mutual respect and consensus orientation should be ensured. From Dryzek's discourse-theoretical approach, Dingwerth deduces the criterion of *discursiveness*. Here, the analytical focus should be on the quality of dominant discourses in a decision context as well as the role of alternative discourses. For the purpose of this report, Dingwerth's four contextual factors provide a good basis for the analysis of the requirements of democratic legitimacy of ETI as well as the context in which it operates. Nevertheless, some changes will be made in relation to legitimacy criteria.

The scope and quality of participation as well as the accountability and transparency of decision-making processes can be regarded as virtually universal criteria of democratic legitimacy and shall therefore not be modified. However, restrictions are made in regard to deliberative quality and discursiveness. A thorough analysis of the discursiveness of rule-making processes would require an examination of the dominant discourse in an issue area and the identification of alternative discourses. Since this undertaking is beyond the scope of this study, the criterion of discursiveness will be disregarded. Difficulties also



arise when researching deliberative quality: an analysis of how decision-making processes proceed in practice can only be achieved through participant observation over a longer period of time. In addition, it is difficult to determine and to verify whether participants really aim at reaching a consensus or primarily act out of self-interest. For these reasons, the intention of this study was to restrict the examination of discursive quality to its participatory component. Unexpectedly, however, the majority of interviewees from ETI mentioned deliberative aspects. The fact that no questions were posed in relation to deliberative practice and that nonetheless many interview partners explicitly pointed to deliberative elements of rule-making indicates their relative importance. Thus, despite methodological restrictions and without any claim of generality, aspects of deliberativeness are included in this study as mentioned during interviews.

1 Scope of participation	According to which criteria are stakeholders selected? What alternatives would have been available and how convincing is the actual choice?
2 Quality of participation	How do those who are included in the decision-making process participate? Are there different levels of participation? What role does representativeness play?
3 Transparency	What information about the existence, structure, content and current status of the decision-making process is made public? How and at what cost can those who may be affected inform themselves about decision-making processes?
4 Democratic accountability	Which effective mechanisms of ensuring accountability exist in a decision-making structure? Which groups can hold decision-makers accountable and how?
5 Deliberativeness	What deliberative elements do decision-making processes include? How do participants approach deliberations? Do deliberations extend beyond elite negotiations?
6 Reflexivity	To what extent is the adequateness of rules reflected within the initiative? Is the initiative open for learning and adapting to changing steering requirements? What possibilities exist to challenge rules?

Furthermore, Dingwerth's criteria are complemented by the aspect of *reflexivity*, which is adopted from the debate of legitimate law beyond the constitutional state. Like state regulations, transnational rules and norms require the continuous reflection about their appropriateness and their adaptation to changing contexts (Neyer 1999: 399). If a multi-stakeholder initiative like ETI cannot adequately respond to changing conditions and satisfy the needs of its members, the acceptance of involved parties is likely to decline. The criterion of reflexivity is thus closely related to the effectiveness of private governance and can be regarded as one prerequisite for output legitimacy. Important requirements for reflexivity are complaints procedures to scrutinise existing rules and regulations. For multi-stakeholder initiatives, reflexivity is crucial, as many of these new coalitions lack experience in comparison to most interstate organisations. Even though private regulations are likely to display some deficits of democ-



matic legitimacy, it should be positively acknowledged if they are continuously reflecting on their activities and actively working towards improvement.

Recapitulating, six criteria of democratic legitimacy are to be included in the analysis of ETI: scope and quality of participation, accountability, transparency, reflexivity and some aspects of deliberative quality. For the analysis, these criteria are operationalised in guiding questions (cf. table 1). Questions 1 to 5 are based on Dingwerth's respective guiding questions (2005: 46f) with some minor modifications.

4.2 Reflections on Case Selection

To use the criteria outlined in the previous chapter, a case of private governance should be selected that involves transnational actors and produces rules with global reach. Since Dingwerth's study focuses on transnational rule-making in the environmental field, new insights might be found by examining private governance in another issue area.

One field where a "boom" of private regulations can be observed is that of global labour standards in the textile and food sector (Wick 2005: 25). However, efforts to define and implement labour standards face several challenges, not least because economic globalisation and trade liberalisation have had huge impacts on global trade. TNCs increasingly transfer the work-intensive part of production to less developed countries, thereby creating a highly complex system of subcontractors and suppliers, which makes it difficult to track production processes (Wick 2004: 245; Hughes 2001: 425; Hale 2000: 354). Since transnational corporations are able to transfer production from one location to another and rarely conclude binding contracts with suppliers, they are in a position of higher power (Hale/Shaw 2001: 350f). These sectors are thus not only characterised by a high fluctuation, but also by unequal power structures. Additionally, global competition increases pressures to produce at lower costs, which consequently leads to the reduction of labour costs. This has serious implications for labour conditions at the lower end of the supply chain (Hale 2000: 352; Barrientos 2000: 565).

In the textile sector, a high degree of flexibility is necessary to respond to changing trends and demands. This leads to insecurities in employment relationships and has negative implications for social security systems (Wick 2005: 13). To be able to meet production demands, many suppliers move their production to the informal sector: "At present, one quarter of the global labour force works in the informal economy, generating one third of global GDP" (Wick 2005: 13). Besides, the textile sector is the dominant sector in EPZs where national labour standards are restricted. These aspects hinder the organisation of workers: "Traditional forms of trade union organising based on secure factory employment will not work in the context of a casualised and dispersed labour force" (Hale 2000: 356).

All these factors pose huge challenges for the democratic legitimacy of a multi-stakeholder initiative that operates in this issue area. Complex supply chains impede transparency, which in turn restricts control opportunities. The fact that a huge proportion of subcontractors and workers are in the informal sector complicates the inclusion of affected groups and individuals in decision-



making processes. Moreover, unequal power structures are likely to have a negative impact on participation and deliberation. There are two more reasons why the enforcement of labour standards in global trade is an especially interesting case of examining private governance. On the one hand, as it will be explained below, intergovernmental regulations for protecting labour standards are regarded as largely ineffective. On the other hand, private governance forms such as supply chain codes are accused of competing with or circumventing state law.

Taking all these factors into account, global trade can be regarded as a “hard case” for examining the democratic legitimacy of private governance. Against this background, ETI was selected for the case study as the majority of its corporate members operate precisely in the textile or food sector, and its focus is not just on code compliance by its members, but by their whole supply chain.

4.3 Methodological Approach

The analysis of ETI will be conducted as a single case study, based on a normative-descriptive approach. None of the aforementioned criteria can be measured quantitatively. As Dingwerth (2005: 237f) notes, it is hardly possible to determine how much participation, transparency, etc. should be considered as sufficient for democratic legitimacy. Therefore, the different criteria shall be critically discussed in order to gain an overall picture of ETI’s legitimacy advantages or deficits and to identify opportunities for improvement.

The analysis is based on a review of documents published by ETI and secondary literature. In addition, expert interviews were conducted to clarify remaining questions.³ To ensure balanced information, interviewees were selected among all three groups of ETI – corporations, TUs and NGOs. One criterion for the selection was that interview partners had been involved in the initiative for a substantial period and that they were currently active members. Nine expert interviews were conducted in July 2006, six face-to-face and three by telephone. Three of the interview partners represent corporate, three TU and two NGO members. The respective ETI members are Monsoon Accessorize, Sainsbury’s Supermarkets Ltd., the Pentland Group, Antislavery International, Oxfam, the International Confederation of Free Trade Unions (ICFTU)⁴, the International Textile, Garment and Leather Workers’ Federation (ITGLW) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Association (IUF). In addition, one member of the ETI secretariat was interviewed and there was an email exchange with the ETI trade union coordinator. The questions of the interviews were adapted to the experience of the respondent as well as the type of organisation. To cross-check information, several questions were posed in all interviews. Interviews were recorded and transcribed; one interview was not recorded on tape, but protocolled.

³ For the method applied of conducting expert interviews cf. Meuser/Nagel 2005.

⁴ Since the ICFTU merged in the International Trade Union Confederation (ITUC) in November 2006, ETI membership is held by ITUC.



As there are few studies on ETI, a large part of the information that was used for this report is based on ETI's publications and the expert interviews. Thus, even though external sources were taken into account wherever possible, the analysis reflects in some parts the internal perspective of ETI and its members.

5. The Democratic Legitimacy of the Ethical Trading Initiative

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"Together, we aim to improve the lives of poor working people around the world. Specifically, we are an alliance of companies, NGOs and trade union organisations working to promote and improve the implementation of corporate codes of practice which cover supply chain working conditions" (ETI 2007).

As this quote shows, the self-conception of ETI is as a coalition of different actors with the aim of promoting corporate codes throughout the supply chain. Since its foundation in 1998, ETI has been continuously growing – at the time of writing, 39 companies, mainly from the textile and food sector, four Trade Unions (TU) and 17 NGOs were part of ETI. In the beginning, mainly UK-based companies were involved; today, TNCs from Spain (Inditex) and USA (Levis) also count among the members. The NGO community is represented by larger organisations (i.e. Oxfam, CAFOD) and smaller, specialised NGOs (i.e. Anti-slavery International, Woman Working Worldwide), often with a focus on development or human rights issues. Among TU members, there are the "International Trade Union Confederation" (ITUC) and the "International Textile, Garment and Leather Workers' Federation" (ITGLWF). ETI is funded by a combination of membership fees (60%) and a grant from the Department for International Development (DFID) (40%) (ETI 2007).

There are only a few studies about ETI, which has not been analysed from a political science point of view yet. The existing studies come from business ethics, debates about CSR and corporate citizenship, economic geography or development studies. In general, ETI is positively evaluated for its cooperative approach between different stakeholders (Barrientos 2000: 560; Blowfield 1999; Browne et al. 2000: 71; Collier 2000: 74; Hughes 2001: 233). Notwithstanding this, the majority of authors stress the difficult environment of the sectors in which ETI operates (Barrientos 2000: 561; Hale 2000: 350ff; Hughes 2001: 432). Some authors also criticise ETI by noting that it should hold more consultations with workers (Hale 2000, 2001); others suggest that ETI should focus more on power structures between UK retailers and suppliers from southern countries (Hughes 2001).

5.1 The Origin of ETI

At the beginning of the 1990s, TNCs came under pressure. Campaigns by TUs and NGOs turned the spotlight on bad working conditions in corporate supply chains (Wick 2004: 247). In the UK, NGOs such as Oxfam targeted big supermarket chains, while CAFOD blamed large textile companies for labour standards in their supply chain (Hughes 2001: 426). Media reports about inhumane



working conditions threatened to damage corporate reputation (Justice 2001). Many TNCs responded with voluntary regulations covering their whole production chain (Faure 2001: 1; Kearney/Justice 2003: 105). Thus, CoCs began to boom, especially in Europe and the US (Jenkins et al. 2002: 2; Wick 2004: 244).

The campaigns for labour standards can be understood as a reaction to the lack of effective intergovernmental regulation (Kearney/Justice 2003: 126). As early as in the 1970s, international conventions had been created, such as for instance the ILO “Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy” or the “OECD Guidelines for Multinational Enterprises”; yet due to the absence of sanctioning mechanisms, they have not been very effective (Wick 2004: 246f, 2005: 9).

Soon, voluntary codes came under critique. As Kearney remarks, “many of these were of course just public relations exercises, they were not properly applied.”⁵ Many TNCs do not refer to international conventions, but prefer to create their own codes – often with weaker standards (Justice 2001). Most codes include provisions about child labour, but rarely about freedom of association or the right to collective bargaining (Faure 2001: 10; Kearney/Justice 2003: 107). Because of this, unionists fear that companies aim to impede bargaining with TUs by adopting weak standards (Kearney/Justice 2003: 108; Justice 2001). Moreover, many codes lack any implementation and monitoring mechanism (Jenkins 2001: 6).

Consequently, NGOs and TUs started to work on how to conduct audits and how monitoring can be effective. In the UK, the “Monitoring and Verification Group” was founded. Among its members were TU representatives of the “Trades Union Congress” (TUC), the ITGLWF, the ICFTU and of NGOs such as Oxfam and CAFOD (Hughes 2001: 422). The group worked on questions about code design, implementation and monitoring and cooperated with corporations (Hale 2000: 350; Hale/Shaw 2001: 514; Hughes 2001: 422). The idea to found ETI came out of this cooperation and was referred to the DFID to request financial support (Hughes 2001: 422).

The willingness of NGOs to cooperate with the “former enemy” grew out of the realisation that confrontation cannot support firms to improve standards: “Oxfam realised that you have to help process change in a company by supporting their dynamics to force social responsibility.”⁶ TUs aimed at moving corporations towards the adoption of codes that are based on international labour standards and could deal with the difficulties within the trade sectors (Blowfield 2002: 188). Among the motivations of corporations was public pressure, but some also hoped for support with code implementation and monitoring.

5 Interview Neil Kearney, General Secretary of ITGLWF, 19.07.2006.

6 Interview Rachel Wilshaw, Purchasing Strategy Manager, Oxfam, 6.07.2006.



5.2 Central Activities and Governance Structure

5.2.1 Working Methods

Among ETI's first activities was the design of the "Base Code". This code of conduct is the basis on which ETI operates. Justice, one of the founders of ETI, remembers that there were differences in relation to the definition of "child" and freedom of association, but on the whole, the debate about the Base Code seems to have been rather uncontroversial since it was based on ILO core conventions and UN human rights standards.⁷ Among others, the nine elements of the code include provisions about child labour, discrimination, working hours, living wages and freedom of association (ETI 2006). By joining ETI, all corporate members commit themselves to adopt the Base Code or their own code as long as it incorporates the Base Code (ETI 2006). However, they may also restrict the scope of application to certain products or activities.

Companies are expected to comply with national and other applicable law and, where the provisions of law and the Base Code address the same subject, to apply that provision that affords the greater protection (ETI 2006). Member companies have to monitor and verify compliance in their supply chain and inform their staff and suppliers about the code and its standards. Furthermore, high-level commitment should be ensured (ETI 2006). Corporate members also have to report annually on their experiences with code implementation. Renewal of membership is dependent on documented company engagement and improvement. ETI publishes a summary of company compliance in its annual reports, but does not name specific companies.

The initiative operates on the "principle of continuous improvement" (Wick 2005: 46). If code breaches are detected, retailers and suppliers should agree on a realistic time frame in which measures for improvement have to be implemented. In case of serious code violations, the respective company has to respond immediately. Only if a supplier refuses to cooperate and all other measures have failed should commercial relationships be terminated (ETI 2006).

Pilot projects constitute another focus of the initiative. By adopting an experimental approach, ETI aims to identify how the Base Code can be implemented effectively and how compliance can be monitored (ETI 2006). Projects are conducted cooperatively – each member is required to participate in at least one of the projects which vary in relation to their location, sector and thematic issue. Where possible, ETI tries to create and support local initiatives (ETI 2007a).

ETI considers itself as a learning initiative that provides a safe forum for its members to exchange experiences and organises learning events such as seminars or introductory courses on ethical trade. Thematic round-tables are offered to meet members' learning demands; additionally, ETI holds biennial confer-

⁷ According to Dwight Justice, ICFTU specialist on Multinational Enterprises (now ITUC), the "ICFTU/ITS Basic Code of Labour Practice" served as a standard code (ICFTU 1997). Indeed both codes are very similar.



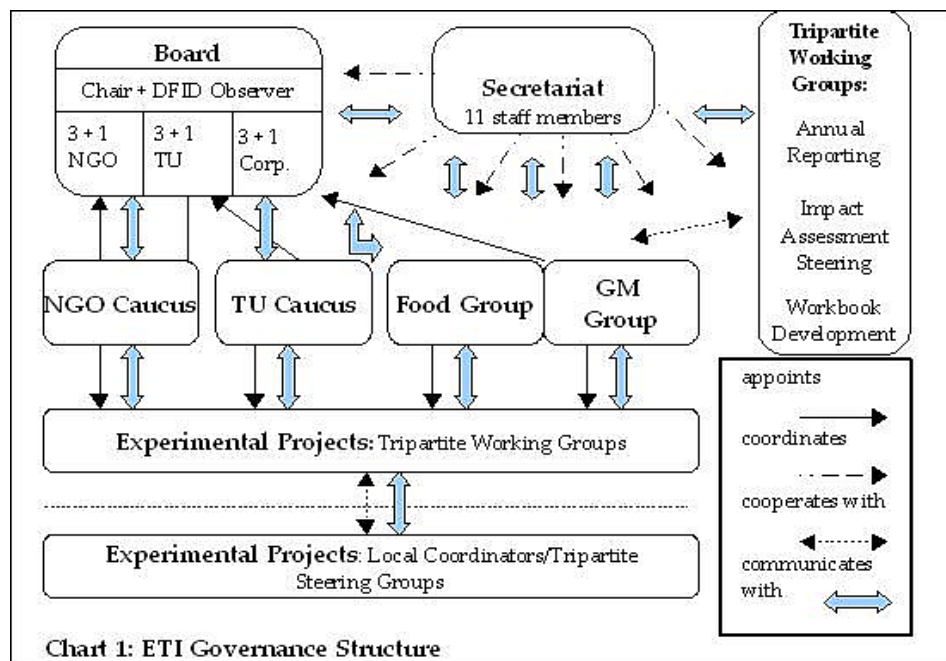
ences with speeches, workshops and discussion forums. The multi-stakeholder initiative neither certifies its members nor publishes assessments of specific companies. Consequently, company members are not allowed to use the ETI logo on their publications (ETI 2007b).

Over the past years, ETI has focused more on capacity-building in Southern countries, and for instance supports multi-stakeholder initiatives in India and South Africa (ETI 2007c). Besides, ETI cooperates with other multi-stakeholder initiatives to conduct research and to create common standards for code implementation and monitoring. The so-called “Joint Initiative on Corporate Accountability and Workers’ Rights” (JO-IN) has agreed on a common code that is currently being tested in the Turkish textile industry. JO-IN also aims to tackle the problem of the global proliferation of voluntary codes (ETI 2007d).

In addition to the Base Code, ETI publishes annual reports, guidelines, project reports and briefing papers. Since 2001, the initiative provides the “ETI workbook” to collect experiences and make them available to a wider public.

5.2.2 Governance Structure

ETI is a non-profit membership organisation that explicitly regards itself as a private organisation (ETI 2006). Since its foundation, ETI has become increasingly institutionalised (cf. chart 1). One of its special characteristics is the tripartite composition of almost all ETI bodies, with all stakeholder groups represented. The only exceptions are the three caucus groups. The ETI board, which meets approximately four times a year, is responsible for overall steering and decision-making. Each stakeholder category is represented in the board with three directors and one alternate director (ETI 2007e). The board members appoint an independent, externally recruited chair. The DFID sends one representative to board meetings, who has pure observer status.





According to ETI members, all decisions are made by consensus: “One group of those [stakeholders] dissenting would mean that the process does not go forward. So decisions are by consensus.”⁸ Furthermore, all decisions are discussed in the four different caucus groups. Board representatives are appointed by their respective caucus for a period of three years, after which they can resign or be re-elected. There is no possibility to suspend board members – according to the ETI secretariat, because this was never necessary.

Other central elements of ETI are four caucus groups, who are meant to ensure representativeness of different stakeholders: “Given the diversity of the partnership, it is recognised that each of these caucus groups may have quite different priorities and interests, each of which need to be represented in ETI’s policies and activities” (ETI 2007f). In order to meet needs of different trade sectors, there are two corporate caucuses, the “General Merchandise (GM) Group” and the “Food Group”.

The caucus groups develop policies and priorities and are meant to ensure that these are represented in the board as well as ETI projects and activities. Besides this, the groups serve as forums in which members are updated on the activities of the project groups and where problems can be discussed. The groups meet approximately four times a year, often before board meetings. In the caucus groups, representatives are elected for tripartite project groups (Blowfield 2002: 187). Depending on issue area and geographic focus, these groups cooperate with local partners of the country in which they operate. ETI is generally trying to create a local cooperation between the three stakeholder groups who work in close exchange with a UK-based group. For some projects, such as the “Sri Lanka Garment Industry Project”, local coordinators are recruited. In the long term, ETI aims to engage more local representatives (ETI 2005c: 6). In addition, there are three other groups with specific tasks: the “Annual Reporting Working Group” defines the content of the member reports, the “Impact Assessment Steering Group” coordinates the implementation of an external study about ETI and the “Workbook Development Group” is continuously improving the workbook (ETI 2007g).

Finally, the London based secretariat has grown with the enlargement of ETI and now comprises eleven full-time and two part-time staff members. It is responsible for coordinating the board and the caucus groups, conducting research, organising seminars, conferences and pilot projects and for general internal and external communication (ETI 2006).

5.3 Normative Context and Legitimacy Requirements

5.3.1 Authorisation

As mentioned before, ETI evolved from a cooperation of private actors who were not officially authorised. In theory, the ILO would be the most adequate organisation to authorise ETI. However, at the time of the initiative’s founda-

8 Interview Neil Kearney, 19.07.2006.



tion, the ILO was reluctant to become involved with CoCs, because of the fear that codes may undermine labour standards by incorrectly interpreting their meaning.⁹ According to Kearney, the ILO's position towards codes is still ambiguous:

*"There isn't much relationship between the ILO and any of the codes of conduct initiatives. Largely because of the attitude of the international organisation of employers at the ILO which for a long time insisted that there will be no discussion about codes of conduct."*¹⁰

However, the DFID has supported ETI until today, which seems to be one major incentive for corporations to join (Faure 2001: 24) - probably for reputational gains. Thus, although ETI was not officially authorised, the DFID's financial support can be interpreted as implicit authorisation. However, ETI aims to be financially independent in the long run: "I think in about five years we will have to be [financed without the grant], because otherwise it's always going to be an 'if we get funded'."¹¹

The British Government seems to recognise ETI as legitimate actor. For instance, ETI coordinated an alliance of business and TUs to negotiate a regulation about labour standards of temporary workers with the government. In 2004, this led to the passing of a national law, the "Gangmaster Licensing Act" (ETI 2005; 2005a). Additionally, ETI established contacts with international organisations. UN and ILO representatives participate at ETI conferences, and – despite its ambiguousness about codes – contacts with the ILO were established within the "ETI Child Labour Project" (ETI 2005b). This can be interpreted as ex post authorisation by international organisations, even though contact with ILO seems to be sporadic: "The contacts are periphery at best. Not because ETI would not welcome it, but because of internal political difficulties at the ILO."¹²

One advantage of ETI is that the initiative's main regulations are based on ILO and UN standards (Blowfield 2002: 184). The inclusion of international standards in the debate about supply chain CoCs is a declared goal of TUs. However, even though the Base Code relies on international regulations, related monitoring standards and guidelines for implementation do not, because such application-oriented instruments do not exist in the intergovernmental sphere. Furthermore, even though corporate members are expected to incorporate the Base Code, many corporations failed to adjust their own code for a long time (Ascoly et al. 2001: 15f; ETI 2004a).

Taking all this into account, ETI can largely be regarded as a self-authorised initiative that over time was increasingly acknowledged by the British Government and – with some restrictions – by international organisations.

9 Interview Dwight Justice, 10.07.2006.

10 Interview Neil Kearney, 19.07.2006.

11 Interview Adil Rehman, Communications and Events Coordinator, ETI secretariat, 04.07.2006.

12 Interview Neil Kearney, 19.07.2006.



5.3.2 Affectedness

From the beginning, the ETI Base Code and principles for implementation were designed to cover the whole supply chain (ETI 2000). According to ETI, corporate members have at least 25,000 suppliers who for their part source from a vast network of subcontractors. As one corporate member explained: "There could be seven layers removed from the direct relationship with us. (...) The numbers, if you follow that period through, the first level is 1.400. By the time you got down to the bottom layers, it's millions really."¹³

In addition, trade relations are characterised by fluctuation and a large part of production is located in the informal sector. As Roberts explained: "In our sector, the updating of the supply base is a never ending task, even more so looking further back to raw materials and subcontracting processes."¹⁴ In the light of this complexity, it can hardly be determined which actor at which link of the supply chain is affected to what extent by ETI activities. Also, affectedness is related to ETI's effectiveness, which is very difficult to measure. Because of this, this section only treats the *potential* affectedness of groups and individuals.

One indicator for the affectedness of suppliers and their workers is the number of audits, which has grown continuously. In 1998, only 447 suppliers were evaluated, and as early as 2005 the figure was 9,529 (ETI 2000, 2005). The percentage of audited companies has risen as well: if in 1999, 13,8% of all suppliers were audited, in 2000 the respective percentage was 31,9% and in 2001 64% of all suppliers (ETI 2000, 2001). The percentage declined in the following years to approximately 55%, mainly because more suppliers were identified on the whole (ETI 2002, 2003, 2004, 2005). In contrast, the number of code violations and corrective measures has increased continuously since 1999 (ETI 2003, 2004, 2005).

The costs that have to be paid for code implementation and verification can be relatively high. Furthermore, annual reporting requirements are becoming stricter (ETI 2004c, 2005f, 2006d). Yet, according to the interviewees, the actual performance of member companies and thus their affectedness varies depending on the company. However, the potential affectedness of suppliers is likely to be higher. Generally, it can be observed that corporations reduce the number of suppliers when implementing codes in order to increase control possibilities (Hale 2000: 354). Ultimately, most suppliers have to bear the costs for code implementation, which are seldom or only partly paid by retailers (Collins 2001: 27). This can lead to competitive disadvantages in comparison with other companies that do not supply TNCs. Also, in the context of a worldwide proliferation of different CoCs with differing provisions, suppliers are faced with the difficult requirement of fulfilling varying standards. This problem surely applies to the code of ETI as well.

13 Interview David Meller, Socially Responsible Sourcing Manager, Sainsbury's Supermarkets Ltd., 05.07.2006.

14 Interview Lesley Roberts, Group Business Standards Manager, the Pentland Group, 05.07.2006.



Globalisation of trade has led to increasing pricing pressure. Thus, on the one hand, suppliers are expected to reduce prices, and on the other, they are expected to bear the costs for the implementation of code standards, as illustrated by a supplier's statement in one of ETI's annual reports:

"Our customers' buyers are forcing us to reduce our prices so they can maintain their margins (...) but their technical/socially responsible trade teams require us to comply with standards that are probably the most stringent in Europe. We then do the same thing with our own suppliers: we negotiate prices down as far as possible to protect our own margins, and require them to comply with our ethical code (...). And so the costs are pushed all the way down the chain until we reach the producer who has no leverage and nowhere else to go" (ETI 2004).

This shows how, within a "downward spiral", costs and pressures are ultimately transferred to the weakest link of the supply chain. ETI has realised this problem and is currently running a pilot project about purchasing practices. Furthermore, the problem was discussed at the 2005 conference (ETI 2005d: 11). So far, however, solutions remain to be found. And it is criticised that the ETI Base Code lacks provisions about responsible purchasing practices (Hughes 2001: 431).

Workers can be positively or negatively affected by the Base Code. On the one hand, a successful implementation can potentially lead to high improvements – in some circumstances, higher security standards might save lives. On the other hand, one of the largest fears of workers is that foreign companies might stop sourcing from their employer (Jenkins et al. 2002: 5). In this regard, ETI works according to the principle of "continuous improvement" - only if suppliers deny cooperation should trade relations be terminated. This has happened in several cases. Levis, for instance, had to stop working with the Mexican supplier "Tarrant Ajalpan", which refused to cooperate. Consequently, the factory was closed down (ETI 2004b).

Concerning pilot projects, negative and positive impacts can be observed. In some cases, projects had to be given up, as negotiations with local partners failed (ETI 2003). Other projects were more successful. Many interviewees mentioned the "Gangmaster Licensing Act" as a big success. Positive impacts can also be observed in South Africa. The local "Wine Industry Ethical Trade Organisation" (WIETA) was created, a multi-stakeholder forum for the implementation of labour standards in the South African wine industry (ETI 2007h). Since 2004, WIETA has enlarged the sectoral scope of its activities. Negative consequences can be observed in the case of the "Homeworker Project" in the UK. When it was discovered that Christmas crackers were produced by homeworkers who did not receive the minimum wage, an ETI project group convened talks with producers and homeworkers. Ultimately, however, as producers claimed that the problem could not be solved and moved production to China, British workers lost their jobs (ETI 2004).

One general fear is that CoCs might be abused to circumvent state regulation. In contrast, ETI explicitly recognises the importance of national and international law; especially TUs underline that the Base Code is not a substitute for the role of government and governmental law, for TUs and collective bargaining or for an international framework to regulate business behaviour. Still, ETI cannot entirely exclude the possibility that governments may neglect some of

their responsibilities of guaranteeing labour standards and justify it with reference to private codes.

A final indicator of the impact of ETI is its influence on similar stakeholder coalitions. As ETI states: “ETI-type initiatives are springing up in Europe and we helped advise them as well as giving presentations at the Trades Union Congress, the OECD and elsewhere” (ETI 2001).

One initiative whose principles are very similar to ETI’s is the Ethical Trading Initiative Norway (Initiativ for Etisk Handel 2007). According to Kearney, ETI is highly respected in the global debate on multi-stakeholder codes and has significant impact on the thinking of brands and retailers, particularly in the UK. It is thus probable that ETI influences the spread of CSR norms as well as multi-stakeholder rhetoric and practices.

The potential reach of ETI can thus be seen as relatively broad, and it shows tendencies to increase. Even though affectedness cannot be measured, the possibility of negative impacts demands a high degree of legitimisation. Because suppliers and workers further down the supply chain seem to be affected to a larger degree than ETI members themselves, their inclusion is of high relevance. Finally, legitimacy requirements also result from ETI’s normative impact on similar initiatives and the CSR debate.

5.3.3 Quality of Rules

According to ETI, the Base Code and its principles of implementation are to be understood as the normative basis on which ETI defines good practice as well as minimum standards for participating corporations (ETI 2007i). Closely related to the code are criteria that have to be fulfilled for membership as well as annual reporting requirements. In addition, there are guidelines that can be implemented on a voluntary basis. Specific briefing papers give general advice, sometimes having quite appellative and normative character (ETI 2005d).

The most comprehensive collection of “rules” is the workbook, which is conceptualised as “definitive source of guidance for companies on negotiating the ethical trade maze” that “reflects the latest hands-on experiences of the retailers, brands, trade unions and non governmental organisations (...) delivering best practice guidance, case studies and resources back to the ethical trade practitioner” (ETI 2007j). The workbook comprises definitions of key terms such as “assessment” and guidelines about monitoring, the integration of ethical trade in corporations and relations with suppliers (ETI 2003a). In addition, practical tools are provided. Guidelines and norms included in the ETI workbook are quite precise. For instance, it is elaborated in detail which information should be provided to a supplier’s management before an audit is carried out (ETI 2003a).

The degree of obligation is certainly weak in comparison to state rules, because membership is voluntary and rules are not legally binding. Yet there is social and economic pressure. With ETI membership and the commitment to ethical trade, expectations of consumers and civil society groups grow that corporate members comply with ETI rules. Corporations violating their CoCs are welcome targets for negative press coverage and consumer campaigns. Com-





pared with other ETI rules, the degree of obligation is highest for the Base Code and its implementation principles. In the case of serious code violations, a detailed process is initiated to enforce membership obligations (ETI 2002a). This first entails measures of improvement that are agreed with the ETI director and the chair, second consultations with the tripartite “Members Disciplinary Committee” and third a twelve-months suspension of membership. The last step is the exclusion from ETI. The process had to be used several times, but no corporation has been excluded so far. However, Levis is currently suspended from membership because of its refusal to adopt the “living wage” provision of the Base Code (ETI 2006d). In any case, this means of sanctioning code violations ensures a relatively high binding force of the Base Code, at least as long as corporations do not lose interest in ETI membership.

All stakeholder groups have to report on their activities in relation to ethical trade. For NGOs and TUs, there are no specific reporting criteria; in contrast, reporting requirements for corporations are quite demanding. Also, membership obligations for corporations are stricter than those for NGO and TU members. As far as trade union organisations are concerned, their membership is not restricted by any prerequisites, but rather they are encouraged to join ETI (ETI 2007k). All other rules and norms like the Workbook, guidelines, etc. are not obligatory, but are conceived as resources and application-oriented tools.

Concerning the *precision of rules*, further differences can be observed. The Base Code is relatively precise; for instance, it reads:

“In any event, workers shall not on a regular basis be required to work in excess of 48 hours per week and shall be provided with at least one day off for every 7 day period in advantage. Overtime shall be voluntary, shall not exceed 12 hours per week, shall not be demanded on a regular basis and shall always be compensated at a premium rate” (ETI 2006).

Besides, the Base Code comprises specific definitions of what should be understood as “child”, “young person” and “child labour”. The principles of implementation are also quite exact.¹⁵ It is unclear, however, what accounts for a “serious” code violation and thus demands immediate response (Burgess 1999).

The “Corporate Annual Reporting Guidelines” are an obligatory and demanding requirement for corporate members (ETI 2004c; 2005f; 2006d). Since 2005, they are accompanied by an extensive Excel-based reportbook. Among others, reporting companies have to provide detailed information about the implementation of all five principles and supplier performance in relation to the nine Base Code provisions. Additionally, extensive information about supplying companies and detailed information about non-compliances and corrective measures must be provided (ETI 2006c).

ETI guidelines are voluntary, but often go into more detail than the Base Code. The “Alleged Code Violation Investigation Guidelines” in particular are quite extensive and include concrete steps that should be followed (ETI 2001a).

¹⁵ These principles are 1) commitment, 2) monitoring, 3) independent verification and reporting 4) awareness raising and training, 5) corrective actions and 6) management (ETI 2006).

ETI briefing papers are also detailed – however, they make no prescriptions, but rather present experiences of different ETI members (ETI 2005d).

The final question is the *scope of the rules*, and whether ETI rules and regulations claim normative authority beyond the parties who have negotiated it. This surely applies to the ETI Base Code, as it covers suppliers and workers who are not official members. As argued above, the potential reach of ETI norms and their normative influence on other initiatives point to their large scope. As far as the sectoral reach of ETI is concerned, mainly corporations from the textile and food sector are involved, but the initiative is principally open for other sectors. The majority of members come from the UK - only global TUs, some corporations and NGOs have their head offices outside of Great Britain. Still, since all corporate members source from a wide range of countries and many of participating NGOs operate outside of Europe, the scope of ETI rules and norms can be considered as relatively high.

In summary, rules and norms of ETI are quite precise and detailed, but differ in their obligatory character. Especially the range of influence of the Base Code can be regarded as relatively high.

5.3.4 Subsidiarity

Indeed many aspects point to the importance of global regulations for the operations of TNCs. Since TNCs operate across countries and move production from one nation to another, global regulation is not only valuable for the protection of workers, but also for the planning reliability of TNCs. An often-heard fear about global competition is the “race to the bottom effect”, according to which countries with the lowest and most “cost-efficient” labour standards attract most foreign investors. Especially in developing countries that depend on foreign direct investments and thus have few possibilities or interest to interfere with labour standards workers might be better protected by global rules. And given the proliferation of CoCs, it would surely be desirable to find global or at least common sectoral regulations. Advocates for state sovereignty could certainly argue that legislative powers to regulate corporate activities should be reserved to national states – but even if one agrees with this position, the problem remains that in many countries, national law is not implemented effectively and that TNCs can influence the implementation of legislation to a considerable extent.

However, at the core of the problem of the regulation of labour standards is not a lack of intergovernmental rules, given the number of ILO conventions and related human rights standards. Yet these regulations are not very successful, and even if ILO conventions are integrated in national law by some countries, they are not effectively implemented. As one of the ETI members said: “The fact is that when you’re going to most countries, including the UK, legislation at the micro-level is ignored.”¹⁶

16 Interview Sarah Barlow, former Ethical Trade Manager at Monsoon Accessorize, 03.07.2006.





The crucial question is whether private standards are preferable. Alternatively, national governments could be lobbied to enforce ILO standards. Several arguments were brought forward by the interviewees in relation to this question: First, it is important to bring the large number of abstract ILO conventions into an applicable format for private corporations. Second, it was emphasised that the ETI Base Code is entirely based on ILO conventions and that due to the principle that either the Base Code or the national regulation – whatever provides for higher protection – should be respected, the Base Code does not compete with state regulation. And third, ETI should be seen in the context of other activities as trade union organisations are working on state implementation of ILO standards.

However, one critical aspect is whether corporations should gain reputational advantages for respecting the law: “Why is compliance with national or international law being rewarded? It should be something that is a matter of routine.”¹⁷ This is certainly true – nevertheless, in reality, corporations often do not respect national law and it is therefore important to provide incentives that motivate corporations to adhere to labour standards.

Another aspect that points to the necessity of ETI’s work is the quantity of unresolved questions about monitoring. Even if suppliers are audited against standards, relevant deficits might be ignored. One sad example is the collapse of the Spectrum factory in Bangladesh, which caused the death of 64 people. In this factory, international corporations had conducted audits on security standards (CCC 2006). Furthermore, there is a huge debate about the most effective and credible form of monitoring. Should it be done internally or externally, by private audit corporations, NGOs or by the company itself (Utting 2002: 82ff)? Thus ETI’s investigation into effective implementation mechanisms of CoCs is surely valuable.

On the whole, many arguments point to the necessity of global standards and a transnational regulation of corporate practices. Still, it has to be acknowledged that ETI only regulates the activities of a restricted numbers of firms and that it might be better to have a general, effective code for all TNCs. Such a code, however, is unlikely to emerge in the near future.

5.3.5 Summary

ETI can be regarded as a largely self-authorized initiative that is implicitly authorised by the DFID and to some extent by intergovernmental organisations. The positive or negative affectedness by ETI rules and norms can not be measured. Still it can be observed that the implementation of the Base Code and experimental projects can have far-reaching consequences. In addition, ETI has normative influence on other initiatives and the CSR debate. Even though ETI rules and norms are non-binding, they aim at a large number of people and for corporate members, the acceptance of the Base Code and the principles of implementation are a clear condition for membership. In addition, at least some of

¹⁷ Interview Sue Longley, Agricultural Coordinator at the IUF, 18.07.2006.



the provisions are very precise. As far as subsidiarity is concerned, many arguments support the necessity for a global regulation of TNCs as well as the need to identify effective monitoring methods. Nevertheless, requirements of democratic legitimacy are relatively high in the case of ETI. The potential affectedness of those who are addressed by its regulations is high and the initiative has not been officially authorised. Since suppliers are in a weak position towards ETI member companies, it should be ensured that their interests are integrated in decision-making procedures.

5.4 The Democratic Legitimacy of ETI

5.4.1 Scope of Participation

All activities of the initiative are based on the logic of different stakeholder groups: “ETI place great emphasis on multi-stakeholder approaches to the implementation of labour codes because new partnerships between all stakeholders are key to implementing ethical trading” (ETI 2000).

In principle, stakeholders can participate as members or as partners in one of the pilot projects. As a member, corporations and NGOs pay fees depending on their annual turnover, which allows for the participation of financially weaker organisations;¹⁸ TUs do not pay membership fees. Membership criteria for NGOs are not strict: Among other things, they should have experience of promoting fair working conditions and should have an office in the UK. After having participated in some caucus meetings, NGOs apply for membership with a relatively simple application form; the NGO caucus decides on admissions (ETI 2002b). When joining ETI, NGOs commit themselves to attend at least half of all NGO caucus meetings and to participate in at least two areas of ETI work. Membership for TUs is confined to four organisations. However, their members are encouraged to participate in the TU caucus and are automatically regarded as ETI members.

Generally, every firm that sells products in the UK or produces for the British market can apply for membership. Membership criteria for companies are quite strict. Companies have to submit an application to the ETI board, which comprises approximately 30 questions about aspects such as corporate profile, supply chains and motivation (ETI 2006a). Applications are discussed in the board and between members who may consult partners in supplying countries. Decisions about admissions must be based on consensus (Faure 2001: 22).

A second possibility to participate in ETI is given by pilot projects, for which - depending on the respective geographical focus and issue area - external partners are recruited. There are no formal criteria for the selection of these partners except for the provision that, if possible, all three stakeholder groups should be represented. For the selection, ETI mainly relies on the contacts of its members; in some cases, information of external organisations is used or re-

18 NGOs pay from 50 to 5.000 £ a year, corporations pay a percentage of annual turnover. Some of the subscriptions of larger NGOs are used to finance ETI activities of smaller NGOs (ETI 2003).



search institutes are integrated in the projects (Burgess 1999). National and local governments can also be involved or consulted. For instance, the South African Government supported the “South African Wine Project” (ETI 2007l). Several ETI members emphasised the importance of governments to sustainably influence labour standards: “It is only through governments that you are actually going to sustain a long-term change (...) if we get governments on board then it’s a major step.”¹⁹

Finally, different actors participate in events, seminars and conferences. In 2005, 370 participants from over 20 countries attended the ETI biannual conference (ETI 2005a). According to the ETI secretariat, travel and attendance fees of some southern NGOs are paid by ETI to enable them to participate. The lists of participants reveal, however, that the vast majority comes from western industrialised countries (ETI 2003b, 2005c). However, the NGO caucus organised the conference “Voices from the South and Eastern Europe” in May 2003, which was attended by 18 organisations from Africa, Asia, Latin America and Eastern Europe (Turner 2004). Thus, ETI tries to include a wide range of stakeholders. Despite this, membership - the most important opportunity to participate - is restricted to three stakeholder groups. How convincing is this selection?

State actors are not explicitly regarded as a stakeholder category. But the probability that states are interested in participating in ETI’s internal planning structures is not very high. Besides, conflicts should be avoided as the Base Code is based on international conventions and national law should be respected. Despite this it was recognised as early as in 1999 that state actors should be integrated to a higher degree (Faure 2001: 27). This still seems to be important as there is mistrust on the part of southern governments that sometimes perceive CoCs as non-tariff trade barriers (Turner 2004: 17).

Since suppliers are particularly affected and in a weaker position, it might be useful to consider them as special stakeholder category to ensure that their interests are respected. Among ETI company members, some suppliers participate in the caucus groups. At one of the special supplier meetings, which are held every six months, they rejected the idea of their own caucus group, because they benefit from their participation in the general company caucuses and “(...) don’t want to lose their chance of being in the main kind of caucus with the main retailers.”²⁰ Nevertheless, Southern suppliers are not amongst ETI members, but only participate in pilot projects.

Another highly affected stakeholder group whose interests should be represented within ETI is the predominantly female work force in the manufacturing sector. According to Hale and Shaw (2001: 517), 75% of the workers in the global textile sector are women. The protection of their rights is difficult since many women work in EPZs or in the informal sector and are not organised (Hale/Shaw 2001: 524). According to Pearson and Seyfang (2002: 47), female workers fall victim of rights violations such as sexual abuse, forced pregnancy tests or abortions. Specific female needs such as reproductive rights are seldom

19 Interview Adil Rehman, 04.07.2006.

20 Interview Adil Rehman, 04.07.2006.



covered by CoCs. ETI is aware of these problems, yet the Base Code does not embrace special provisions to protect female rights except for a general anti-discrimination clause. In addition, an independent assessment of ETI showed that the Base Code has only weak impacts on discrimination and that serious issues remain in relation to discrimination based on gender (Barrientos/Smith 2006: 17). The gender aspect was also discussed in the NGO caucus, at the 2003 biannual conference and the conference “Voices from the South and Eastern Europe”, where it was noted that “there is still substantial lack of awareness of the implications this has for monitoring, compliance and all other issues related to ethical company behaviour” (Turner 2004: 4). Consequently, it would be desirable for ETI to work more on gender issues, particularly as two NGO members are specialised on these aspects.²¹

To sum up, there are alternatives to ETI’s stakeholder groups and the selection is not entirely convincing. On a more positive note, however, stakeholder selection is only restrictive in regard to membership, and ETI tries to include other groups in all its activities.

5.4.2 Quality of participation

As the Base Code is the basis for ETI’s work, it is highly relevant who was included in its negotiation. According to Dwight Justice, it was mainly the three ETI stakeholder groups who were involved. The ILO was not consulted and the DFID did not directly take part in the process. However, Justice recalls that DFID representatives were present at some early meetings.

As the Base Code has not been revised since ETI’s foundation, new members or external stakeholders had no possibility to participate in its negotiation. However, local project partners are allowed to create their own local code on the basis of the ETI code. In contrast to the code, the understanding about the responsibility of ETI member companies with respect to the scope of its application has changed, as can be seen in relation to guidelines and tools. These emerge among others from ETI conferences, round-tables and experimental projects, which embrace a broad range of actors. Though the workbook is steered by an ETI working group, it also integrates external information (ETI 2003a).

In regard to the balance of stakeholder groups, corporations are clearly in the majority. This can be partly traced back to the fact that ETI is aiming to increase its influence on business, which could entail negative consequences: “There can be too much company influence. One problem with multi-stakeholder initiatives involving business is that the cost of obtaining corporate buy-in can become too high.”²² In the board, this is neutralized by equal representation of the three stakeholder groups (Wick 2005: 81). This does not hold for

21 The NGOs are “Woman Working Worldwide” and “Woman in Informal Employment: Globalising and Organising”. Remarkably, there is no problem with women’s representation within ETI membership, where a majority of representatives is female.

22 Interview Dwight Justice, 10.07.2006.



pilot projects and working groups, which are, according to Justice, dominated by companies. Indeed, corporate participation in the pilots is predominant compared to the number of NGOs and TUs. The China group, as an extreme example, consists of 16 companies, but only two trade union organisations and one NGO (ETI 2007m). Besides, project partners in South Africa criticised ETI for putting suppliers' interests above those of local TUs and NGOs (Turner 2004: 8).

Since workers are the main addressees of ETI rules, they should be adequately represented. At the first glance, the number of four TU members seems to be small. But it has to be considered that these unions are umbrella organisations embracing a broad range of trade union associations and individual TUs. As a merger of the ICFTU and the World Confederation of Labour (WCL), the ITUC embraces 304 affiliated member organisations in 153 countries with a total membership of 168 million workers (ITUC 2007). As sectoral representatives, the IUF has 336 affiliated organisations in 120 countries and the ITGLWF embraces 217 trade union associations in 110 countries (IUF 2007, ITGLWF 2007). Both were selected by the "Global Trade Union Federation" to participate in ETI. The fourth TU member is the British TUC with 62 affiliated TUs (TUC 2007). In sum, a broad range of unions is represented in ETI: "In practice, almost every national trade union centre and almost every union across the globe in textile, clothing, footwear and food and agriculture is represented."²³

The participation of global TUs distinguishes ETI from other initiatives (Ascoly et al. 2001: 12). Still, legitimacy chains from the worker to the global TU level are long. Furthermore, cooperation with local TUs can be difficult in developing countries, because local unions lack capacity or are repressed, as for instance in EPZs (Hale 2000: 355). The biggest problem is thus that there are no representative organisations for a large part of workers (Turner 2004: 6). Consequently, many workers do not know about the existence of a code of conduct (Hale 2000: 355). It is thus a big challenge to ensure their representation.

Another important aspect is the unequal geographical representation of members and the "North-South-Problem". It is criticised that southern actors are in the weaker position compared to initiatives that are based in industrialised countries: "The fact that some of the participant stakeholders, especially southern groups, representing the interests of marginalized workers, have no commercial power also undermines their ability to participate on equitable terms" (Barrientos 2000: 567).

Even if suppliers participate voluntarily in projects, there is pressure on the part of their contractors. In relation to Sri Lanka, Wilshaw explained: "They [suppliers] probably did have problems with the code, but the retailers would have said, you've got to do this."²⁴ In general, Southern actors only participate in ETI projects, conferences or seminars. Even though they could apply for membership, it is simply not practicable for many organisations in developing countries to participate in a London-based initiative. Both NGO interviewees

²³ Interview Neil Kearney, 19.07.2006.

²⁴ Interview Rachel Wilshaw, 06.07.2006.



stated that southern actors were not adequately represented and one stated that ETI suffers from a top-down approach (cf. Hale/Shaw 2001: 522). Still, southern representatives are invited to ETI seminars and conferences and their participation is partly financed even though financial resources are limited.

In relation to decision-making, the ETI strategy reads: “All major planning and implementation decisions involve our corporate, trade union and NGO members and where appropriate we also consult members’ partners and affiliates in supplier countries” (ETI 2005c: 3). It is vaguely stated that it is “appropriate” when southern partners are affected. In contrast, some suppliers regard the ETI code as being dictated by the North (Blowfield 1999: 767). In the case of one pilot project, southern representatives voiced the criticism that project members were not equally involved in decisions: “More could already have been accomplished if measures had been put in place to ensure greater equality for participants in the process” (Turner 2004: 9).

Still, the integration of southern actors differs from project to project. According to Wilshaw, for the “Sri Lanka Garment Project” it was ensured that the London based group supported and consulted its counterpart in Sri Lanka instead of dominating it:

“We always worked on the basis that, if we did that, the only thing that the pilot would show was how well they could follow instructions. And that’s not learning. Active learning means making mistakes, it means making your hands dirty, it means thrashing issues out and discussing them and coming to a decision and trying something and then modifying it and trying it again – that was the approach that has been taken.”²⁵

Within ETI it is discussed how the integration of southern actors can be ensured and whether local ETI affiliations should be created (Turner 2004: 8). Yet at the moment, resources to build local representations are scarce. And even if ETI tries to cooperate with local TUs and NGOs, those local organisations often lack capacities. In part, there is also a lack of interest – some local NGOs see more pressing problems in their country. In contrast to suppliers, who might have a commercial interest to work with ETI, NGOs seem to be harder to motivate. As Ould illustrates: “How can you involve Southern partners from Bangladesh or Thailand or Columbia in terms of what Marks & Spencers is doing in China?”²⁶

Nevertheless, some authors state that ETI should work more on capacity-building and inform affected workers about their rights and ETI’s work (Hale 2000; Turner 2004). To a certain extent, this is already carried out by NGO and TU members, and it is clearly among the goals of the initiative (ETI 2000, 2001b, 2005e).

5.4.3 Transparency

According to ETI’s communication strategy, the exchange of information is at the core of its work: “It is fair to say that in a learning organisation such as ETI

25 Interview Rachel Wilshaw, 04.07.2006.

26 Interview David Ould, Antislavery International, 04.07.2006.



communication is core to every activity" (ETI 2001c). At least since 2001, the initiative publishes a broad range of sources.

The main source of information is the ETI website, which provides information about its governance structure, goals, method of operating and experimental projects. The majority of sources are available in English, some documents also in Spanish and Chinese. Today, the Base Code is translated into eleven, the principles of implementation into six languages. According to the website, further translations will follow (ETI 2007e).²⁷ Project groups also produce foreign-language publications as needed. According to Rehman, ETI tries to provide more translations as far as the budget allows for it.

Seminars and conferences are open to everyone, whereas board and caucus meetings and round-tables are reserved to ETI members. However, at least since 2003, protocols of the board meetings have been published and findings of round-tables have been published in the "ETI Forum" series. In contrast, no protocols of caucus group meetings are available. Seminars and conferences are documented in detail. Reports of pilot projects can be downloaded and some of them are quite critical, as the "Voices from the South" report demonstrates (Turner 2004). Every six weeks, ETI informs its members about current developments with the "ETI Update". The newsletter has been published on the website since 2004. In addition there is a press section where press releases and reviews are available. The workbook is the only publication that is not free of charge. However, organisations with weak financial resources can apply for a free copy. And lastly, ETI publishes an annual report, providing information on member performance, projects, the ETI strategy and its finances.

Indeed, the quantity of information that is available for the (English-speaking) public is enormous. Still, there are relevant limitations. First, some publications are only available for members. Second, reports of individual ETI members are only circulated within the membership. This might be necessary to stabilise trust, but it makes it impossible for non-members to assess the extent to which corporations are really engaging in code implementation. It also bears the risk that firms are "free-riding" without ever changing their behaviour (Blowfield 2002: 187). And third, some reports are only published when relevant decisions have already been taken. Information about upcoming decisions seems to be only circulated internally. Another problem is that ETI is not very visible in public since it does not issue certificates or product labels. ETI explains this by stating that in the context of complex supply chains, it cannot guarantee that goods are produced according to ethical standards. In addition, certification carries the risk that smaller firms are disadvantaged and that corporations stop sourcing from countries with structural problems (ETI 2002). These arguments cannot be neglected – nevertheless, possibilities for public control are reduced.

The crucial question is how affected groups can inform themselves about ETI. The majority of workers and suppliers is based in developing countries,

²⁷ The Code is available in English, Spanish, French, German, simple and traditional Chinese, Portuguese, Italian, Afrikaans, isiXhosa and Bahasa Indonesia.



and in addition to language barriers, many have no internet access or are not able to read. NGOs and TUs engage in capacity-building (Faure 2001: 6f), but their resources to do this are limited. It can be presumed that corporations communicate the Base Code to workers and suppliers to a varying extent. Differences can also be expected in relation to pilot projects. In Sri Lanka and South Africa, for instance, comic strips were distributed among workers to inform them about their rights and the code (ETI 2004d). In some local project working groups it is discussed whether there should be public relations work done about ETI. So far, however, this did not have the highest priority. Nevertheless it can be assumed that at least workers that are involved in pilot projects are informed about ETI and labour standards.

In summary, ETI can be regarded as a relatively transparent initiative, and its transparency has increased over time. The most critical aspects are the non-publication of member reports and difficulties in communicating with workers and suppliers.

5.4.4 Democratic Accountability

There are several mechanisms to hold board members accountable. Caucus groups appoint their board representatives and agree on what they should speak for. Board members cannot be suspended, but have to report to their caucuses. For the ETI chair and board directors, there is a special complaint mechanism for potential conflicts between their office and other activities (ETI 2003c, 2005i).

Criticisms of members are heard and discussed by the chair and the board. Since the board and the secretariat circulate information in a newsletter and members are updated in caucus meetings, ETI members are enabled to exert control. Possibilities to hold corporations accountable and reporting requirements have previously been mentioned. The circulation of reports within the membership enables mutual control. The option to exclude companies if they do not act according to membership obligations is a strong control mechanism.

Analysing the *internal accountability* of all ETI members is beyond the scope of this report. Still some differences between stakeholders can be identified. According to Kearney, TU representatives are accountable to their organisations and report regularly. In the case of NGOs it can be assumed that their representatives have to justify their activities at ETI towards their members and boards. Still, NGO members are different in relation to their size and organisational structure. Therefore it can be presumed that they show different degrees of internal accountability and that in some cases there might be deficiencies. Company representatives surely have to account for their actions towards their board of directors and shareholders. According to the principles of implementation, high-level commitment has to be ensured by assigning responsibility for code implementation to a member of senior management (ETI 2006). It thus can be hoped that ETI representatives keep their corporate management informed about ethical trading (Hughes 2001: 428).

One contribution to the *external accountability* of ETI is that the initiative reports to DFID on a regular basis. In addition, when ETI had to re-apply for a grant in 2002 and 2005, DFID assessed ETI's work. Thus DFID can exert some



control. However, if ETI finances itself without the grant in the future, this control mechanism no longer applies.

It is remarkable that ETI voluntarily undergoes external evaluations. In 1999, an independent research institute was commissioned to conduct a study on the pilot projects (Burgess 1999). Even more relevant is the “Impact Assessment” conducted by the Institute of Development Studies at the University of Sussex that was completed in October 2006 (Barrientos/Smith 2006). The aim was to assess the influence of the implementation of the Base code and to identify positive and negative impacts on the lives of workers. The final report showed that code implementation had different effects depending on the respective Base code principle and the kind of workers. In addition to ETI’s strategy, the report enables the public to critically compare ETI goals with real achievements.

How can workers and suppliers hold ETI accountable? Member companies commit themselves to provide secret complaint mechanisms for workers covered by the Base Code (ETI 2006), even if few corporate members have really done so (Turner 2004: 10). NGOs and TUs can forward complaints of Southern partners. For this purpose, ETI created the “Alleged Code Investigation Guidelines” that can be – voluntarily – used by members (ETI 2001a: 4). However, it is a requirement for the effectiveness of these guidelines that workers know about them, and probably few of them do. In addition, these guidelines relate only to code violations – suppliers that get into conflicts when trying to meet the requirements of the code of conduct cannot hold ETI accountable.

On the whole, there are several mechanisms to ensure internal and external accountability. Among the deficits are difficulties in ensuring accountability towards workers and suppliers at the lower end of the supply chain.

5.4.5 Deliberativeness

One of the advantages of ETI is that it brings together actors with opposing interests: “One of the keys to success has been the creation and consolidation of the ETI as a real institution bringing together players with what are, in principle, conflicting interests” (Faure 2001: 24).

In the early days of ETI it seemed that conflicts could not be overcome easily. According to a study by Hughes (2001: 428f) there were deep-rooted differences in relation to ethical trade and a high degree of mistrust between NGOs and companies. Meanwhile, there seems to be mutual trust among ETI members: “In the early days, people were quite tight-lipped about what they discussed, they were nervous of sharing information with the ‘enemy’. (...) But I think as time progressed and trust has built up between the membership, we can share problems.”²⁸ Several interviewees positively evaluated relations between members. In the light of this positive atmosphere, old enmities between NGOs and companies sometimes seem to be forgotten:

“I suppose the problem is that your relationship is not really with the company, it’s with an individual (...). And sometimes it’s easy to forget that actually the company is a money-

²⁸ Interview Sarah Barlow, 03.07.2006.

making machine and it's not just the people in it, it's much more ruthless than the people. It's not nice and cuddly. But the people might be lovely."²⁹

Another important aspect is that decisions are made consensually (Faure 2001: 23). Even if some discussions can be lengthy, this principle ensures that decisions can seamlessly be put into practice. Decision-making in the board is facilitated by previous debates between the caucuses:

"Nothing is presented to the board cold. And I think that's also helpful in securing consensus, because it's a fairly open and transparent system, so ideas are floated. Or maybe out of a strategic discussion in the board it is felt that work needs to be done in a certain area that then would be discussed by the various caucuses."³⁰

Since some of the corporate members compete with others, one could assume that there is some mistrust in the business caucus groups. But apparently, differences are set aside. In the NGO caucus, every member has its own priorities and know-how, which is accepted by the others despite occasional differences. In spite of this, one remaining critical point is that working groups are dominated by companies, which can have implications for the kind of consensus that is found.

For members, there are several opportunities for deliberative exchange and there is a high degree of communication between caucuses, in working groups and at seminars, conferences and at round-tables. As early as in 2000, Hughes concluded: "What is seen to be the central advantage of the [ETI's] approach is the function the organisation plays as a meeting place for ideas and a forum for discussion" (Hughes 2001: 430). As a learning initiative, the exchange of arguments seems to be at the core of ETI's work. According to Hughes (2001: 431), ETI members are willing to promote dialogue and to spread ideas about ethical trade in debates and collective learning processes.

But are external actors integrated into deliberative processes? Central problems in relation to participation and transparency were already mentioned. ETI tries to exchange ideas with external organisations and integrates a broad range of actors. Yet there are capacity constraints in relation to suppliers and workers further down the supply chain. In addition, the initiative's relative lack of visibility makes it difficult to include a wider public into debates.

In sum, the high degree of trust between members and the consensus principle seem to be conducive to deliberativeness. There are many opportunities for members and non-members to engage in communicative exchange. Nevertheless it would be desirable to provide more forums for suppliers and workers.

5.4.6 Reflexivity

ETI works according to the principle of "continuous improvement", which seems to point to a high degree of reflexivity. However, the Base Code has not been changed since its creation, although it was criticised at the conference "Voices from the South" and some argue that the code does not adequately

29 Interview Rachel Wilshaw, 06.07.2006.

30 Interview Neil Kearney, 19.07.2006.





integrate gender aspects. In contrast, a reflexive attitude can be observed in pilot projects. Even problematic pilots like the “homeworker project” are self-critically reflected. As the respective report reads:

“Inaction and lack of commitment by some members negated the effectiveness of other members’ efforts and commitment. The outcome for some homeworkers involved has been the opposite of that intended – instead of better conditions, they have lost their livelihoods altogether” (ETI 2004e).

Yet such encompassing reflections cannot always be found, as there seems to be no formal reporting requirement for working groups: some projects such as the “prawns project” are hardly discussed. In contrast, broad information is provided about more successful projects. And it is unclear to what extent experiences gained in former projects really influence company behaviour.

Still, it has to be acknowledged that the majority of critical points mentioned in this study are already being discussed among ETI members. In contrast to other initiatives, ETI treats problems that are related to purchasing practices, and the problem of code proliferation is tackled with the JO-IN project. Critical aspects with regard to workers in the informal sector and relations with suppliers are discussed. Even issues affecting women workers are singled out as a central theme of a special round-table (ETI 2007n). Also, the North-South problem is being discussed among NGO members and ETI is trying to integrate Southern organisations in learning events. The fact that ETI commissions external evaluations shows that the initiative is ready to scrutinise its own actions. Shortly after the completion of the impact assessment, ETI published a preliminary response on points of criticism that were raised in the final report (ETI 2006e). According to this response, ETI seems to take the results seriously and to wish to integrate the recommendations in its future work.

Problems in relation to complaint mechanisms have already been discussed. To implement these mechanisms more effectively would be crucial to being able to hold companies accountable and to avoiding free-riding. ETI seems not to be criticised often by external organisations. On the contrary, one interviewee said it was difficult to arouse interest for ETI: “The difficult trick is to find people taking interest. It is difficult enough to get the interest from those who are in the inside of it to keep going.”³¹

A final important aspect is the actual compliance of corporate members with code implementation, which differs between individual members. This is acknowledged by ETI, which tries to solve this problem with stricter reporting requirements. Nevertheless, there seems to be the risk of attracting free riders. And though ETI discusses problems with companies, so far no corporate member has been excluded. This clearly shows that there is room for improvement. Still, all in all, the learning approach of ETI seems to be conducive to a high degree of reflexivity. ETI seems to be rather self-critical and responsive to criticism.

31 Interview David Ould, 04.07.2006.



5.4.7 Summary: ETI as a Legitimate Rule-Maker?

Given the multifaceted concept of democratic legitimacy, a final assessment of ETI is difficult. Thus the following conclusions are to be understood as a discussion of strengths and weaknesses of ETI in relation to the six legitimacy criteria as presented in the previous sections, which are summarised in the table below.

Among the greatest strengths of ETI are clearly the principle of continuous improvement and ETI's self-conception as a learning initiative. The fact that ETI agrees to evaluations by external research institutes shows that the initiative is open for criticism and highly reflexive. Furthermore, ETI tries to include a wide range of actors and provides some support to financially weak organisations to ensure their participation. In addition, it has to be recognised that ETI members engage in capacity-building in supplying countries and encourage local code initiatives. Also, there are various mechanisms to ensure internal and external accountability that enable members to exert control over ETI. A rather high degree of transparency further enhances control possibilities. It is also remarkable that all decisions seem to be taken consensually and that there is a high degree of trust between the members.

Admittedly there are problems with the definition of stakeholder groups, but ETI includes a wide range of actors beyond its membership and cooperates with similar initiatives. Also, there are communicative forums for non-members. Given the criticism that governments might be circumvented, which is often heard in debates about private governance forms, ETI's emphasis on the importance of state actors as well as national and international law is remarkable. And since its foundation, ETI has improved in some aspects of democratic legitimacy such as participation and transparency.

In spite of all this, several weaknesses can be identified. A central problem is the participation of Southern workers and suppliers and ensuring accountability towards them. At least in theory, workers' interests are represented by TU members. Suppliers from southern countries, however, can only participate in some projects and do not have any representative who can assure that their interests are taken into account. As far as the "North-South problem" is concerned, it would certainly be good if ETI created local branches or consultative forums for southern actors.

Means of control are restricted to projects and ETI's work as a learning initiative. The real influence on company behaviour cannot be assessed, because reports are not published. There seems to be a conflict between transparency and ensuring trust, especially of corporate members. Another problem is the unequal power balance between large companies and their suppliers, as well as between industrialised and developing countries. However, to change these relations is clearly beyond the capacities of an initiative like ETI. This should rather be regarded as a factor that complicates ETI's work than a weakness of the initiative itself. In contrast, the uneven balance of NGOs, TUs and companies, especially in the working groups, seems to be an intrinsic problem of ETI's work.

Thus, there are some important deficits in relation to the democratic legitimacy of ETI. Nevertheless, even if ETI cannot comply with all normative crite-



ria, the fact that the initiative has brought together organisations with opposing interests can be seen as an indicator that at least ETI members regard the initiative as legitimate. And crucially, due to its high degree of reflexivity, it can be assumed that even if ETI cannot solve its problems immediately, it will discuss them. Many critical aspects that were identified have already been taken into account by ETI. And in the end, as Beisheim (2004a: 181) rightly argues, it is not fair to compare private governance forms like ETI to a perfect world. A fairer standard of comparison would be other instruments of governance. The criteria of democratic legitimacy that were applied in this study are demanding, and presumably no public or private form of governance can fully satisfy each of the aspects mentioned.

On the whole, a positive impression of ETI prevails – not least because of its approach as a learning initiative. The following concluding chapter discusses the results of this study in relation to the democratic legitimacy of private governance and its contribution to global democracy.

Summary: The Democratic Legitimacy of the Ethical Trading Initiative		
Criterion	Strengths	Weaknesses
Scope of participation	Integration of a large number of stakeholders beyond ETI's membership. Graduated membership fees allow participation of smaller organisations. Travel/attendance fees of some weaker organisations are paid.	The definition of stakeholder groups is only partially convincing. Participation of stakeholders in supplying countries is problematic.
Quality of participation	Participation of global TU federations. Local code initiatives are encouraged. Capacity building in supplier countries.	Balance of stakeholders is not always even. North-South problem. No influence on Base Code for new members and external stakeholders.
Transparency	Communication and transparency as central principles. Various publications on the website. Base Code is translated into various languages.	Member reports are only internally published. ETI and its members lack visibility. Difficulties in communicating with workers and (Southern) suppliers.
Democratic accountability	Numerous mechanisms to ensure internal and external accountability. ETI undergoes external evaluations.	Problems with ensuring accountability towards workers and suppliers.
Deliberativeness	Mutual trust between members. Principle of consensus is central. Numerous communicative forums.	Danger of company domination. Difficulties in integrating the general public and Southern stakeholders in deliberations.
Reflexivity	Learning initiative/ principle of continuous improvement. ETI is responsive to criticism. Voluntary external evaluations.	No discussions about the Base Code. Project evaluation varies. Problems with the implementation of complaint mechanisms.

6. The Democratic Legitimacy of Private Governance: Preliminary Conclusions

What can be concluded for the democratic legitimacy of private governance? First, ETI confirms some of the findings of previous studies. When comparing the democratic legitimacy of the WCD, the GRI, the FSC (Dingwerth 2005) and ETI, all initiatives show difficulties in integrating representatives from developing countries, and decision-making processes seem to be dominated by Northern experts. One possibility to alleviate this problem is by introducing affirmative measures like the FSC with its 50% quorum for North and South representation in governing bodies (Pattberg 2005a: 179f). Another way would be to hold consultations with southern actors or to recruit local coordinators. However, the analysis of ETI also showed that capacity-building is crucial to enable weak actors from developing countries to participate in the initiative and – where possible – to organise themselves to defend their interests. And – as can be observed in governmental development cooperation – capacity building also is of high relevance to ensure ownership and long-term change.

As was argued before, a central difficulty regarding private governance is the selection of stakeholders (Dingwerth 2005: 228; Risse 2004: 17). To some extent this report confirms this aspect. Still, ETI also shows that problems relating to stakeholder selection can be reduced if the respective private organisation provides a broad range of other opportunities for external actors to participate.

Private governance forms seem to integrate governmental actors to very varying degrees – the FSC, for instance, explicitly excludes governmental actors (Dingwerth 2005: 192). The example of ETI illustrates two important aspects in this regard. First, it surely enhances the legitimacy of private governance if its respective rules are based on international law and if its provisions prevent private regulation from competing with state law. However, many private governance forms develop in issue areas where international rules are ineffective or absent. In this case it is especially important that governments are at least consulted or integrated in some activities of a private governance initiative, not least to ensure sustainability and to gain local buy-in.

Remarkably, many private organisations put a lot of rhetorical emphasis on ensuring transparency and sometimes are more transparent in comparison to most intergovernmental regulation (cf. Dingwerth 2005: 229). However this observation could also be due to a selection bias – less transparent forms of private governance might be difficult to analyse, simply due to lack of information. In relation to transparency, it can also be observed that private organisations need some time to become institutionalised before they start to publish information and before trust can develop. Time thus seems to be an important factor.

The analysis of ETI also shows how sector-specific difficulties influence the assessment of an initiative's democratic legitimacy. The main criticism in regard to ETI is that suppliers and workers are not integrated sufficiently. Yet, this problem cannot be easily overcome, due to sector-specific problems such as for





instance the lack of organisation among workers, and unstable relations with suppliers due to the high fluctuation in trade relations or the informal sector. Also, unequal power relations between retailers and suppliers are problematic. Here, a paradox can be observed: ETI member companies need to have sufficient leverage to ensure code compliance of their suppliers. The same power structures that are problematic for democratic legitimacy seem thus to be one prerequisite for the effectiveness of ETI. In terms of legitimacy, however, this effectiveness would be questionable if it was indeed based on the downward spiral explained above, in which small producers at the end of the supply chain eventually bear the costs for code implementation.

In addition to the complexity of the policy field, other factors that potentially influence democratic legitimacy of private governance are the financial budget, the method of operation and organisational size. ETI illustrates how enhancing transparency or engaging more in capacity building also depends on its finances. The way an initiative operates also seems to be relevant. It does make a difference in relation to transparency and accountability if an initiative issues labels or engages in certification like Rugmark or SAI, even if there might be good reasons for not labelling ethically traded goods. Finally, as a comparatively small initiative, ETI has managed to build up trust between the members and to create an enabling environment for deliberation. Thus the size of a private organisation seems to influence deliberativeness.

In conclusion, an analysis of democratic legitimacy of private governance should take into account the specific sectoral context in which the initiative operates. Due to special challenges that arise in different policy fields, it might be fairer to compare different private governance forms operating in the same context. Still, as only few studies on the legitimacy of private governance exist, more research is needed to confirm the preliminary conclusions outlined in this chapter.

Should private governance be regarded as a chance or threat for global democracy? The most prominent fear that private governance might circumvent states cannot be confirmed in the case of ETI for the above-mentioned reasons. However, this cannot be generalised, as other private initiatives that lack these provisions surely could compete with state regulation.

Another potential threat of private governance is that accountability cannot be ensured. Even though ETI surely shows some deficits with regard to transparency as well as the ensuring of accountability to workers and Southern suppliers, there are still informal control mechanisms that hold ETI members accountable, and ETI provides a broad range of information about its work.

Neither can it be expected of ETI to meet all hopes in relation to the democratisation of global governance. Even though it includes a broad range of actors and therefore enhances participation, involvement of southern workers and suppliers remains highly problematic despite ETI's efforts towards capacity building. It has to be positively acknowledged, however, that as a learning initiative, ETI continuously works on its improvement in an especially difficult context. And finally, a world without ETI would surely not be less democratic. Without such an initiative, TNCs would still implement CoCs to avoid consumer campaigns and reputational damages. And in contrast to the Base Code,

many voluntary codes lack provisions about freedom of association and might be enforced in an irresponsible way. In comparison to these codes, ETI can surely be regarded as the better and more democratic alternative.





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Abbreviations

CAFOD	Catholic Fund for Overseas Development
CCC	Clean Clothes Campaign
CoC	Code of Conduct
CSR	Corporate Social Responsibility
DFID	Department of International Development
EPZ	Export Processing Zone
ETI	Ethical Trading Initiative
EU	European Union
FLA	Fair Labour Association
FSC	Forest Stewardship Council
GRI	Global Reporting Initiative
ICFTU	International Confederation of Free Trade Unions
ILO	International Labour Organization
ITGLWF	International Textile, Garment and Leather Workers' Federation
ITS	International Trade Secretariat
ITUC	International Trade Union Confederation
IUF	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Association
JO-IN	Joint Initiative on Corporate Accountability and Workers' Rights
NGO	Non-governmental Organisation
NSMD	Non-State Market-Driven
OECD	Organisation for Economic Co-operation and Development
SAI	Social Accountability International
TNC	Transnational Corporation
TU	Trade Union
TUC	Trades Union Congress
UN	United Nations
WCD	World Commission on Dams
WCL	World Confederation of Labour
WIETA	Wine Industry Ethical Trade Association

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