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Mark Pieth

Multistakeholder Initiatives to Combat Money Laundering and Bribery

GOVERNANCE

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From 1989 to 1993 he was Head of Section on Economic and Organised Crime in the Swiss Federal Office of Justice (Ministry of Justice and Police). In this position he was involved in drafting legislation against money laundering, organised crime, drug abuse and corruption and also on the confiscation of assets. As an official and later as a consultant to governments he has acquired extensive experience in international fora, e.g. as a Member of the Financial Action Task Force on Money Laundering (FATF) between 1989 and 1993, the Chemical Action Task Force on Precurser Chemicals, as Chairman of an Intergovernmental Expert Group of the United Nations (UN) to determine the extent of illicit trafficking in drugs (in 1990).

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1. Introduction

Intensified economic globalisation has had positive and negative effects. It has left nation states struggling to deal with the negative fall-out.[1] National regulation against abuses has, however, proven increasingly ineffective, especially since companies have the freedom to move their hazardous activities to under-regulated areas.[2] States have stepped up cooperation and coordination on a bilateral as well as a multilateral basis: international organisations and treaties become more and more relevant to the regulation of international trade relations.[3] However, the traditional instruments of international law are frequently considered too cumbersome and slow. Increasingly international law is created by unconventional means: 'task forces'[4] prove to be far more expedient, since they prefer 'soft law' to treaty law.[5] Political enforcement by peer-pressure becomes more relevant than by juridical instruments (e.g. courts and tribunals).[6] Furthermore, regulation goes well beyond law-making by legislators and government bodies; non-state actors contribute extensively, especially in the area of regulating international trade relations.

However, after a phase of enthusiasm for self-regulation[7], some of the drawbacks have now become apparent. Effectiveness depends largely on independent monitoring and complaint procedures, transparency is not always guaranteed. Furthermore, doubts remain about whether self-regulatory instruments are able to go beyond the narrowly defined self-interest of those in control.

In more recent times, therefore, – short of reverting fully to state regulation – self-regulatory instruments are conceptualised as multi-stakeholder initiatives (see ch. 4.3. below) or as instruments of co-regulation (see ch. 4.2. below), co-opting the different interest groups into the mechanisms themselves or linking self-regulation to state regulation.

This paper follows up on two recent examples of so-called 'multi-stakeholder initiatives' and discusses their creation, the respective political and legal context and gives some details on their operation in order to analyse them as current examples of the role of non-state actors in regulation. Finally, the paper addresses some of the critique levelled against these initiatives and discusses the challenges.

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1 Haufler 2001:11; Jenkins 2001:2 et seq.

2 Haufler 2001:1, 7.

3 Brütsch/Lehmkuhl 2005: ch. 2.

4 Originally a US concept: introducing an ad hoc multi-agency structure to deal with a specific problem in the international area, cf. especially the Financial Action Task Force on Money Laundering and the Chemical Action Task Force on Precursor Chemicals for Illicit Drug Production.

5 Black 2001:11 and see note 3.

6 Brütsch/Lehmkuhl 2005: introduction.

7 Haufler 2001:7 et seq.

2. The Examples

On the one hand the so-called ‘Wolfsberg Principles’, a multi-stakeholder initiative in the financial services industry aimed at standardising customer-due-diligence procedures, is presented. On the other hand the ‘Partnering Against Corruption Initiative (PACI)’ is put into its wider context.

2.1. Wolfsberg

In 1999, after a series of reputational disasters for the banking industry – in the US especially the ‘Salinas’ and the ‘Bank of New York-scandals’, in Europe the fallout of the various ‘Abacha’ cases – two leading banks could be convinced by the NGO Transparency International and the think tank Basel Institute on Governance to form the nucleus of a group whose aim it was to develop customer-due-diligence standards in private banking. With the help of these protagonists, the group rapidly grew to the now twelve key industry players, controlling roughly 60-70% of the world market in private banking. The Wolfsberg Anti-Money Laundering Principles on Private Banking – the Group is named after the UBS conference centre ‘Wolfsberg’ where these first standards were written in autumn 2000[8] – were rapidly followed by further standards on preventing the financing of terrorism, on correspondent banking, anti-money laundering issues in the context of investment and commercial banking and texts relating to the risk-based approach. In 2002, the AML Principles on Private Banking were updated in the light of recent developments. After initial hesitation the relevant national financial regulators and their international organisations, especially the ‘Basel Committee on Banking Supervision’ as well as the ‘Financial Action Task Force on Money Laundering’, met at the ‘Wolfsberg Forum’, an event that now takes place regulary every year. The Wolfsberg initiative has managed to establish itself as a key policy interlocutor with the regulators and international bodies; the standards are increasingly referenced and quoted even by non-members as ‘best practices’ of the industry. However, the group has not grown since 2000 and it has not established monitoring mechanisms of its own; obviously the area is highly supervised by regulators, who sometimes refer to the Wolfsberg standards in their decisions. Furthermore, the annual ‘Wolfsberg Forum’ serves as a sounding board and as a means to include about 50 of the largest banks worldwide into the discourse on standards.

2.2. Partnering Against Corruption Initiative (PACI)

On 28 February 2005, at the Annual Meeting of the World Economic Forum in Davos, the representatives of three sectorial groups of companies participating in the World Economic Forum went on stage and published an industry code against corruption, the so-called ‘Partnering Against Corruption Principles for Countering Bribery’: the presidents and CEOs of now about 110 companies in the construction and engineering industry, in the mining business as well as some Oil and Gas corporations signed a compact, which had been proposed by a working group made up of industry representatives and facilitators of the World Economic Forum, the NGO Transparency International and the Basel Institute on Governance. Whereas the Wolfsberg Principles focus on customer-due-diligence and the prevention of money laundering in the financial services industry, the PACI Principles establish the foundations for corporate compliance codes to prevent bribery. They, in particular, deal with definitional aspects

8 Pieth/Aiolfi 2003:259 et seq.

of issues such as gifts, political and charitable contributions, so-called facilitation payments and with the treatment of third parties, both ‘upstream’ and ‘downstream’. In order to prevent indirect bribery the code gives an answer to the question of how far the responsibility for due-diligence in the selection and instruction of suppliers, agents, subsidiaries, joint-venture partners and other contractual partners should reach from an industry standpoint.

The group is open to further participants and all protagonists currently lobby for the inclusion of additional signatories, especially as some big players in the oil and gas industry have so far been reticent to sign up. The three sectorial group leaders within the Davos framework which presented the initiative to the media promised in public to help introduce a monitoring mechanism for the initiative, thereby deliberately putting their reputation at risk.

3. The Context

From the 1970s onwards the pace of economic globalisation intensified and TNCs were increasingly criticised for their tendency to exploit under-regulated and economically or politically dependent areas. At first, states in the South attempted to counteract uncontrolled self-interest by public regulation in a nation state context. Soon they had to realise, however, that this approach was economically no longer sustainable, and a general move towards **de-regulation,** motivated in the South by the need to attract investors set in.[9] International organisations like the World Bank, the IMF and the OECD supported this drive towards de-regulation in the 1980s, even if there were some attempts to prevent some of the worst excesses of globalisation, e.g. by the OECD with its Guidelines on Multinationals of 1977, revised on 27 June 2000.

In 1990, after the East-West détente, a new phase in the history of globalisation commenced: its positive and negative impacts became more and more visible, and states as well as international organisations were forced to take counter-measures, especially against ecological damage and the exploitation of the labour force.[10]

An intensive discourse about the extent to which these tasks could be managed by self-regulation set in, and in several instances companies and groups of companies started experimenting with social accountability initiatives, together with NGOs. The acceleration of globalisation made society more vulnerable to organised crime, terrorism and new dimensions of transnational economic crime due to the liberalisation of goods and services as well as the new means of data transmission and travel simplified cross-border transactions.[11] An era of **re-regulation** set in. This time, however, the driving forces were not so much nation states, but international organisations and members of the civil society. Whereas NGOs proved forceful in pushing even the largest TNCs to re-consider their environmental and labour policies, the fight against economic and organised crime remained primarily a state function. In particular the 1990s brought about a regulatory boost in the area of money laundering and corruption prevention. The following chapter gives a quick overview of this development and specifically addresses the issue of the main actors in regulation.

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9 Jenkins 2001:1 et seq.

10 Cf. Haufler 2001:14, 17; Jenkins 2001:19 et seq.; Utting 2002:75 et seq.

11 Cf. Passas 1999:399 et seq.

3.1. Combating Money Laundering

3.1.1. Public Sector Initiatives

Originally a limited concept, introduced in the core area of fighting organised crime by the UN Convention against illegal drugs, money laundering legislation was rapidly extended to include other predicate crimes. Initial attempts to harmonise criminal law, especially by defining the offence, introducing forfeiture rules and a minimum standard with respect to mutual legal assistance, were soon supplemented by regulatory and preventive rules, in particular on 'know your customer'-policy.[12] The political change was brought about not so much by conventions but by 'soft law', especially by the 'Forty Recommendations' of an informal group called 'Financial Action Task Force on Money Laundering' (FATF) created by G7 and later extended to the OECD scope and beyond. The rules on customer identification pre-dated action against money laundering and were originally developed within a self-regulatory context. In Switzerland, in 1977, after the so-called 'Chiasso scandal'[13], the primary role of such an instrument was to prevent state regulation. In 1988, the standards had just been elevated from a national to an international model text, when the FATF picked them up and integrated this approach into its work to develop a series of Anti-Money Laundering Recommendations that were to be adopted in their first version in 1990. AML legislation is, therefore, from the outset a mixture of 'hard law' and 'soft law', of traditional government-led 'hierarchical' regulation and self-regulation as well as mixed, negotiated solutions. Clearly, the emergence of the FATF was an effort within the wider agenda of countries in the North to control financial flows worldwide. To some extent it could be explained to the countries of the South as serving their interests in tracing stolen assets.

Since then, the standards against money laundering have been broadened in every sense, and the scope of predicate offences in the Recommendations of the FATF has been enlarged to tackle all (serious) offences. The professions addressed in the preventive concepts have been drastically extended to include all kinds of 'gate-keepers', a category that reaches far beyond fiduciaries and traditional financial intermediaries to include lawyers, precious metal dealers etc. The geographic scope of the AML-initiatives now spans the world, well beyond the FATF and its satellite organisations. Those jurisdictions which were perceived as un-cooperative were put on a black list and coerced into cooperation. International recommendations have continuously and studiously been implemented in national law, especially since the FATF has engaged its constituency in a rigorous peer-evaluation process. The ratings may have dramatic economic effects as they decide on the position of companies domiciled in a specific country. They may also influence the cost of transactions with certain financial institutions. Countries and institutions blacklisted may find it difficult to do business with the rest of the (more) regulated world.

Why would, under these circumstances, a group of key competitors in private banking – one of the areas most at risk – get together and draft a private business standard on customer-due-diligence?

12 Cf. Pieth 2004:23 et seq.; Pini 2004: 227 et seq.

13 Capus 2004:123.

3.1.2. Private Sector Initiatives

a. Reasons

In order to situate the Wolfsberg Group of private banks correctly in the multitude of self-regulation instruments it needs to be stressed that the domain the Principles deal with had already been heavily regulated, and more regulation was just about to come. The 'Basel Committee on Banking Supervision' was at the time preparing its new customer-due-diligence paper, a set of politically, if not legally, binding 'recommendations' to member states. Bankers perceived these moves as yet another threat of over-regulation by less than sensitive regulators. Instead, the Wolfsberg process was to prepare the ground for a change of paradigm towards a **'risk-based approach'**, engaging the responsibility of the profession in a far more in-depth way than the 'rule-based approach' traditionally adopted by regulators. A risk-based approach allows financial institutions to find solutions more closely attuned to their needs.[14] Therefore the Wolfsberg papers must primarily be seen as offers to regulators to enter into collective negotiations on standards and standard-setting procedures.

The main advantage to be drawn from the process both by legislators and banks was the fact that the Principles brought about a harmonisation of standards amongst key competitors – especially the US, European and Japanese companies whose activities were based on rather diverging regulatory environments – far more expediently than through inter-governmental negotiations. Additionally, the Principles had a direct impact even on under-regulated off-shore centres, as they also apply to all subsidiaries of the participants, wherever they do business. One of the major tasks of Wolfsberg is, therefore, to **reduce the risk of regulatory arbitrage** amongst the big players in private banking – a procedure extended to other forms of banking later on.

Of course, a standard of this type improves the public perception of a company. The primary goals of the Wolfsberg standards are, however, of an even more directly pecuniary nature: agreeing amongst competitors and above all with key regulators on 'best practices' allows to **reduce risk and costs**. If the standards on customer identification seem high in comparison with everyday practice in the industry today they also put a limit on what needs to be done and, by defining adequate compliance with the new standards, help manage legal risks. They are, above all, an instrument for expectation management.

The Wolfsberg banks would, however, have been unable to come together without the help of facilitators from civil society and former representatives of the FATF. What was in the deal for them? Going back to the original motivation for the initiative, their goal was the reduction of the availability of services to corrupt officials. Making it more difficult to launder corruption funds was considered an essential condition to effectively combat bribery. Following this logic the Wolfsberg Group currently considers a further statement with which to address the specific risk of becoming a conduit for corrupt transactions.

b. How does the Wolfsberg Group operate?

The Wolfsberg Group meets up to four times a year under a rotating dual chairmanship, traditionally made up of a representative of both a European and US

14 Pieth 2004:23 et seq.

bank. The structure of the meetings is very informal, decisions are prepared in working groups and also intensively discussed in the plenary. Decisions are taken by unanimity, after consultations of the responsible bodies in every member institution, typically the board.

c. Critique

As must be expected from a private initiative with such public impact, the Wolfsberg Group did not go unchallenged: it has been criticised in particular for its 'elitist' approach and for not monitoring the compliance with its standards. When it comes to monitoring it must, however, be pointed out that banks are under the tight supervision of regulators. Offering detailed language on customer-due-diligence issues to regulators may easily backfire if something 'goes wrong': Wolfsberg banks could find themselves sanctioned by regulators on the basis of their own private standards.

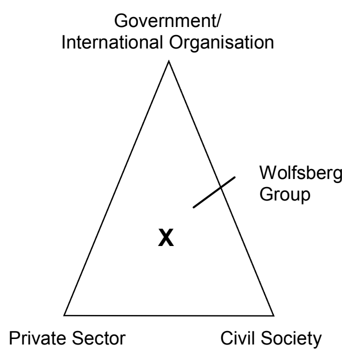

Figure 1: Original actors constellation of the Wolfsberg Group.

As to the elitist approach, the Group has deliberately decided to remain small in order to maintain its discussion culture and to be able to take decisions by unanimity. However, the Wolfsberg Forum, especially in its most recent form, has allowed to reach out to other institutions substantially: the papers produced by the Wolfsberg Group during the last years were subjected to the scrutiny of about 50 of the largest banks worldwide and their key regulators. Their comments are integrated into the final version of these texts.

d. Recent Developments

In the original phase leading up to the first standards, Wolfsberg was very much a multi-stakeholder group, initiated by civil society members, advised by former officials and by farsighted members of the private sector. Since Wolfsberg has managed to establish itself as accepted interlocutor with regulators, there is a tendency to move towards a pure private sector group. A shift in topics, but also in the participants delegated by banking institutions indicates a move away from policy-orientated activities towards a technical emphasis. Not all participants are equally aware that losing the multistakeholder element would imply the risk of transforming the Group into a mere lobbying institution for multinational banking interests. Using the power triangle with government/intergovernmental input, private sector efforts and civil society engagement forming the three corners, the influence of the various actors can be visualised. The original Wolfsberg Group was based very strongly on private sector and civil society contributions; whereas the public interest manifested itself indirectly through the regulatory environment and former members of the FATF and national FIUs as 'translators' and 'motivators'.

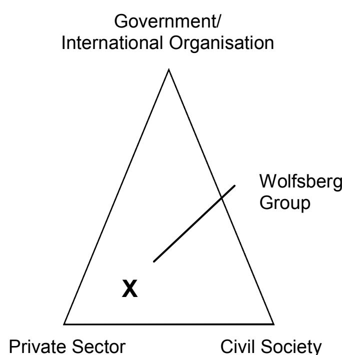

Figure 2: Contemporary actors constellation of the Wolfsberg Group: the current shift changes the balance of the Group considerably.

As a pure private sector group, Wolfsberg would lose a lot of its appeal: it would become vulnerable to all criticism directed at traditional instruments of self-regulation, implying that they are self-serving, undemocratic, intransparent and ineffective because of the lack of control by non-involved observers or by the representatives of public interest (cf. Figure 1).

e. Summary

Wolfsberg is more than a pure private sector representation. As a multistakeholder group it has gained credibility, both because the key institutions in private banking were ready to sign up and to submit to an intensive group process and also because representatives of NGOs and academia have participated. The motivation of the private sector to participate, however, has always been hinged on more direct

economic interests: preventing a next regulatory push or at least influencing its direction and establishing a level playing field amongst key competitors in order to marginalise those who fall below the benchmark and ameliorating the reputation of the sector altogether. In summary, they have become a standard setting power, despite the fact that they are purely private and not necessarily representative for the industry as a whole.

3.2. Combating Corruption

3.2.1. Public Sector Initiatives

Although the negative consequences of corruption, especially transnational bribery in Third World countries, was obvious long before the 1990s, earlier efforts to draft international treaties failed due to North-South and East-West differences.[15] The East-West détente around 1990 changed the landscape dramatically. As formerly 'controlled' territories opened up to international commerce, the need to reduce the risk of unfair competition amongst exporters became paramount. At the same time it was more obvious that endemic corruption in the local justice systems and administrations in the East and the South made investors vulnerable. It was, therefore, ultimately the concurrent effect of first world interests together with NGO pressure that allowed to move corruption up on the political agenda in the 1990s.[16] The OECD started its work on transnational commercial corruption in 1989 and adopted a first Recommendation in 1994; it revised the Recommendation in 1997 and shortly afterwards adopted a Convention focusing on the criminal law aspects of transnational bribery. Much of this work has been accomplished in a sparring relationship between the NGO Transparency International, founded in 1993, and the OECD Working Group on Bribery.

Especially in the 1990s several regional organisations (Organisation of American States, Council of Europe, European Union etc.) developed their own anti-corruption conventions, some of which cover a vast area of topics. The most recent brick in the anti-corruption building is the comprehensive UN Convention Against Corruption, which entered into force in December 2005.

Concurrently Multilateral Development Banks (MDBs) as well as bi- and multilateral development agencies stepped up to the efforts to prevent bribery dramatically.

The various instruments create a complex web of anti-corruption rules, sometimes causing difficulties for national legislators attempting to implement them all at once. They follow very different rationales: whereas the OECD initiative is primarily directed at fostering a level playing field for exporters, the regional texts seek to harmonise law in order to enable mutual legal assistance amongst neighbours. In the context of the Council of Europe, an additional aim was to upgrade Eastern European legal standard to help enable the enlargement of the European Union. The EU started off following a very narrow remit of protecting its own financial interests and gradually broadened the approach to corruption within the Community's Member States in general.[17]

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15 Eigen/Pieth 1999:1 et seq.

16 Cf. Aiolfi/Pieth in: Fijnaut/Huberts 2002:350 et seq.; Sacerdoti 2000:29 et seq.; Eigen in: Pieth/Eigen 1999:293 et seq.

17 Salazar 2003:137 et seq.

Only at first sight the evolution on anti-corruption has followed the traditional ways of international law more closely than that on money laundering: the OECD standards on corruption evolved primarily with the help of Recommendations, merely in the last minute criminal law rules were translated from the so-called Agreed Common Elements into a legally binding instrument. The key instrument used to make soft law hard, here the peer review process was combined with treaty law. The OECD Convention and the AML instruments have another point in common: they do not request unification of criminal law, but rather adopt the principle of 'functional equivalence', which allows Member States a substantial margin of appreciation.[18]

3.2.2. OECD-ICC-Industry Standards

Already in 1977, when the UN was involved in a first attempt to draft an anti-corruption treaty, the **International Chamber of Commerce (ICC)** developed a code of conduct meant to supplement such UN Convention. Since this Convention was not finalised in due course, the ICC text remained dead letter. When the OECD Convention was signed in 1997 the code obtained a new 'raison d'être'. Correspondingly it was revised in 1996, in 1999 and again in 2005. Its main focus is prevention of corruption, and it addresses some delicate issues, like the relations to third parties. It remains, however, rather generic and does not focus on any sector in particular. The ICC Code of Conduct does not foresee a formal process of adherence and membership.

Equally generic are the business principles developed by **Transparency International** together with a core-group of businesses. In many points this text goes beyond the current ICC standard. The language, however, does not always apply the same precision in definition as a purely legal text would. Furthermore, both the ICC and the Transparency International Business Principles (TIBP) do not require actual declarations of commitment by companies. A further 'industry standard' on corruption emerged when the UN decided, after the adoption of its Anti-Corruption Convention in 2003, to add a 'Tenth Principle' to the **'Global Compact'**. This text is, on the face of it, merely a Statement of Principle without any detail. It does, however, require an annual self-declaration on implementation.

Following the Wolfsberg example, after 2000, a series of **sectorial industry groups** were created to define specific anti-corruption standards. They were all initiated by civil society and co-chaired by industry and NGO members. It was believed that corruption prevention raised different problems in each sector (the construction, the defence, the extractive industries, the power systems manufacturers, the pharmaceutical industry, the insurance sector, etc.). While this may be true for some particular issues, like the treatment of so-called 'signature bonuses' in the oil industry, the problems dealt with in the industry standards tend to gravitate towards a common denominator of topics: issues relating to the definition of corruption, especially distinctions within the 'grey area' of donations, hospitality and facilitations payments on the one hand, and the treatment of third parties and intermediaries on the other hand. Since most of these standards are still in the making, no specific reference is made here before their actual publication.

The benefit of sectorial groups was rather seen in the build up of confidence in the

18 Aiolfi/Pieth 2002:351 et seq.

disciplining effect of face-to-face groups of big companies. Such compacts are useful in oligopolistic markets such as those for turbines, fast trains, oil and gas, mining, aircraft manufacture etc. Even without a formalised monitoring-, complaints- or arbitration-procedure such groups can allow companies who compete for huge contracts that can sometimes decide over the success or failure of entire corporations to meet in a **secure environment** and to agree on a no-corruption policy. These groups are ideally facilitated by disinterested parties. Many such groups currently work on texts. However, the companies are often shy to carry the actual process through to the signature stage. Apparently, the issue of corruption is – in many sectors and many areas of the world – still too hot a topic.

The PACI Board at the signatory ceremony.

Overall, the main consequence of public sector activities has been to **raise the risk** for the private sector and for managers. Especially companies and managers in the North now face criminal, civil, administrative and fiscal sanctions for bribery, also of foreign officials. They are motivated to make sure that their key competitors implement similarly expensive compliance concepts. Industry standards, when they provide sufficient detail and include a monitoring mechanism, are considered useful. They allow the members of the group to present themselves as cooperative and sound business partners. Foremost, industry standards are, however, an instrument of expectation management.

3.2.3. Partnering Against Corruption Initiative (PACI)

a. Davos

A group of three facilitating bodies, the World Economic Forum (WEF), Transparency International (TI) and the Basel Institute on Governance, was asked by key players in the construction sector to create a multistakeholder group on corruption. The idea was launched by Alan Boeckmann, President of Fluor, at the WEF Annual Meeting in 2003. A working group made up of 15 Engineering and Construction company representatives and the facilitators adapted the TI Business Principles to the needs of the sector. The text was then adopted for signature by member companies of the WEF's 'E&C Governor's Group' at the Davos meeting in 2004. Concurrently, other company groups showed an interest in making similar efforts, especially the metals and mining and the oil and gas groups. For the Davos meeting in 2005, intensive lobbying by all parties made it possible to enlarge the scope of participants substantially. The E&C text was from then on used for all three sectors and so far a total of over 110 companies have signed it.

The next immediate challenge for the companies in question is the development of a follow-up mechanism as announced by the chairmen of the three Governors' Groups participating at the press conference in January 2005.

b. Situating PACI

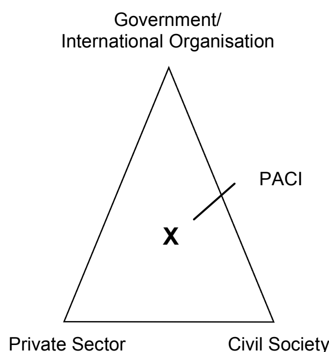

Figure 3: Actors Constellation PACI.

Situating PACI on our 'power diagram' shows a slightly different picture than that for the Wolfsberg Group. Public influence is stronger here, not only due to the strict regulatory environment (Convention texts as opposed to Recommendations), but the direct participation of officials in the international fora during the actual process. Furthermore, the civil society element is stronger than in Wolfsberg, the WEF acts as a neutral convenor, TI as a pressure group on the topic and the Basel Institute on Governance as the technician of the multistakeholder concept.

c. Monitoring

There is a widespread agreement that the follow-up issue is decisive for the credibility of any attempt at self-regulation.[19] A broad variety of options is available. Monitoring can be **informal**. This will be the case where companies do not actually sign but merely publicly declare that they follow a specific standard. But even where an actual Group has been constituted, e.g. Wolfsberg, monitoring can remain informal.

Formalised monitoring mechanisms can either be based on self- or mutual-evaluation by group members or independent third party monitoring. According to the construction a softer form can be selected or, in the extreme case, certification by a professional certifier (e.g. ISO) could be applied, and certification could even be made a condition for participation. Which model the group chooses – group or third party monitoring – depends on the make up of the group: a small group of market leaders in an oligopolistic market will most likely rely on the group process; a large group consisting of SMEs or a mixture of larger and smaller companies will more likely opt for third party monitoring.

Monitoring focuses on the abstract compliance with standards. Another approach would be to base the evaluation of compliance on complaints heard by a tribunal. Some tribunals even have the authority to impose private monetary sanctions. An example on a national basis is the Swiss bankers' agreement on customer-due-diligence.

The choice of an adequate monitoring mechanism for PACI is currently under discussion and will possibly be decided on at an upcoming WEF Davos meeting.

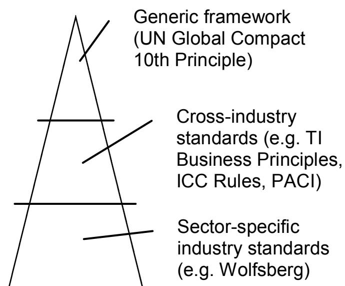

Figure 4: Global Compact: Norms, Principles, Text.

d. The future of PACI

Situating PACI. It is planned to expand PACI yet further and to invite the participation of other sectors. Already now, a serious difficulty arises from the many competing anti-corruption instruments in the private sector (including the ICC, TI Business Principles, PACI, Global Compact and the various sectorial groups' compacts). In many respects, ICC, TI BPs and PACI ought to be treated as equivalents. They are no longer specific to a certain sector, they are generic in so far as they cover the issue of bribery prevention on a mid-level of abstraction.

The Global Compact should not be seen as a competing instrument at all: with its one-sentence statement and its broad constituency, its role is rather that of an umbrella text. The Global Compact should consider ICC, TI BPs, PACI, International Federation of Consulting Engineers (FIDIC) and the like as attempts to translate the basic principle of the Global Compact Tenth Principle into more concrete language. Ideally, the semi-abstract standards would merge. In December 2005, they went as far as to reach a consensus to mutually accept each other as equivalents.

Apart from these instruments there will probably remain some more focused compacts, like the Aeronautic Industry's text on the selection, employment and remuneration of agents ('Clovis Principles'). Furthermore, industry-specific groups of the Wolfsberg type, i.e. small groups of strong oligopolistic competitors, will be necessary in certain sectors to make a real difference (e.g. Power Systems).
Relevant constituency. Another problem that PACI currently faces is how to make the group grow. Even though the text was very successful in securing signatures, some

19 Australian Task Force 2000:51et seq.; Haufler 2001:8; Jenkins 2001:27; Utting 2002:82.

major competitors in the engineering and construction industry as well as, especially, the oil and gas sector still have not signed. In fact, in the oil and gas industry some of the largest TNCs still refrain from joining the group for a variety of reasons: some companies maintain that their standards go way beyond the PACI standards, some are unconvinced that signing will be good for their reputation and finally, several others hold back for as long as their main competitors have not joined yet. Facilitators currently face the arduous task of trying to convince the timid.

4. Analysis

4.1. The Advent and the Demise of Self-Regulation

The history of self-regulation has been told many times over the last two decades while the issue has become very prominent .[20] Most authors mention the deregulation and privatisation processes of the 1980s as a crucial starting point.[21] In search of concepts to contain the negative impact of uncontrolled economic globalisation, the Nation State was out of its depth, and intergovernmental regulation frequently turned out to be a very cumbersome process.

Not only the private sector itself, but also public entities encouraged self-regulation. High hopes were expressed: self-regulation was supposed to be cheaper, more flexible, less burdensome; it was expected to mobilise expertise, particularly that available in the private sector; and the likelihood of the participants to follow their own rules seemed higher, as *'principle and agent are collapsed into one'*.[22] Especially Australia sought to reduce the cost of (public) regulation by farming out as much regulation as possible to the private sector. Laws tried to restrict state regulation in favour of self-regulation; the public sector supplied minimal standards and checklists for sound self-regulation.[23] NGOs increasingly favoured self-regulatory instruments over complex and non-transparent international treaty negotiations. While this approach opens the door to NGOs to influence the rules, it raises issues of legitimacy within civil society. In lieu of the elected parliament, private companies and self-appointed single-issue-representatives dominate this type of regulation.

No wonder that self-regulation very rapidly lost its appeal, and critical opinions of the concept gained in prominence: self-regulation came to be considered ineffective[24], non-transparent[25], self-serving[26] and undemocratic[27].

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20 Black 2001:4 et seq.; Brütsch/Lehmkuhl 2005: ch. 2, 12 et seq.; Haufler 2001:7 et seq., esp. 10; Jenkins 2001; Knill/Lehmkuhl 2002; Utting 2002.

21 Haufler 2001:7 et seq.; Jenkins 2001:4; Utting 2002:61 et seq.

22 Black 2001:16.

23 Australian Task Force 2000:59 et seq.

24 Black 2001:10; Jenkins 2001:26; Klauser 1994:53; Ruch 2004:449.

25 Marti 2000:582; Minogue 2001:14; Ruch 2004:409; Tsingou 2001.

26 Minogue 2001:9 et seq.; Pitofsky 1998:1; Ruch 2004:449.

27 Delmas Marty 2004:260; Klauser 1994:52; Marti 2000:580; Tsingou 2001.

4.2. Co-Regulation

Instead of fully reverting to 'Command and Control' (CAC)-type regulation[28] a new paradigm has emerged: non-state regulators have definitely pushed their way into regulation, even in traditional CAC areas like criminal law. They are increasingly integrated into decision-making bodies, e.g. in financial services supervision.

We currently witness the emergence of **'hybrid regulatory networks'** and new forms of mixed regulation or 'co-regulation'.[29] There clearly is a link between the less hierarchical forms of regulation applied by the international task forces referred to above, the soft-law and peer-review arrangements, and the entry of non-state actors into international regulation. The civil society and the private sector play a decisive role not only in rule-making, but also in the application of rules: monitoring mechanisms controlling implementation of the AML and anti-corruption rules of international bodies frequently rely on the cooperation of non-state actors.

4.3. Multistakeholder Initiatives

Multistakeholder initiatives were first developed in the area of labour practices and the protection of the environment.[30] Frequently, they are partnerships between the private sector and NGOs or between private and public actors, i.e. so-called public-private initiatives or partnerships.[31] They were considered a viable 'third way' between government regulation and corporate self-regulation.[32] In many cases, the impetus to form such initiatives came from civil society, but this is not a fundamental element of their definition. The aim of this 'third' approach is to overcome some of the merited criticism of traditional self-regulation: if the non-industry members of the group want to do their job well, they have to assume a control-function from within and will ensure that the agenda of the group is not entirely dominated by business interests. They also have to insist on the establishment of a credible monitoring or complaints procedure to enforce the standards. It is their task to make sure that the group respects general interests and to seek ways of convincing the participating companies that commercial interests run in parallel to public interests, at least with a long term perspective in mind. This is obviously a tall order for groups and individuals who typically have little economic power to back them up. Their power basis is either public opinion, potential consumer reaction[33] or simply the force of the argument. In this respect it has helped, both in the Wolfsberg and the PACI experience, to establish a link to the public sector in order to allow to influence the agendas of international organisations, since the strongest motivator for the private sector to embark on a self-regulatory experiment has traditionally been the anticipation of public regulation.[34]

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28 Black 2002:2 et seq.

29 Black 2001,6 et seq.; Brütsch/Lehmkuhl 2005: ch. 2; Haufler 2001:12.

30 Cf. for details Utting 2001; also Haufler 2001:14, 17; Jenkins 2001:19 et seq.

31 Utting 2001:61 et seq.

32 Utting 2001:66.

33 Haufler 2001:9, 11, 23.

34 Australian Task Force 2000:7; Black 2001:9 et seq.; Haufler 2001:3, 22 et seq.

5. Conclusion

Wolfsberg and PACI are representatives of a new era of regulation. They are not entirely driven by a private agenda: on the contrary, AML and anti-corruption are key issues in the fight against transnational corporate crime. Heavy public regulation attempts to control these activities, and the private sector is recruited into the fight on a preventive level. It is, however, in the interest of the business world to manage (legal and reputational) risks. Their own efforts in translating the standards onto an operational level serve the purpose of levelling the playing field *vis à vis* competitors and of controlling the cost of risk management. On the other hand, these standards are not simply part of a hierarchical regulatory structure: with a ‘risk-based approach’ to money laundering and with the rules on employing intermediaries to prevent corruption, the private sector genuinely contributes to the fight against transnational economic crime by its own means, and as such reaches beyond what public rules expect from them.

Overall, Wolfsberg and PACI are elements of a system of co-regulation in the emerging international legal framework against commercial crime.

Civil society is probably in the most difficult situation, since its representatives are often the main initiators and motivators of the initiatives, at least in its early stages. If the initiatives do take off, civil society is rapidly considered as superfluous, even though the initiative will change its character without them. On the other hand, the means of civil society groups to set these processes in motion are frequently weak, sometimes crude and the outcome is usually uncertain.

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