

# Chapter 5

## The Law and Voluntary Codes: Examining the “Tangled Web”<sup>1</sup>

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### Introduction

Even though firms may agree to adhere to the rules of voluntary code initiatives without being required to do so by legislation or regulations, there are nevertheless many ways that the law and voluntary initiatives are closely interconnected — so many that one could describe the linkages as creating a “tangled web.” The Scottish novelist and poet Sir Walter Scott once said, “Oh, what a tangled web we weave/When first we practice to deceive.”<sup>2</sup> While it may be appropriate to characterize the law-codes relationship as tangled, the position put forward here is that, on the whole, it is a positive and mutually reinforcing relationship. There is, nevertheless, potential for *self*-deception, for those who fail to appreciate the significant legal issues surrounding the development and use of voluntary initiatives. A more systematic, less tangled approach to law-voluntary code relations holds considerable promise for enhancing the effectiveness of both instruments, for the benefit of all parties concerned. These themes are explored in greater detail in the chapter. We begin here with some examples of how law and voluntary codes are interlinked:

- the impetus for industry sectors adopting voluntary initiatives is not infrequently the perception that, if action is not taken by the sector, then government regulation is likely to follow;<sup>3</sup>

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1. This chapter draws substantially on earlier explorations on this topic, particularly K. Webb and A. Morrison, “Voluntary Approaches, the Environment and the Law: A Canadian Perspective,” in C. Carraro and F. Lévêque, eds., *Voluntary Approaches in Environmental Policy* (London, U.K.: Kluwer Academic Publishers, 1999), pp. 229–259; K. Webb, “Voluntary Initiatives and the Law,” in R. Gibson, ed., *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview Press, 1999), pp. 32–50; K. Webb, “Government, Private Regulation, and the Role of the Market,” in M. MacNeil, N. Sargent and P. Swan, eds., *Law, Regulation and Governance* (Don Mills, Ont.: Oxford University Press, 2002), Chapter 12.

2. Sir Walter Scott, from the poem *Marmion* (1808).

3. In some cases, there are communications from regulators that regulation will be forthcoming if voluntary action is not taken. For example, the Canadian cable television industry assumed self-regulation responsibilities over customer service activities following suggestions from the Canadian Radio-television and Telecommunications Commission (CRTC) that if the industry did not take on these responsibilities the CRTC would. See David Clarke and Kernaghan Webb, *Market-Driven Consumer Redress Case Studies and Legal Issues* (Ottawa: Office of Consumer Affairs, Industry Canada, 2002), available for download at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01643e.html>>. In 1999, in the context of discussions about regulation of certain toxic chemicals, the Canadian Minister of Environment was reported as having said she was prepared to regulate the release of 18 chemicals “unless more companies took voluntary action against them.” She is then quoted as saying, “We have made some good progress with voluntary measures. But if some make the effort and others don’t, you have unfair competition.” (See A. Duffy, “Industry Told its ‘Free Ride’ on Pollution About to End,” *Ottawa Citizen*, March 20, 1999.) In other cases, the likelihood of regulations being

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- voluntary initiatives may pave the way for legislation, with industry and others calling on governments to pass legislation based on voluntary initiatives;<sup>4</sup>
- voluntary standards can be referentially incorporated in law, with or without the approval of the initiators of the voluntary standard;<sup>5</sup>
- voluntary code initiatives may elaborate on and refine the generality of legislative requirements;<sup>6</sup>
- voluntary initiatives may be explicitly created pursuant to legislative instruments;<sup>7</sup>
- governments may support the development of voluntary initiatives that have extraterritorial application when it might be difficult to directly legislate these non-domestic operations;<sup>8</sup>

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promulgated may not be communicated by government officials directly, but is nevertheless understood by industry. In the United States, the vice-president of one supermarket chain that has adopted a voluntary third-party audited food safety program for its suppliers has stated, “If we don’t give them internally generated voluntary programs, we’re going to get it from regulatory agencies.” See R. Vosburgh, “Produce Safety Audits are Consumer Driven,” *Supermarket News*, March 6, 2001, available at <[www.primuslabs.com/ap/SN\\_0300.htm](http://www.primuslabs.com/ap/SN_0300.htm)>; see also discussion of the origins of the Canadian Chemical Producers’ Association’s Responsible Care program, in John Moffet, François Bregha and Mary Jane Middelkoop, “Responsible Care: A Case Study of a Voluntary Environmental Initiative,” Chapter 6, below.

4. See, for example, the origins and development of Canadian federal legislation on personal information collected and used for commercial purposes, which started life as the voluntary *Model Code for the Protection of Personal Information* developed by governments, the private sector and consumer groups through the Canadian Standards Association. When the Code was finalized, the Canadian Marketing Association (which participated in drafting of the Code) urged the federal government and the provinces to develop legislation based on the Code. See Canadian Marketing Association, *Direct Marketing Industry Welcomes Federal Privacy Bill*, October 1, 1998. See also Colin J. Bennett, “Privacy Self-Regulation in a Global Economy: A Race to the Top, the Bottom or Somewhere Else?” Chapter 8, below. In the environmental area, the vice-president of the Canadian Chemical Producers’ Association, speaking in the context of discussions to move control of certain toxic chemicals from a voluntary program to government regulation, was quoted as saying, “We don’t have any problem with having regulations when voluntary programs don’t work. When they don’t work, they have to be backed up by a government willing to regulate, or else you will have free riders — companies that don’t take care of their problems.” (Cited in Duffy, footnote 3.) See also discussion in Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, below.

5. See such examples as hockey helmet, toy safety, sustainable forestry management, environmental management, and health and safety standards incorporated into legislation, discussed later in this chapter.

6. For example, the Canadian Competition Bureau is currently considering adopting as guidelines the ISO 14021 standard on environmental claims, to help interpret the deceptive marketing provisions of the federal *Competition Act*. See <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02206e.html>>.

7. For example, the European Eco-Management and Audit Scheme is a voluntary scheme established by law. See *Council Regulation (EEC) No. 1836/93 of 29 June 1993*, superceded by *Regulation (EC) No. 761/2001 of the European Parliament and of the Council of 19 March 2001*. See also the Canadian Environmental Choice Program, with draft guidelines published in the *Canada Gazette*, pursuant to s. 54(3) of the *Canadian Environmental Protection Act, 1999* (as amended). The Environmental Choice Program is discussed in Kathryn Harrison, “Promoting Environmental Protection through Eco-Labeling: An Evaluation of Canada’s Environmental Choice Program,” Chapter 10, below.

8. For example, the U.S. Department of Labor has provided financial support to the Fair Labor Association, which operates a voluntary apparel code of conduct and monitoring system used by American retailers dealing with their overseas suppliers. See, e.g., Fair Labor Association, *Fair Labor Association Awarded \$750,000 Grant as Part of the Department of State Anti-Sweatshop Initiative*, press release, January 16, 2001, available at <[www.fairlabor.org/html/press.html#Press011601](http://www.fairlabor.org/html/press.html#Press011601)>. For reasons of limits on State sovereignty (and due to trade conventions), it would be difficult for most jurisdictions to develop and enforce command-and-control legislation that has this degree of effective extraterritorial application.

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- regimes for the development of voluntary standards by non-governmental parties may be the subject of legislation;<sup>9</sup>
- in the context of regulatory enforcement activities, regulators may offer incentives for firms to use voluntary programs that reduce the likelihood of violations taking place; moreover, non-compliance with voluntary standards can be a factor used by judges in determining liability, compliance with voluntary standards can aid firms in avoiding penal liability or reducing penalties, and the terms of voluntary programs can be judicially imposed on firms as part of sentencing;<sup>10</sup>
- consumers or affected members of a community may be able to use the commitments made in voluntary initiatives in legal actions to assist in establishing liability against individual firms<sup>11</sup> and against those who develop voluntary standards;<sup>12</sup>
- affected members of the public may be able to use voluntary standards to assist in establishing liability against public bodies in certain circumstances;<sup>13</sup>
- disciplinary actions by code administrators against participating firms may be undertaken through contractual actions;<sup>14</sup>
- the fairness of disciplinary actions taken by code administrators toward participating firms may be reviewed by the courts and, if found wanting, the actions can be overturned;<sup>15</sup>
- governments may introduce or support voluntary programs to stimulate “beyond regulatory compliance” behaviour from companies;<sup>16</sup>

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9. In Canada, the national standards system is essentially a voluntary rule-development and implementation system with both rule-development and implementation components that both governmental and non-governmental interests use. The custodian of the national standards system is the Standards Council of Canada, a Crown corporation established by legislation that reports to the Minister of Industry (*Standards Council of Canada Act*, R.S.C. 1985, c. S-16, as amended). Non-profit, non-governmental standards development organizations such as the Canadian Standards Association, as well as standards organizations devoted to conformity assessment activities, are accredited by the Standards Council of Canada.

10. See discussion of use of ISO 14001 environmental management systems by legislators, governments and the courts, later in this chapter.

11. See discussion of legal suit against Nike, later in this chapter.

12. See discussion of legal suits against the National Spa and Pool Institute, later in this chapter.

13. Recently, following the introduction of a revised voluntary playground equipment safety standard, school boards in some Canadian municipalities dismantled their existing structures out of fear that they would not meet the revised standard, and that the municipality could be held liable. This is discussed in greater detail later in this chapter.

14. See discussion of *Ripley v. Investment Dealers Association* and other legal suits by industry associations against members over issues of code non-compliance, later in this chapter.

15. See discussion of legal suits by code members against code administrators, such as *A.A.A. Khan Transport Inc. v. Bureau d'éthique commerciale de Montréal Inc.*, later in this chapter.

16. See discussion of beyond compliance environmental programs, later in this chapter.

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- governments may develop or support voluntary programs to avoid trade restrictions that apply to regulatory programs;<sup>17</sup>
- firms can incorporate legislative and regulatory requirements into the terms of voluntary codes that apply to participating firms in other jurisdictions;<sup>18</sup>
- governments may have their regulatory regimes certified as meeting the terms of non-governmental voluntary codes;<sup>19</sup> and
- anti-competitive aspects of voluntary code arrangements may be restricted through competition law.<sup>20</sup>

As even this summary listing illustrates, the relationship between voluntary initiatives and law is complex and varied. In light of this, it might be fruitful at the outset to examine the relationship from two perspectives: that of the impact of law on voluntary codes, and that of voluntary codes' impact on the law.

Looking first at the *impact of law on voluntary codes*, and drawing on the above-noted examples, there appear to be four main aspects to this relationship.

- *Enabling*. When parties draw on contract and intellectual property law, or a standards system that has a statutory basis to assist them in structuring their voluntary arrangements, the law facilitates development of voluntary codes. In this respect, there is an *enabling* relationship between law and codes (i.e. law provides some of the tools for code development).

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17. For example, a voluntary labelling standard for foods containing genetically modified ingredients is being developed in Canada, whereas mandatory regulatory requirements on such issues may contravene restrictions contained in trade agreements, as discussed later in the chapter.

18. For example, as part of its apparel workers code, Nike has committed that all Nike supplier factories meet certain U.S. Occupational Safety and Health Administration indoor air quality standards. For discussion of these provisions, see T. Connor, *Still Waiting for Nike to Do It* (San Francisco: Global Exchange, 2001), p. 1, available at <<http://store.globalexchange.org/nike.html>>. According to Connor, "Health and safety is one area where some improvement has occurred. But even here the company is not willing to put in place a transparent monitoring system involving unannounced factory visits." (*Ibid.*, p. 5.)

19. For example, the State of Alaska's commercial salmon fisheries management program has been certified as sustainable by the non-governmental Marine Stewardship Council, pursuant to its sustainable fishery standards. (See Office of the Governor of Alaska, *Alaska's Salmon Fishery Certified as Sustainable*, press release, September 5, 2000.) Professor E. Meidinger, in "Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think," *Environmental Law Reporter* 31 (2001), pp. 10162–10179, p. 10169, reports sources indicating that the agencies responsible for managing State-owned lands in Minnesota, New York and Pennsylvania have either achieved Forest Stewardship Council certification or announced they intended to do so. In Canada, the Ontario Technical Safety Standards Authority (TSSA), an independent non-profit agency formed by the Ontario government in 1997 to administer Ontario safety legislation, is "moving towards ISO 9001/2000 certification." (ISO 9001 is a non-governmental quality management system.) See TSSA, *Consolidated TSSA 2005 Strategy and 2001/2002 Plan* (Ontario: TSSA, 2001), p. 5, available at <[www.tssa.org/about\\_tssa/pdf/tssa\\_plan.pdf](http://www.tssa.org/about_tssa/pdf/tssa_plan.pdf)>.

20. Competition law implications are discussed later in this chapter.

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- *Negative stimulus*. When voluntary codes are developed in tacit or clear recognition that failure to do so may lead to legislation or regulation, it is not inaccurate to say that there is, in essence, a *threat-based* relationship between law and voluntary codes (i.e. the prospect of new legislation or regulations is used as a negative stimulus for voluntary codes, so that the codes operate “in the shadow of the law”<sup>21</sup>).
- *Positive stimulus*. When governments expressly use legislation to encourage the use of voluntary initiatives in furtherance of specific public policy objectives, it could be said that there is a *positive stimulus* relationship between law and voluntary codes (i.e. to some extent, in this respect, voluntary initiatives “stand on the shoulders” of a particular legislative structure).
- *Constraining*. When, through competition law, fairness requirements associated with contracting or the provisions of trade agreements, law prevents or restricts the ability of parties to enter into or operate voluntary code-type arrangements, there is a *constraining* relationship between law and codes (i.e. law sets limits on what can be accomplished through voluntary codes, and how it can be accomplished).

In all of these respects, although in different ways, the law provides a framework within which voluntary codes are developed.

Looking at the *effect of voluntary codes on the law*, there appear to be six main aspects to this relationship.

- *Modelling*. Voluntary codes can act as precursors of laws, demonstrating the practicality of a particular approach, and showing areas in which multiparty consensus can be found. In this sense there can be a *modelling*<sup>22</sup> relationship between voluntary arrangements and the law.
- *Supplementing*. Voluntary codes can refine or elaborate on or operationalize vague legislative or judicial concepts, and in this sense have a *supplementing* relationship with the law.
- *Jurisdiction extending*. When the ability of a State to directly legislate or regulate is constrained for reasons of limits on State sovereignty, voluntary codes can in some cases act to *extend* the reach and influence of governments through non-regulatory means.
- *Interoperability*. Voluntary codes can be used by legislators, regulators and courts as component parts of legal regimes and, as such, there can be a relationship of *interoperability* between voluntary approaches and the law.
- *Substitutability*. In some cases, the promulgation of legislation and regulations, or effective enforcement thereof, is not possible (e.g. by reason of restrictions found in constitutions or trade agreements). In such circumstances, there may be occasions when voluntary codes can act as *substitutes* for or alternatives to laws.

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21. The expression “in the shadow of the law” has been used by legal commentators for some time. See, e.g., R. H. Mnookin and L. Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce,” *Yale Law Review* 88 (1979), pp. 950–997.

22. The notion of rule modelling is discussed extensively in J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

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- *Performance- and credibility-enhancing.* In some situations, adherence by government bodies or government regulatory programs to the terms of voluntary arrangements may actually improve the operation of those government bodies or programs, their public image or both. In this sense, voluntary codes can be seen to enhance the performance and credibility of laws.

It is probably apparent that, in many of these aspects, there can be a close and oft-times mutually reinforcing relationship between the law and voluntary codes. The weaknesses of a legal instrument may to some extent be “covered off” through use of a voluntary approach, and vice-versa. To take an example of public sector actors using voluntary approaches to supplement legal regimes, a government environmental protection agency may choose to support or develop market-driven voluntary programs specifically to stimulate regulated actors to undertake innovative action that goes beyond regulatory compliance; it may use voluntary programs to address harmful behaviour outside its regulatory authority (e.g. behaviour that would be difficult to address directly due to limitations applying to its legislative initiatives); it may develop voluntary programs to quickly obtain reductions of particular pollutants that cannot be addressed so expeditiously through regulatory action (because of the ponderous, careful, expensive and slow process of regulatory development); or it may seek the endorsement or approval of those operating market-based sustainable forest or fish management programs for its activities (in an effort to enhance the perceived public acceptability or legitimacy of its regulatory practices). By the same token, voluntary programs for toxic reductions that, on their own, may be vulnerable to criticisms about how much actual progress is being made may benefit from use of government-mandated information disclosure programs, to enhance transparency and accountability of the voluntary programs.

Similarly, business and civil society organizations that develop voluntary initiatives often buttress or reinforce their programs through legal instruments. Voluntary certification initiatives developed by private sector interests or public interest-oriented non-governmental organizations (NGOs) typically rely on contract law to implement the terms and conditions of operation; the benchmarks of acceptable and unacceptable behaviour articulated by industry associations or standards bodies through their voluntary codes and standards initiatives may be recognized by courts in regulatory actions or private law negligence actions as constituting the accepted “standard of care” for that activity, and, as such, the ability of the industry associations or standards organizations to stimulate compliance with those codes or standards may be enhanced (particularly against “free riders” who may be resisting efforts to comply with the code or standard). From these examples, one can see the potential for symbiotic, constructive interaction between laws and voluntary initiatives, in which some combination of the two types of instruments may work better than either could on their own.<sup>23</sup>

Of course, this degree of reinforcement of one type of instrument by the other need not always occur: indeed, there are situations in which operation of the one type of instrument may be perceived as detracting from the operation of the other. For example, some have claimed that the existence of voluntary programs can be used by the private sector to stave off needed legislative or regulatory initiatives, and that support by a

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23. The strengths and weaknesses of the two instruments are discussed below.

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government agency for a voluntary measure might restrict its ability to act in the future.<sup>24</sup> There is always this potential. But when from the outset parties understand the nature of the impacts voluntary instruments can have on the law, and vice-versa, there is good potential for the two instruments to be developed in a positive and complementary manner.

This chapter explores these and other themes in greater detail. It is divided into two main parts. The first consists of a functional comparison of voluntary code and command-and-control regulatory approaches as rule systems. Analysis suggests that regulatory approaches tend to be advantageous in terms of visibility, credibility, accountability, compulsory application to all, greater likelihood of rigorous standards being developed, sharing of costs of operationalization, and diversity of sanctions. However, regulatory approaches also tend to be highly formal, and expensive to develop and operate, may foster legalistic, adversarial relations between regulator and regulated, have limited scope (i.e. governments have jurisdictional limits), may not encourage innovation and “beyond compliance” behaviour, and are usually difficult to develop and amend (i.e. the rule-making and amendment process is slow and expensive).

Examination of voluntary code initiatives suggests that their main advantages centre around their flexibility, lower cost (i.e. the taxpayer may not directly assume any costs, and the institutions of rule-making, implementation and dispute resolution may be less expensive to operate), speed in establishing and amending rules and structures, minimization of jurisdictional concerns (e.g. it is less difficult to devise systems with multijurisdictional application), potential for harnessing non-State, non-coercive energies (e.g. positive use of market and peer pressure and internalization of responsibility), informality and accessibility to government, private sector and civil society actors. Typical drawbacks of voluntary approaches include generally lower visibility and credibility, difficulty in applying the rules to those who do not wish to participate in the program, the possibility of less rigorous standards being developed, uncertain public accountability and potentially weaker enforcement capacity.

It is also important to recognize at the outset the tremendous variety of voluntary code approaches in operation: some are initiated at the behest of government, others independently of government; some are adjuncts and refinements to statutory regimes, others have no direct connection to legislation; some apply to only one firm, others apply to many (even across jurisdictional boundaries); some are market-based; and some have no market dimensions. In light of this variety, it is useful to view voluntary codes on a continuum, with some having formal rule-making, implementation and adjudication institutions and processes, and others being less formal and elaborate.<sup>25</sup> The reader should also bear in mind that with such a wide variety of voluntary arrangements in existence, the general observations made in this chapter may apply more to some types of codes than others.

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24. See J. Moffet and F. Bregha, “Non-Regulatory Environmental Measures,” in R. Gibson, ed., *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview Press, 1999), pp.15–31, footnote 7.

25. See M. Priest, “The Privatization of Regulation: Five Models of Self-Regulation,” *Ottawa Law Review* 29 (1998), pp. 233–302, p. 236.

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The second part of the chapter focusses on the legal implications of the use of voluntary codes. An examination of the applicability of contract law to voluntary code arrangements highlights the consensual nature of such systems, and suggests that actions based in contract law may be used by consumers, standards organizations, individual firms and associations to require that voluntary code commitments are kept. A potentially significant conclusion emerging from the tort law analysis is that, in spite of their consensual nature, voluntary code arrangements can be used by courts to impose standards and impose liability on those who develop the code and on parties who did not participate in the original voluntary code arrangement. Legislation prohibiting deceptive practices can be used to address failure to meet commitments contained in voluntary codes. Regulatory legislation concerning consumer, environmental and worker health and safety protection can draw on voluntary codes and standards particularly with respect to determinations of due diligence and in sentencing. Analysis of the legal effects of government support of voluntary initiatives on enforcement suggests that such support can assist compliance activities but it can also undermine enforcement capacity through claims of abuse of process or officially induced error. The impact of trade agreements on voluntary initiatives is explored and the suggestion is made that such agreements indirectly create incentives for governments to support properly framed voluntary standards, since voluntary standards are less constrained by such agreements than are regulatory approaches. A review of antitrust (competition) law reveals that this type of law can restrict the operations of voluntary codes when they decrease the ability of non-participating competitors to gain access to a market and sell their products and services, or increase prices.

Taken together, this analysis suggests that individuals, firms, industry associations, non-governmental organizations and governments need to thoroughly explore and understand the legal implications of voluntary code arrangements before undertaking or participating in such initiatives. It is possible to devise and operate voluntary code regimes that serve *both* the public and private interests involved, but failure by all parties to properly consider the legal implications and act accordingly could potentially result in problems for all concerned. The final section of the chapter explores how the legal system and voluntary codes could be designed to operate in a more systematic, less haphazard way.



## **Comparison of Regulatory and Voluntary Code Regimes as Rule Systems**

As understood for the purposes of this chapter, both regulatory and voluntary code regimes consist of groupings of institutions, mechanisms and processes created to carry out the functions of rule creation, administration/implementation and adjudication,<sup>26</sup> which are designed to affect the behaviour of a defined population. In view of the tremendous variation possible from one regulatory or voluntary regime to another, the comparison of the two types of rule systems that follows is at quite a high level of generality. However, the comparative charts set out in the following pages, while only a summary, can be used to test specific regimes. Indeed, an attempt has been made to refer for illustrative purposes to aspects of particular codes whenever possible.

### **Rule Creation**

As the following chart demonstrates, the rule-creation function can be considered from a number of perspectives. Generally speaking, the public law, regulatory rule-creation function, which develops statutes, regulations and related instruments, is carried out by well-known, pre-existing institutions<sup>27</sup> possessing a high degree of credibility and visibility. It is, of course, possible for government to create new regulatory rule-making bodies, and indeed governments have done so from time to time. For example, prior to the 1970s, most jurisdictions had no separate government agencies responsible for environmental protection, whereas now such regulatory agencies are commonplace.<sup>28</sup>

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26. This tripartite discussion of rule systems is in basic agreement with definitions of the constituent components of legal systems, such as those described by J. Raz, *The Concept of a Legal System: An Introduction to the Theory*, 2nd ed. (Oxford: Oxford University Press, 1980). Although Raz speaks specifically of State-based legal systems, the basic functions are the same for voluntary codes.

27. For example, legislative bodies variously named “Parliament” or “Congress” or “Legislative Assembly,” executive delegated authority rule-making bodies such as Cabinet and the “Governor General in Council,” and statutorily delegated rule-making bodies such as regulatory agencies, including the Canadian Radio-television and Telecommunications Commission and the U.S. Federal Trade Commission.

28. In Canada, environmental protection has in general been entrusted to government departments or ministries, and not independent agencies. See discussion of evolution of Canadian federal environmental protection regimes in K. Webb, *Pollution Control in Canada: The Regulatory Approach in the 1980s* (Ottawa: Law Reform Commission of Canada, 1988), pp. 3–15. In the United States, a separate, independent agency with rule-making powers for environmental protection (the Environmental Protection Agency) was established in 1970 (see <[www.epa.gov/history/topics/epa/15c.htm](http://www.epa.gov/history/topics/epa/15c.htm)>).

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<b>Rule Creation: Comparison of Regulatory and Voluntary Code Regimes</b>		
<b>Characteristics</b>	<b>Regulatory Regimes</b>	<b>Voluntary Codes</b>
<i>Rule-making institutions</i>	Pre-established by State: well-known, highly credible. State controls process, access.	May be newly established: less credible, at least at outset. Government, business or non-governmental organizations can create.
<i>Visibility of process</i>	Generally high, particularly in the democratically elected rule-making organs of State.	Generally lower, but not necessarily so.
<i>Cost</i>	High, but usually spread across society.	Lower, but borne by a smaller group.
<i>Development process</i>	Difficult: highly formal, expensive, democratic (in primary rule-making bodies). Theoretically open to all.	Possibly easier: less formal, less expensive. May not be open to all.
<i>Ability to make amendments</i>	Difficult (see above).	Easier (see above).
<i>Sanctions that can be attached</i>	Can include coercive and liberty-depriving sanctions, including imprisonment.	Primarily market-based. May be tort and contractual liability implications.
<i>Scope of application</i>	Can be imposed on free riders. Not based on contractual consent.	Difficulty with free riders. Based on contractual consent.
<i>Constraints on rule development/implementation</i>	Considerable: constitutional and procedural.	Few: may apply across national and provincial boundaries.
<i>Likelihood of rules being developed through the process</i>	Political process makes outcomes difficult to predict.	Closed, limited process may make outcomes easier to predict.
<i>Likelihood of rigorous obligations being developed</i>	High: obligations developed by parties other than those who will be directly affected, less chance for bias to affect obligations being developed.	Low: obligations often developed by parties whose interests are directly affected, greater chance for bias to affect obligations being developed.

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The function of rule making in a voluntary code context may necessitate creating new bodies (e.g. the formulation of a new organization tasked with the rule-making responsibility),<sup>29</sup> or it may be undertaken by an existing body, be it an individual firm,<sup>30</sup> an association of firms,<sup>31</sup> a non-governmental organization,<sup>32</sup> a multistakeholder group<sup>33</sup> or a standards organization.<sup>34</sup> Typically, these types of bodies do not have the visibility, credibility or legitimacy<sup>35</sup> of pre-established governmental institutions, but in some respects this can be considered advantageous: first, businesses, NGOs or others are largely free to create these new bodies and operate them as they choose (subject to certain legal restraints as discussed in the second part of this chapter), and so there is a climate conducive to considerable rule innovation. Unlike public rule-making organs, such as legislatures or regulatory agencies, government does not “set all the rules” pertaining to the operation and access to the process.<sup>36</sup> Second, because they are not normally well-established bodies with known reputations, non-governmental voluntary code rule-making bodies may be stimulated to engage in credibility-, visibility- and legitimacy-enhancing activities. Thus, for example, as in the case of sustainable forest certification programs, there may be open competition among rival certification initiatives, with each pointing out their strengths and their counterparts’ weaknesses.<sup>37</sup>

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29. For example, the Cable Television Standards Council created by the Canadian Cable Television Association, as discussed in Clarke and Webb (footnote 3); see also the Assembly created as part of the multistakeholder Forest Stewardship Council, as discussed in Gregory T. Rhone, David Clarke and Kernaghan Webb, “Two Voluntary Approaches to Sustainable Forestry Practices,” Chapter 9, below.

30. See, e.g., Gregory T. Rhone, John Stroud and Kernaghan Webb, “Gap’s Code of Conduct for Treatment of Overseas Workers,” Chapter 7, below.

31. See, e.g., Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, below.

32. For example, the Web Trader consumer electronic commerce regime, developed by the U.K Consumers Association, discussed in Kernaghan Webb and David Clarke, “Voluntary Codes in the United States, the European Union and Developing Countries: A Preliminary Survey,” Chapter 13, below (hereafter “Other Jurisdictions”).

33. For example, the multistakeholder Fair Labor Association, which has established rules for proper treatment of apparel workers, as discussed in Rhone, Stroud and Webb, “Gap’s Code of Conduct,” Chapter 7, below.

34. For example, the Canadian Standards Association, as discussed in Andrew Morrison and Kernaghan Webb, “Bicycle Helmet Standards and Hockey Helmet Regulations: Two Approaches to Safety Protection,” Chapter 11, below; Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below.

35. For discussion of the importance of legitimacy in the context of voluntary sustainable forestry certification schemes, see B. Cashore, “Legitimacy and the Privatization of Environmental Governance: How Non State Market-Driven (NSMD) Governance Systems (Certification Eco-labelling Programs) Gain Rule Making Authority,” *Governance: An International Journal of Policy, Administration and Institutions* 15:4 (October 2002), pp. 503–529.

36. This can allow for considerable innovation in terms of how rules are developed. Perhaps the most effective restraints on this rule-creation capability are member- and market-driven, not legal.

37. See discussion of the activities of the proponents of the Canadian Standards Association and Forest Stewardship Council sustainable forestry initiatives in Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below. As pre-established organs of the State, regulatory bodies in normal circumstances do not have to engage to the same extent in such credibility-enhancing activities. This is not to suggest that regulatory agencies, and indeed, States, do not engage in competition with their counterparts elsewhere, but this form of competition is largely interjurisdictional in nature (e.g. each regulatory agency has a monopoly over the management of a particular resource within its jurisdiction). In apparent recognition of the fact that governments, too, are increasingly being required to earn and maintain marketplace credibility, we now have the

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With respect to public sector regulatory regimes, in keeping with the democratic nature of rule-creation processes in most industrialized countries, the development of statutes and regulations is normally characterized by a high degree of formality and attempts to ensure that the process is accessible, fair and transparent, and is perceived as such. On the one hand, this undoubtedly adds to the credibility and visibility of public sector regulatory regimes. On the other, it also contributes to the expense and slowness of statute and regulation development. The costs of developing statutes and regulations are generally<sup>38</sup> borne by all taxpayers, and thus there is a “cost-spreading” effect at work. There is also a high publicity value associated with use of the formal and transparent lawmaking processes.<sup>39</sup>

In contrast, the rule-development process for voluntary codes may be considerably quicker and less expensive than for regulatory regimes. The process may be quite informal, but also may not be accessible to all who are affected, nor may its mode of operation be very visible or well understood.<sup>40</sup> This, of course, may affect the credibility of the rules developed, since it would be easy for those who were not given the opportunity to participate, or not given an explanation of its mode of operation, to assume that an inadequate *fait accompli* was devised among like-minded insiders.<sup>41</sup>

This need not be the case, however, since it is possible for firms, associations, NGOs, multistakeholder organizations and standards organizations to engage in transparent, accessible, fair and easy-to-understand rule-development processes.<sup>42</sup> It

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spectre of governments seeking out the approval and certification of non-governmental organizations for their regulatory and administrative programs. For example, the State of Alaska has successfully obtained certification for its salmon fishery management system through the non-governmental Marine Stewardship Council, as discussed above (footnote 19).

38. In some jurisdictions, there is experimentation with forms of co-regulation, where new quasi-autonomous but accountable entities are established by government to administer or “manage” legislative regimes. These entities may be given a modicum of authority to develop some of the rules associated with the implementation of the regime, and may operate on a cost-recovery basis. See, for example, in Ontario, the experience with the Technical Safety Standards Authority, as discussed above (footnote 19).

39. For example, laws are debated in publicly accessible fora, frequently with television coverage, and regulation development can be the subject of extensive public consultations.

40. That is, the process of rule development for voluntary codes may not follow such well-known techniques as consensus, majority rule, draft versions circulated for comments, etc. It should be noted that formal standards development processes used to devise voluntary initiatives, such as those employed by the Canadian Standards Association, do use consensus decision-making techniques, and have formal notice and comment processes.

41. See, e.g., discussion of criticisms levelled at the Canadian Chemical Producers’ Association’s Responsible Care program in Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, below, and discussion of the Canadian Standards Association’s processes concerning development of the sustainable forestry management standards, in Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below. For insights on the perspective of environmental non-governmental organizations concerning voluntary standards development, see, e.g., T. Burrell, *CSA Environmental Standards Writing: Barriers to Environmental Non-Governmental Organizations Involvement* (Toronto: CIELAP, 1997).

42. See, e.g., the discussion of rule-development processes associated with the Responsible Care program (Moffet, Bregha, and Middelkoop, “Responsible Care,” Chapter 6, below), sustainable forestry initiatives (Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below), helmets (Morrison and Webb, “Helmet Standards and Regulations” Chapter 11, below), privacy (Bennett, “Privacy Self-Regulation,” Chapter 8, below), apparel (Rhone, Stroud and Webb, “Gap’s Code of Conduct,” Chapter 7, below), and e-commerce (Webb and Clarke, “Other Jurisdictions,” Chapter 13, below). See also discussion of the cable television rule-development process and that associated with advertising standards, in Clarke and Webb (footnote 3).

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perhaps goes without saying that the more transparent, accessible, fair and easy-to-understand the rule-development process is, the more expensive it tends to be. Thus, although voluntary code rule making may be considerably less costly than regulatory rule making, it can still be an expensive proposition. And since costs are borne principally by the rule makers (e.g. a firm or group of firms, an NGO), and not all taxpayers, there is less of a “cost-spreading” capability than there is with regulatory decision making. As long as markets are adequately competitive, most costs borne by voluntary code rule makers are likely to be passed on to the ultimate consumers of products and services, in the form of higher prices. Thus, the discipline of the market is likely to push firms to attempt to minimize rule-making costs and cut corners. In the long run, however, it may be a worthwhile investment for code developers to be as open, accessible and thorough as possible in voluntary code rule making, since this will usually serve to decrease the likelihood of criticisms and problems arising later on.

In this regard, for the task of rule making, drawing on the services of established standards development organizations, such as the Canadian Standards Association, the British Standards Institution, the American National Standards Institute and Standards Australia, may represent an attractive option in some situations.<sup>43</sup> The credibility and experience of these organizations in developing standards, their use of matrix models to ensure balanced representation, and their employment of public consultation strategies can help answer the need for transparent, fair, accessible and understandable rule making.<sup>44</sup> In a sense, standards development organizations could be described as professional “rent-a-rule-makers.”

With respect to sanctioning options, the State is the exclusive organ in Canadian society to have the authority to deprive individuals of their life, liberty or security (e.g. through capital punishment, imprisonment, probation), and can only do so in a manner compatible with principles of fundamental justice.<sup>45</sup> However, a wide variety of sanctions short of capital punishment and imprisonment are available to non-State bodies, including fines, withdrawal of association privileges, membership and use of logos, and adverse publicity. These sanctions are discussed in greater detail later in the chapter in the examination of dispute resolution.

A key distinction between public law regulatory regimes and non-governmental voluntary code rule making is the ability of public law-making organs to develop a specialized form of rule (laws) that apply to *all* actors in a sector, *whether or not those actors agree to the rules*. When developing consumer, environmental, or health and safety regulatory regimes, the elected members of democratic organs of the State

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43. See descriptions of bicycle and hockey helmet standards developed through the standards process in “Helmet Standards and Regulations,” Chapter 11, below; privacy standards in Bennett, “Privacy Self-Regulation,” Chapter 8, below; and sustainable forestry management standards in Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below.

44. *Ibid.* However, it should be noted that the rule-making processes of standards organizations have not been without criticism, as is discussed in Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below, and in T. Burrell (footnote 41).

45. Section 7 of the *Canadian Charter of Rights and Freedoms* stipulates that everyone has the right to “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” As discussed later in the chapter, the ability of the State to implement penalty regimes may be constrained by principles of natural justice in ways that do not so constrain non-State regimes.

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(e.g. members of Parliament, members of Congress, members of legislative assemblies) are typically *not* the very parties who will be the subject of the regulatory regimes, and nor is the consent of those regulated industries necessary before such laws are passed.<sup>46</sup> The reverse is true with voluntary code regimes developed by industry, for industry. As Bryne Purchase notes in his chapter in this volume, ultimately, a voluntary code regime is a consensual arrangement. It is therefore not possible for a group of firms *by itself* to compel a firm that has not agreed to participate in a voluntary code arrangement to comply with the code. As a result, there is a potential problem in voluntary code regimes with free riders (firms that do not participate in the code, but nevertheless benefit from the perception of others that they are part of it, without paying the cost). As discussed earlier in the chapter, it is possible that the standards contained in a voluntary code regime could be incorporated into legislation or regulations (and thus apply to all firms in a sector), or be applied by a court to a non-participating firm through an action in tort or through a regulatory offence prosecution (examined in greater detail in the second part of this chapter), but the voluntary code makers cannot *on their own* compel non-members to comply with a voluntary code.

Governments can only establish laws to the extent of their authority to legislate on any particular subject matter. They cannot create a set of rules when they do not have the constitutional authority to do so. In Canada, for example, a province cannot normally create a regulatory regime applying specifically to banks, because banks are a federal responsibility.<sup>47</sup> Moreover, it is difficult for governments in one jurisdiction to create legislation designed to apply to companies in another jurisdiction. For example, it is not possible, in a direct manner, for a Canadian government to require a company in El Salvador to meet Canadian labour or environmental standards.

In contrast, through a non-governmental voluntary code, there is no constraint for a private actor such as a Canadian company stipulating that its El Salvadorian suppliers meet Canadian standards, as a term of contract.<sup>48</sup> Of course, if an El Salvadorian supplier does not wish to meet the conditions stipulated by its potential Canadian business partner, it can simply choose to not enter into a contract with that company. The contract is voluntarily entered into. A foreign or domestic government legislatively imposing a particular standard faces constitutional and legislative constraints that typically do not affect private consenting commercial parties. Similarly, a group of firms operating in several countries can establish a voluntary code that applies in multiple jurisdictions (as long as competition and other domestic legislation is not being violated). For example, versions of the Responsible Care program operate not only in Canada, but also in more than 40 other countries.<sup>49</sup> Similarly, voluntary code regimes such as the

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46. This is not to suggest that governments do not expend considerable resources consulting with regulated industries and others in an effort to ensure that the rules are practical and effective, in an effort to increase the cooperation and compliance of those industries to the new legislation and regulations. And, of course, industry associations spend enormous sums of money on lobbying efforts aimed at legislators, regulators and the attentive public.

47. For example, Quebec's *An Act respecting the protection of personal information in the private sector*, L.Q. P-39.1, does not apply to banks.

48. For example, the clothing company Gap Inc. requires its suppliers to meet particular standards for working conditions. See Rhone, Stroud and Webb, "Gap's Code of Conduct," Chapter 7, below.

49. Moffet, Bregha and Middelkoop, "Responsible Care," Chapter 6, below.

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Forest Stewardship Council can also operate in multiple jurisdictions, as can formal standards initiatives such as ISO 9000 (quality management) and ISO 14000 (environmental management).

From a predictability standpoint, because of the formal, lengthy nature of legislative and regulatory rule making, with its many checks and balances, there are considerable opportunities for legislative and regulatory projects to be derailed. Frequently, we hear of legislative projects that have not been passed before the closing of legislative sittings, and often the “death” of these bills reflects successful lobbying by particular interest groups.

In contrast, once there is agreement to establish a voluntary code arrangement — be it through an industry association, standards body, NGO, or otherwise — there would appear to be fewer obstacles preventing those rules from being promulgated.

A final but crucial point concerning rule making pertains to the content of the rules themselves. All other things being equal, one can generally expect greater rigour in the substantive obligations imposed by legislation and regulations on industry than in the substantive obligations imposed on firms by firms, by multistakeholder groups and, to some extent, even by NGOs. Decisions about the content of particular rules made by legislators or civil servants on the one hand and by representatives of private firms or NGOs on the other tend to reflect their respective constituents. As mentioned earlier, although members of Parliament, members of legislative assemblies and civil servants may all have particular viewpoints, and may be influenced by the views of others through lobbying, in the final analysis the one essential fact is that they are not employees or representatives of particular firms, and are not directly beholden to those firms.<sup>50</sup> Moreover, they are accountable, directly in the case of elected members, and indirectly in the case of civil servants, to the broad electorate they serve, and not simply to a narrow set of interests.

In contrast, individuals in the private sector with responsibility for drafting voluntary codes are paid by firms, and these firms are accountable ultimately to their shareholders and to their customers. When voluntary codes to control industry conduct are developed by public interest-oriented NGOs,<sup>51</sup> one can perhaps expect greater rigour in the obligations than one would expect from voluntary codes developed by industry. However, because ultimately the codes developed by consumer, environmental or worker NGOs are to be applied by industry, the obligations contained in such voluntary codes cannot be so rigorous as to repel industry “clients.” Voluntary code approaches that employ multistakeholder rule-development processes (e.g. standards developed through formal standards development processes) are perhaps the most likely to develop rigorous yet practical substantive obligations, yet even with these it is possible for individual firms or stakeholders to “leave the table” (and, to some extent, to thereby stymie the process) when they do not like the obligations being developed. No such avenue is open to parties

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50. Of course, in practice, monied interests are often in a position to influence in any forum, but even this is indirect influence.

51. The Web Trader e-commerce regime developed by the U.K. Consumers’ Association is a good example of such a scheme. It is discussed in Webb and Clarke, “Other Jurisdictions,” Chapter 13, below. The Forest Stewardship Council was spearheaded by environmental non-government organizations, and is discussed in Rhone, Clarke and Webb, “Sustainable Forestry Practices,” Chapter 9, below.

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subject to legislation or regulations (i.e. the rules will be developed and imposed regardless of whether these parties “leave the table”).

There is another way in which legislative and voluntary code approaches to rule-making content may be different. Typically, laws must be written in precise, detailed language. If they are not, it is possible that the laws would be held void for vagueness, and therefore unconstitutional.<sup>52</sup> On the other hand, voluntary codes can be written in considerably more general language. This can be advantageous when the activity to be addressed is highly variable and defies easy definition. For example, Advertising Standards Canada has established rules concerning advertising that is in “bad taste.”<sup>53</sup> It would probably be very difficult, and perhaps not desirable, for governments to attempt to discourage “bad taste” through laws, but businesses, concerned with upholding a certain image, may be in a better position to address such behaviour of their peers.

In the United Kingdom, a voluntary regime for controlling the acquisition of publicly listed companies has existed for many years.<sup>54</sup> The regime sets out general principles rather than detailed provisions. In reviewing the regime, judges have remarked on the apparent effectiveness of this approach.<sup>55</sup> Of course, lack of precision can also become an excuse for non-compliance, when variable interpretations are possible, and no one can agree on the correct interpretation. Therefore, the possibility of establishing less precise obligations for voluntary codes than for laws is not necessarily advantageous.

It is also worth pointing out that, in the short run, the existence of a voluntary code arrangement may decrease the likelihood of legislation or regulations being introduced. In some cases, industry may develop a voluntary code in the hope of delaying or preventing the passage of perceived burdensome legislation.<sup>56</sup> While there is undoubtedly a need for governments and others to be wary of this type of strategy, it is also possible that the rules developed through voluntary code arrangements can become the basis for legislative action, with support from industry,<sup>57</sup> or that government will specifically give industry the opportunity to regulate itself in lieu of government-imposed regulations.<sup>58</sup>

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52. A law must not be so vague that a court cannot give “sensible meaning” to its terms. See *Re: ss. 193 and 195.1 of Criminal Code (Prostitution Reference)* [1990] 1 S.C.R. 1123 at 1160.

53. Clarke and Webb (footnote 3).

54. *R. v. Panel on Take-overs and Mergers* [1987] 1 All E.R. 564.

55. *Ibid.*, p. 567.

56. This was one of the motivations for development of the Responsible Care program, discussed in Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, below.

57. In Canada, the Canadian Standards Association’s *Model Code for the Protection of Personal Information* became the basis for federal privacy legislation, in the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c-5, as discussed earlier.

58. For example, the Canadian Radio-television and Telecommunications Commission (a federal agency), specifically provided the Canadian cable industry the opportunity to self-regulate certain aspects of its activities, subject to review by the Commission. See discussion in Clarke and Webb (footnote 3).



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### **Rule Administration**

The comparative chart on page 115 summarizes the main characteristics of command-and-control regulatory regime and voluntary code regime administration. Many of the same factors in play in rule creation are in play for rule administration.

Although there is a school of thought that holds that enforcement of rules is not always necessary to achieve compliance,<sup>59</sup> it can generally be said that without effective rule implementation, there is strong potential for voluntary codes to become little more than “window dressing,” and as such mislead the public and government and put competitors at a disadvantage. A voluntary code that is not fully implemented is susceptible to legal actions (as discussed in the second part of this chapter), public exposure and embarrassment. This scenario materialized with respect to Gap Inc.’s initial code of conduct for apparel workers. As discussed in Chapter 7, in the face of public criticism, Gap Inc. eventually agreed to a more rigorous code with implementation monitored by civil society non-governmental organizations.<sup>60</sup>

It is worth pointing out that regulatory regimes, like their voluntary counterparts, can also be less than fully enforced. This strategy can backfire on regulators just as limited implementation of voluntary code initiatives can backfire on firms.<sup>61</sup> Formal accountability mechanisms, such as annual reports, Auditor General reports, inquiries, questions in legislative assemblies to the elected officials responsible for program administration, and legal actions, can all go some way toward revealing regulatory enforcement inadequacies. By the same token, voluntary code administrators can issue annual reports, and include community, academic and NGO representatives in compliance verification activities.<sup>62</sup> Non-affiliated academics<sup>63</sup> and non-governmental organizations<sup>64</sup> can also conduct investigations and release public reports on voluntary code compliance. Commentators have suggested that information sharing, transparency and general public access to information are the most important mechanisms available to

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59. J. Braithwaite and P. Drahos (footnote 21), p. 554, following Chayes and Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995) and O. Young, *Compliance and Public Authority: A Theory with International Implications* (Baltimore: Johns Hopkins University Press, 1979). The theory is that enforcement in some cases is a secondary consideration because it is dialogue that redefines interests, delivers the discipline of complex interdependency, and persuades parties to normative commitment.

60. See Rhone, Stroud and Webb, “Gap’s Code of Conduct,” Chapter 7, below.

61. For example, the 1992 Westray mining disaster (Nova Scotia, Canada) could be described as an example of regulatory non-enforcement, with tragic results. See Justice K. Peter Richard, Commissioner, *The Westray Story: A Predictable Path to Disaster* (Report of the Westray Mine Public Inquiry, 1997).

62. See discussion of the public reporting and compliance verification activities used in Responsible Care administration in Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, below.

63. See, e.g., D. Rourke, *Monitoring The Monitors: A Critique of Pricewaterhousecoopers (PWC) Labor Monitoring* (Boston: Massachusetts Institute of Technology, 2000), available at <<http://web.mit.edu/dorourke/www/PDF/pwc.pdf>>.

64. See, e.g., Connor, *Still Waiting for Nike to Do It* (footnote 18), p. 1.

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address criticisms concerning the legitimacy, independence and objectivity of voluntary code enforcement, that pressures are growing for code administrators to use these mechanisms, and that it is likely they will respond to them over time.<sup>65</sup>

In the final analysis, a key factor when considering rule implementation is an intangible factor that could be called a “compliance ethos.” In Canada, as in most Western developed countries, laws are generally held in high regard. For the most part, few wish to be seen to be in non-compliance with laws. There may be no similar ethic or aura surrounding voluntary codes. As a result, there may be less perceived societal pressure for firms to comply with voluntary codes. This is not to suggest that there are not other incentives at work that will tend to encourage compliance with voluntary codes. There undoubtedly are. One is peer pressure. When the rules are developed by firms, there may be considerable pressure from other firms to preserve the good image of the code and the industry.<sup>66</sup> There is potential for an internalization of responsibility to take place when voluntary codes are employed “by industry for industry” that may be missing when rules are externally imposed on industry by government. There may also be market pressure to comply — bad publicity may harm sales — and representations that one is meeting high standards may be rewarded (particularly when third parties attest to compliance with the standards).<sup>67</sup>

A 1985 study by Dale T. Miller of Simon Fraser University’s Psychology and Law Institute, entitled *Psychological Factors Influencing Compliance*,<sup>68</sup> suggests that, when those who are the subject of regulations:

- initially propose the standards;
- acknowledge the social value of the goal the regulations promotes and the means of achieving that goal;
- make a public commitment to the standards and the goals of the standards;
- feel that the regulations are clear and feasible and take into account the circumstances of the regulated;
- introduce their own sanctions;
- feel responsible for their own compliance records; and
- are subject to positive economic incentives and sanctions in instances of non-compliance,

they are more likely to feel that the regulations are fair and therefore accept a constraint on their freedoms and resources, and are more likely to conform to the standards. All of these factors would appear to apply with equal force to voluntary code regimes. Thus, as Bryne Purchase suggests in his discussion of consent in his chapter in this volume, while it is not the same as the compliance ethos associated with laws, there may nevertheless be

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65. E. Meidinger (footnote 19), p. 10164. Although Meidinger was speaking specifically about environmental certification schemes, his remarks would appear to apply with equal force to voluntary code administration in other policy contexts.

66. See Moffet, Bregha and Middelkoop, “Responsible Care,” Chapter 6, below.

67. See Rhone, Stroud and Webb, “Gap’s Code of Conduct,” Chapter 7, below.

68. D. T. Miller, *Psychological Factors Influencing Compliance: Final Report*, Study for the Federal Statutes Compliance Project, Department of Justice Canada (Vancouver: Vancouver Psychology and Law Institute, Simon Fraser University, 1985).

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a powerful compliance ethos in play for firms complying to voluntary codes, since voluntary codes are inherently consensual instruments, involving the close cooperation of the “regulated” in the development of (and public commitment to) the rules and incentives and sanctions.

<b>Rule Administration: Comparison of Regulatory and Voluntary Codes Regimes</b>		
<b>Characteristics</b>	<b>Public Laws</b>	<b>Voluntary Codes</b>
<i>Institutions of rule administration</i>	Primarily pre-established institutions.	May use newly developed institutions or existing bodies.
<i>Visibility of rule implementation process</i>	High: public reporting requirements.	Lower: can have procedures to ensure visibility such as public reporting requirements.
<i>Cost</i>	High: due to need to adhere to due process considerations and transparency obligations, but cost spread across society.	Lower: may be lesser concerns with transparency but cost borne by a small group.
<i>Accountability</i>	High: scrutiny by Auditor General, responsible ultimately to Minister/Parliament.	Lower: depends on reporting requirements; the market, public and media are important.
<i>Constraints on rule administration</i>	Considerable: constitutional and procedural.	Few: varies by institution.
<i>Credibility</i>	High.	Tends to be lower.
<i>Investigation and inspection capabilities</i>	Subject to constitutional constraints: may have extensive powers.	Subject to consent of parties: may have extensive powers.
<i>Sanctions for non-cooperation in administration of rules</i>	May include coercive measures.	May be more limited: consensual system.
<i>Formality</i>	Normally high.	Variable.
<i>Likelihood of rules being followed</i>	High: in a law abiding society few wish to be seen in violation.	Lower: pressure to comply is derived primarily from peers and market perceptions.

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**Adjudication**

The chart below summarizes the main points of distinction between regulation and voluntary code dispute resolution.

<b>Adjudication: Comparison of Regulatory and Voluntary Code Regimes</b>		
<b>Characteristics</b>	<b>Public Laws</b>	<b>Voluntary Codes</b>
<i>Institutions of rule adjudication</i>	Both pre-established (courts) and new (e.g. regulatory tribunals).	Primarily newly established bodies, indirectly supported by courts.
<i>Authoritativeness of determinations</i>	High.	Variable.
<i>Ability to enforce judgments</i>	High: can draw on State-approved coercion.	Variable: limited ability to use coercive force; can use market-based sanctions.
<i>Structure of adjudication</i>	Tends to be centralized.	Variable centralization.
<i>Application</i>	Wide: applies to all parties, can compel attendance, impose penalties on parties who do not attend.	Variable: dependent ultimately on consent; difficulty applying sanctions to those who do not wish to participate.
<i>Cost</i>	High: spread across society.	Variable: borne by a small group.
<i>Formality</i>	Tends to be high.	Variable: may be formal or informal.
<i>Credibility</i>	High.	Variable.
<i>Visibility</i>	High.	Variable.
<i>Constraints</i>	Considerable: constitutional and procedural.	Variable.

It is worth noting that governments, the courts, the private sector and individuals are increasingly turning to private adjudicative mechanisms, methods and institutions, in light of their advantages in terms of speed, cost and their perceived fairness and effectiveness.<sup>69</sup> These private dispute resolution approaches — mediation, ombuds-services, arbitration, tribunals and others — depend to some extent for their success on the existence of court systems as a backstop final resort. Thus, parties may engage the services of a private dispute resolution service because they wish to avoid the expense, slowness, uncertainty, adversarial nature and formality of the courts. Yet, in most cases, those same parties may have some comfort in knowing that formal litigation remains a

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69. S. Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (London: Routledge & Kegan Paul, 1983).

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viable option of last resort, should alternative techniques be considered inappropriate, unless the parties agree in advance that the decision is final.<sup>70</sup> Furthermore, decisions reached through alternative dispute resolution approaches may ultimately be imposed through the formal legal processes.

In voluntary code regimes, a wide range of approaches have been used to encourage compliance. Canadian Automobile Association (CAA) members can make use of CAA arbitration services for consumer disputes concerning Approved Automobile Repair Service garage owners.<sup>71</sup> The Canadian Bankers Association has established a consumer ombudsman service to complement those in place for individual banks.<sup>72</sup> For consumer disputes about cable television, the Canadian Cable Television Association has established a formal tribunal as a dispute resolution mechanism, which includes representatives from the cable industry and from a public interest or consumer group.<sup>73</sup> Decisions from this tribunal (including dissenting opinions) are made public.

Formal and transparent approaches, including the use of non-business-affiliated third parties (e.g. consumer or environmental group representatives, retired judges, experienced arbitrators), would appear to have the most credibility in the eyes of the public, and with non-governmental organizations and governments.<sup>74</sup> However, they may also be the most expensive, and are not necessarily the most effective.

Private adjudicative bodies may be able to employ decision-making processes that reverse burdens of proof so that firms accused of wrongdoing must demonstrate that their practices were in compliance with the terms of the voluntary code. While such processes are more likely to protect the consumer interest, it would be difficult for public courts or tribunals to operate in this manner.<sup>75</sup> For example, the private, independent, U.K. Advertising Standards Authority (ASA) notes that “in many instances the Codes go further than the law requires. Under the Authority’s system of control, the normal judicial burden of proof is reversed: advertisers must prove to the ASA that their claims are true. Another distinction is that the Codes are applied in the ‘spirit’ as well as in the letter.”<sup>76</sup> The ASA’s adjudicative methods have been the subject of legal challenge, with U.K. courts declaring that the procedures were “perfectly proper and satisfactory.”<sup>77</sup> The

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70. In consumer-business contexts, in the authors’ opinion, efforts to contractually foreclose the option of resort to courts when some other mechanism of resolution is provided should generally be discouraged because of the imbalance of power between the parties.

71. Approved Automobile Repair Service garages must, as a term of participation in the CAA’s program, agree to meet CAA service standards and submit to random inspections. As described in Clarke and Webb (footnote 3).

72. *Ibid.*

73. *Ibid.*

74. The Government of Quebec and a Quebec automobile protection association (an NGO) only agreed to approve operation of a Quebec version of the non-statutory Canadian Motor Vehicle Arbitration Plan after there was improved transparency and public disclosure concerning the results of arbitrations. See Clarke and Webb (footnote 3).

75. This point is discussed in greater detail in the second part of this chapter.

76. Advertising Standards Authority, *Misleading Advertisements: The Law*, available at <[www.asa.org.uk/issues/background\\_briefings](http://www.asa.org.uk/issues/background_briefings)>.

77. Lord Justice Glidewell, in *R. v. Advertising Standards Authority, ex parte The Insurance Service plc*, Queen’s Bench Division, 9 Tr L 169, July 6, 1989.

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ASA's processes have also been the subject of government review (most recently in 1999). According to the 1999 review, "the Government strongly supports the self-regulatory controls on advertising in the UK run by the Advertising Standards Authority."<sup>78</sup> The point here is that private adjudicative bodies may be able to operate in a more flexible manner than do public adjudicative bodies, to the advantage of public interests such as those of consumers.

Although it is not possible in the context of a voluntary code regime for a private body to impose penal sanctions such as imprisonment on recalcitrant members, a full panoply of other potentially effective techniques are available and are used, including fines,<sup>79</sup> publicity,<sup>80</sup> withdrawal of privileges such as access to certain databases or services<sup>81</sup> or use of logos,<sup>82</sup> orders of restitution and rectification<sup>83</sup> and banishment from an association.<sup>84</sup>

### **Significance of the Differences in Rule Creation, Administration and Adjudication**

What emerges from the foregoing comparison of command-and-control regulatory regimes and voluntary codes as rule systems is that each approach has strengths, weaknesses and distinctive features. Clearly, the public organs of rule making, implementation and adjudication are powerful, credible, open, democratic and generally effective, although they tend to be formal, expensive and slow. Voluntary code rule systems tend to have less visibility and credibility, less ability to deal with those who do not wish to join the program and reduced options for stimulating compliance, but they

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78. U.K. Department of Trade and Industry, *Modern Markets, Confident Consumers* (July 1999), available at <[www.dti.gov.uk/consumer/whitepaper](http://www.dti.gov.uk/consumer/whitepaper)>. In the late 1980s, regulations were introduced that provided the ASA with an additional sanction whereby the Director General of Fair Trading could be asked by the ASA to initiate legal action (an injunction) against advertisers for serious or persistent breaches of the Codes. The *Control of Misleading Advertisements Regulations 1988* recognized the ASA as an "established means" for controlling the content of non-broadcast advertising. Since 1988, there have been 10 referrals to the Office of Fair Trading. See ASA (footnote 76). Note that the ASA remains an independent, privately funded body.

79. For example, some real estate boards discipline their members by imposing fines.

80. The Canadian Marketing Association (CMA) publishes the names of companies found to be in non-compliance with its voluntary standards. See the CMA's Web site, <[www.the-cma.org](http://www.the-cma.org)>. See also Clarke and Webb (footnote 3).

81. For example, some real estate boards refuse access to Multiple Listing Services when a member is non-compliant.

82. This is the case with the Better Business Bureau in Canada. See Clarke and Webb (footnote 3).

83. This is so in the cable television industry in Canada. See Clarke and Webb (footnote 3).

84. The Canadian Chemical Producers' Association requires adherence to the Responsible Care program as a condition of membership. See Moffet, Bregha and Middelkoop, "Responsible Care," Chapter 6, below.

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can be more flexible, less expensive and faster, avoid certain jurisdictional limitations attached to public organs, allow non-State parties the freedom to create their own rule structures, and be effective in harnessing the energies of non-State actors.

As discussed in the introduction to this volume, Harvard Business School Professor Clayton Christensen has articulated the idea of “breakthrough innovations” to describe new approaches or processes for developing products that typically enable a larger population of less skilled people to do things previously performed by specialists in less convenient, centralized settings.<sup>85</sup> As with the introduction of personal computers into a world of mainframe devices, voluntary codes open up the possibility of societal rule development and implementation to a much wider group of players than do conventional public law organs such as legislatures and the courts. Non-governmental organizations, firms and multistakeholder groups can establish and operate their own rule systems and engage in “norm conversations” without need for a government intermediary. These voluntary code rule systems are not a replacement for those of the State, and indeed they operate within a broader State legal framework. Seen in this light, voluntary rule systems are an addition to conventional legal processes, with concomitant increased, enriched possibilities for effective norm development and implementation.

## **Legal Implications of Voluntary Codes**

### **Contract Law and Voluntary Codes**

As observed above, a key point of distinction between command-and-control regulatory regimes and voluntary codes is that regulations are imposed on a particular set of actors, whether or not those actors desire it or agree to the terms, while voluntary codes are in essence consensual regimes, so that at first instance, only those parties who agree to participate are subject to them. In legal terms, a formalized consensual arrangement typically takes the form of a contract. A contract is formed when one party makes an offer that is accepted by another party and consideration is exchanged.<sup>86</sup> The existence of a contract has legal implications for the parties involved — implications that translate into rights and obligations ultimately enforceable in court. Many voluntary code arrangements are structured through contracts,<sup>87</sup> particularly market-driven initiatives that employ certification schemes and logos (e.g. those pertaining to apparel production, worker-friendly and environmentally friendly food, organic food, pesticide-free food,

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85. See, generally, C. Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail* (Boston: Harvard Business School Press, 1997) and, more particularly, C. Christensen and T. Petzinger, “Innovation in the Connected Economy: A Conversation with Clayton Christensen,” *Perspectives on Business Innovation*, Issue 5: The Connected Economy (September 2000).

86. Consideration has been defined by the courts as “some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other”: *Currie v. Misa* (1875) L.R. 10 Exch. 153. Typically, consideration takes the form of a payment for goods received or services rendered.

87. Licensing agreements, which authorize the use of logos on products and representations in advertising and company literature, are an example of a contractual arrangement that is common in market-oriented voluntary code regimes. As discussed below, there may also be contracts between code administrators and compliance verification bodies, between firms and their suppliers, and between industry associations and members.

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sustainable forestry and fishery practices, humane treatment of animals, consumer friendly e-commerce merchants, ethical businesses, privacy, and quality and environmental management). There are also issues of intellectual property associated with many voluntary code regimes (e.g. copyright of standards and trademarks of logos and names of programs), but since these are generally straightforward and non-controversial, we will not discuss them further in this chapter.

For purposes of voluntary code analysis, key issues in contract law revolve around when a contract is made, what its terms are, and who the parties to it are.<sup>88</sup> Parties to a contract who fail to comply with contract terms may be liable for restitution, damages or specific performance requirements. As with all legal instruments and actions, there must be sufficient precision in the terms of the commitment (e.g. the provisions of the voluntary code) before there are grounds for action. The use of contracts in voluntary code regimes can take many forms, and involve a number of different parties. These issues are discussed below.

### **Contracts, Code Administrators and Participating Firms**

Perhaps the most obvious contractual relationship created by voluntary code regimes is between code administrators and those participating in the code program. Typically, when member firms join a voluntary codes body, they must pay a membership fee and agree to abide by whatever rules and standards are imposed by the codes body. In exchange, the member firms can advertise their affiliation with the body, and have access to services provided by it. The failure of a member firm to abide by agreed-upon standards set by the codes body may be actionable in contract by the body, just as a failure on the part of the body to provide agreed-upon services could result in an action against the body. “Disciplinary actions” by industry associations,<sup>89</sup> non-governmental organizations,<sup>90</sup> multistakeholder organizations<sup>91</sup> and standards organizations are common.

A 1991 Nova Scotia Court of Appeal decision<sup>92</sup> dealt with a member of the Investment Dealers Association who had breached its standards and was subsequently disciplined by the Association’s Business Conduct Committee. Although the plaintiff member acknowledged that he was familiar with the standards set by the organization and the penalties for breaching them, he argued that the Association should not be

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88. For more information on contract law see, generally, G. Fridman, *The Law of Contract in Canada* (Scarborough, Ont.: Thomson, 1994).

89. See discussion of the Investment Dealers Association and Better Business Bureau (Quebec) cases below.

90. For example, the U.K. Consumers’ Association’s Web Trader consumer e-commerce regime has withdrawn membership of merchants who were not complying with the terms of the program. See discussion of dismissal of Jungle.com from Web Trader in E. Taylor, “E-tailers Seek Seal of Approval To Reassure Cautious Customers,” *Wall Street Journal Europe*, March 1, 2001. Following extensive improvements, Jungle.com was reinstated.

91. For example, the multistakeholder group Forest Stewardship Council has suspended activities of the Europe-based Skal Certification body; see Forest Stewardship Council, *Forest Stewardship Council Suspends Activities of Europe-Based Certification Body*, press release, March 30, 2001.

92. *Ripley v. Investment Dealers Association (Business Conduct Committee)* [1991] 108 N.S.R. (2d) 38 (N.S.C.A.).



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permitted to discipline him since this would violate his Charter rights under sections 7 and 11. The Nova Scotia Court of Appeal ruled against the member, noting that:

It may be inferred that members of the securities industry contract to regulate themselves because it is to their advantage to do so. An obvious benefit is the avoidance of the need for government regulation in a field where the need for protection of the public might otherwise attract it. A party to such a contract cannot have it both ways; if he enjoys benefits from a contract which excludes government intervention from his profession, he cannot claim *Charter* protection when he is accused of breaching the conditions of his contract.<sup>93</sup>

The effect of the decision is to uphold the right of industry associations to enforce agreed-upon standards on members. While the right of industry associations to discipline their members, and to not be constrained by the Charter in doing so was confirmed in the Investment Dealers Association case,<sup>94</sup> this is not to suggest that such disciplinary actions, even though part of private, contractual regimes, are not subject to basic notions of fairness. The 1998 Quebec case pertaining to disciplining actions of the Quebec chapter of the Better Business Bureau<sup>95</sup> is judicial authority for the proposition that, even with private rule initiatives, code administrators must meet basic notions of procedural fairness, such as providing a member being disciplined with notice that a complaint has been laid against that member, and giving the member an opportunity to respond to the complaint before being removed from the organization.

In the sense that code administrators can impose penalties and discipline members, yet must do so in a fair manner, the contractual enforcement actions of code administrators resemble in many ways the enforcement actions of regulatory agencies against regulated parties. The key difference is that, in private rule contexts, a code administrator can bring a contractual enforcement action only against a party who has previously agreed to participate in the voluntary code arrangement. Those firms or individuals who choose not to join the program are beyond the reach of code administrators through contract litigation, even though the reputation of all the firms in a particular sector may be sullied by the activities of the non-participating firm.<sup>96</sup>

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93. Ibid.

94. Note that unlike private voluntary code administrators, governments are subject to the Charter, as discussed later in the chapter.

95. *A.A.A. Khan Transport Inc. v. Bureau d'éthique commerciale de Montréal Inc.* [1998] Q.J. No. 226, Quebec Superior Court (General Division) (Q.L.). In a curious side note, an Ontario court has recently ruled that it would *not* interfere with a dispute between a company that produces and sells kosher meats and three rabbis who were senior members of a council that supervised the production and distribution of kosher food, on the grounds that the matter was more properly to be addressed through a rabbinical court. As result, the legal action for, among other things, breach of contract, was stayed: *Levitts Kosher Foods Inc. v. Levin* [1999] 45 OR (3d) 147 (Ont. Superior Ct.). In the United States, state attempts to create statutory provisions that explicitly protect consumers against false labelling of food as kosher have been ruled unconstitutional, as a violation of the First Amendment because they were interpreted as endorsing and advancing religion: see discussion later in this chapter.

96. It is worth noting that although compliance with voluntary arrangements cannot be compelled on firms not party to the agreement through an action in contract, other legal pressures, particularly tort or regulatory law, can lead a non-member to comply. These aspects are discussed later in this chapter.

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### **Contracts, Codes, Firms and Suppliers**

Firms can require that suppliers meet certain criteria as a term of contract. While regulatory regimes are, in most circumstances, limited in application to the jurisdiction in which the laws are made, there are few such constraints in private law contracts between, for example, retailers in one jurisdiction and suppliers in other jurisdictions that agree to abide by the terms of a voluntary code program. Through such arrangements, voluntary codes can have multijurisdictional application, so that, for example, Nike Inc. can require by contract that its suppliers located around the world meet certain U.S. Occupational Safety and Health Administration standards for indoor air quality.<sup>97</sup> In the event of non-compliance with code obligations, these supplier-factories risk termination or suspension of contracts.<sup>98</sup> An interesting variation on this theme is the agreement of Gap Inc. to hire local union, religious and academic leaders as independent monitors of their code of compliance for some of their supplier factories. The monitors meet regularly with workers to hear complaints, investigate problems and look over the books.<sup>99</sup> This monitoring arrangement represents another layer of contractual relationship developed as part of voluntary code implementation.

### **Contracts, Codes, Consumers and Retail Firms**

Although there are practical obstacles that discourage such actions,<sup>100</sup> it is possible for consumers to bring actions in contract law over issues pertaining to voluntary codes. From the standpoint of consumers, a firm or group of firms that boasts that it is complying with a voluntary code is making a commitment to consumers that it will meet certain obligations. It has long been established in contract law that an offer made to any member of the public, if accepted, must be honoured.<sup>101</sup> If the terms of the offer are not met, actions can be brought in contract,<sup>102</sup> or can be based on legislative protections prohibiting unfair business, deceptive labelling and advertising practices.<sup>103</sup> If a retailer falsely claimed that a product or service had certain attributes, and the retailer knew that the representation was false, and intended to deceive — for example, that it

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97. See, e.g., Connor (footnote 18).

98. In one well-documented case concerning supplier-factory Mandarin International (now called Charter) in El Salvador, following NGO-assisted public exposure of worker abuse, two of four retailers terminated contractual relations with Mandarin (including J. C. Penney), one suspended its contract (Eddie Bauer, a unit of Spiegel Inc.) and a fourth (Gap) stayed after deciding that all groups — workers, labour activists and factory owners — were willing to make changes. See Rhone, Stroud and Webb, “Gap’s Code of Conduct,” Chapter 7, below, and L. Kaufman and D. Gonzalez, “Labor Standards Clash with Global Reality,” *New York Times*, April 24, 2001.

99. Gap itself made changes as well — reformulating and improving its suppliers’ code of conduct, as discussed in Rhone, Stroud and Webb, “Gap’s Code of Conduct,” Chapter 7, below.

100. See “Drawbacks of Contractual Actions,” below.

101. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 (C.A.).

102. Fridman (footnote 88), p. 694.

103. See explorations of the relation between misleading advertising regulatory prohibitions and voluntary codes later in the chapter.

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was a Canadian Automobile Association-approved garage, a Better Business Bureau-approved merchant, or that it was selling a Forest Stewardship Council-approved sustainable forestry product, a Fair Labor Association-approved garment, or a Canadian Standards Association-certified product or service, when it was not — a consumer (or the body that grants approvals of these sorts of merchants or products) could potentially bring a contractual action for fraudulent misrepresentation.<sup>104</sup>

### **Contracts, Codes, Consumers and Manufacturers**

In most cases consumers do not purchase goods directly from the manufacturer, but rather from a retailer. In this scenario a contract exists between the consumer and the retail vendor, but no contract exists between the consumer and the manufacturer. However, this does not necessarily prevent the consumer from suing the manufacturer for breach of contract. Using a doctrine known as “collateral contracts,” the court can find that an implied contract exists between the manufacturer and the consumer in which the manufacturers make claims concerning their products or services that cannot be fulfilled. For example, a manufacturer could claim that a product meets certain environmental standards when it does not. If a court finds that a manufacturer’s statements about a product constitute a binding promise or contractual undertaking, the court can rule that a “collateral contract” exists between the manufacturer and the consumer, and should the claim not be substantiated, provide a remedy for any breach.

A case that illustrates the application of this principle is *Murray v. Sperry Rand Corporation*.<sup>105</sup> The manufacturer of farm machinery published a brochure that contained statements about the quality of the machine. The brochure was highly promotional and was not merely a description of the machine. The court found that anyone reading the brochure would reasonably conclude that the manufacturer was promising that the described performance was the actual performance of the machine. Even though the product was purchased through a distributor, the manufacturer was found liable to the consumer in contract, since through its promises it had induced the consumer to purchase the machine.

### **Drawbacks of Contractual Actions Concerning Codes**

There are a number of factors that tend to mitigate against individual consumers bringing actions in contract against retailers or manufacturers for violations of the terms of voluntary codes. Most focus on the uneven power relationship between the two parties: firms tend to have the expertise to know when a contractual term is being violated, whereas individual consumers may not. Firms may also have the know-how to successfully fight a contract action in court, while individual consumers may be intimidated by court processes and not knowledgeable about court rules and procedures. Firms are more likely to have the resources to hire lawyers than are individual consumers and their representatives. And finally, the individual damage to any one consumer in

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104. Fridman (footnote 88), p. 295.

105. (1979) 23 O.R. 456 (H.C.).

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instances of code non-compliance may be so small that the consumer may simply decide not to bother with the action (and the court may also find the damages to be negligible). With respect to the latter point, this may be particularly troubling since, while the damage to any one consumer may be inconsequential, the cumulative or aggregate damage to all affected consumers and to the marketplace may be quite large.<sup>106</sup>

For all of these reasons, legislators in certain jurisdictions have developed class action legislation.<sup>107</sup> Here, one consumer or a small group of consumers can bring an action on behalf of all affected consumers. Even though an individually aggrieved consumer might not feel he or she has been harmed to such a degree as to warrant bringing an individual action, and also might not have the resources or stamina to bring a legal action, a group of consumers acting together is in a considerably stronger position to bring such actions. In the Canadian jurisdictions that have modern class action legislation (e.g. Ontario, British Columbia and Quebec), there are a number of procedures and mechanisms in place that go a long way toward levelling the playing field between the parties, and in turn increase the likelihood that mass contractual voluntary code breaches can be remedied.

### **Tort Law and Voluntary Codes**

Although the consensual nature of many voluntary code arrangements makes the contract law aspects of codes particularly self-evident, tort law and voluntary codes can also be closely linked. Torts are “civil wrongs” characterized by breach of legal duties when there are no necessary pre-existing contractual relations between the litigating parties. Determinations of what constitute “legal duties” can include drawing on the existence of voluntary codes as evidence of both the nature of the duty and to whom it is owed. We will look here at two types of torts, nuisance and negligence.

#### **The Tort of Nuisance and Codes**

Nuisance has been described as “an unreasonable interference with the reasonable use and enjoyment of land by its occupier or of the use and enjoyment of a public right to use and enjoy public rights of way.”<sup>108</sup> The basic premise underlying the tort of nuisance is that people should be free to use their own land in any manner they wish, so long as their actions do not interfere with the proper use of their neighbour’s land. In recent years, suits in nuisance have tended to be related to the environment, addressing nuisances such as noise, vibration and pollution. Voluntary standards can assist courts in determining what constitutes a nuisance. For example, in *340909 Ontario*

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106. It is for all these reasons that consumer regulatory agencies have been created. Using legislative prohibitions against unfair, deceptive and misleading business practices, such agencies can act on behalf of individual consumers, and (in theory at least) they have the expertise, time and resources to see such actions through to fruition. See explorations of the relation between deceptive practice prohibitions and voluntary codes later in the chapter.

107. For more information on class actions, see M. Cochrane, *Class Actions in Ontario: A Guide to the Class Proceedings Act 1992* (Toronto: Canada Law Book, 1992).

108. A. Linden, *Canadian Tort Law* (Toronto: Butterworths, 1988), p. 503.

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*Ltd. v. Huron Steel Products Ltd.*,<sup>109</sup> International Organization for Standardization (ISO) standards were used to determine whether vibrations caused by a plant constituted a nuisance. Expert witnesses testified that, at the time, there were three different ISO standards for vibration levels. The vibrations caused by the plant exceeded these levels by two, two-and-a-half, and seven times. The court found that the vibration levels were so severe that they interfered with the plaintiff's reasonable use and enjoyment of the land, and thus awarded judgment for the plaintiff.

### **The Tort of Negligence and Codes**

A key feature of tort actions in negligence is that, if the court accepts that the standard of care embodied in a voluntary code represents the "accepted industry standard," such codes may in effect impose liability on parties even if those parties never directly participated in the voluntary code arrangement in question. In this way, it is possible for voluntary code arrangements, through judicial endorsement in tort actions, to have application beyond the members who participated in the voluntary code regime to parties who did not agree to participate in the regime, but may nevertheless be benefiting from the good name and reputation associated with the regime (free riders). Affected individuals and communities who are in a non-contractual relationship may be able to make use of voluntary codes in negligence actions. For example, if citizens of a town downwind from a polluter suffer certain harm, it is possible that they can bring an action in negligence, and make use of the existence of a voluntary code concerning emissions as evidence of an accepted industry standard, even though those citizens may have never entered into any type of formal arrangement with the polluter.

To establish a cause of action in negligence, the aggrieved party must demonstrate three factors: the existence of a duty of care owed by the defendant to the plaintiff, a breach of the duty caused by the defendant failing to meet an acceptable standard of care, and actual harm ensuing from the breach.<sup>110</sup>

#### *Standard of Care in Negligence Actions*

In general, the standard of care used by courts in tort cases of negligence is "that degree of care which a reasonably prudent person should exercise" in the circumstances.<sup>111</sup> However, when negligence occurs in the course of a specific function, the standard of care changes. For example, when a doctor is accused of medical negligence, the standard becomes that of the reasonable *doctor* in like circumstances (and not just any "reasonable person"). When allegations of negligence are made against a corporation, the standard generally used is that of the particular industry. For example, if a chemical company were accused of negligence, its conduct would be judged against the industry practice. If the company's conduct deviated from the industry practice and this was demonstrated to the satisfaction of the judge, in practice there would be a strong presumption of negligence. Although the industry standard does not alone determine

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109. [1992] 9 O.R. (3d) 305 (Ont. C.A.).

110. Linden (footnote 108), p. 92.

111. J. R. Nolan and J. M. Nolan Haley, eds., *Black's Law Dictionary* (St. Paul, Minn.: West, 1990).

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negligence, proof of deviation from the industry standard may be a difficult burden for a defendant to overcome.<sup>112</sup>

Often, courts find the accepted industry practice indicative of what is reasonable in the circumstances. Furthermore, it has been suggested that it would be unfair to demand that the defendant in a negligence action be required to know of safeguards beyond those used in his or her profession.<sup>113</sup> For these reasons, negligence actions are often mainly concerned with the question of what constitutes the agreed-upon industry standard. Voluntary codes can be viewed by the courts as having the effect of establishing, documenting and/or raising the standard for a particular industry. In addition, those who are not adherents to a voluntary code may nevertheless be judged by the standard specified in the code, when it is the accepted industry norm. From a public standpoint, this could have a beneficial effect on firms that have refused to directly participate in voluntary code arrangements (i.e. free riders). American judge A. David Mazzone sees the deterrence of free riders through increased potential liability as one of the main benefits of voluntary standards. Speaking about the ISO 14001 environmental standards, Mazzone commented, “This [reduced chance of liability] is the carrot. If companies fail to adopt a compliance program and commit an environmental offence, we will essentially be giving them the stick.”<sup>114</sup>

However, the use by courts of voluntary codes as an indication of the standard of care for a particular sector can in a sense make such codes compulsory, since courts can measure the behaviour of a firm that decides not to adhere to a particular standard and find the firm’s conduct unacceptable. While this can have a beneficial effect when the result is increased safety or environmental protection, there is also the theoretical potential for judicial recognition of such standard to have inefficiency or anti-competitive effects. For example, a voluntary standard could be set at a level that is costly to meet and offers few tangible safety or environmental benefits. Nonetheless, organizations could feel obliged to comply with it since it may be used by the court as the basis for determining what constitutes industry practice.<sup>115</sup> In addition, standards that are set very high and are expensive to meet could force smaller companies out of the marketplace and thereby indirectly establish a barrier to entry into the marketplace. By the same token, a voluntary code standard could be set at an artificially low level, below the standard that the industry is capable of achieving. In either circumstances, if the voluntary code was inadequate as the basis for an industry standard, it would be open to an individual firm or organization that is the subject of the negligence action or a plaintiff that is bringing the legal suit to point out the inadequacies or inappropriate aspects of a standard to a court

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112. *Clark v. MacLennan* [1983] 1 All E.R. 416 (Q.B.).

113. Linden (footnote 108), p. 162.

114. “Reducing Legal Liability With an ISO 14001 EMS,” *Standards New Zealand Environmental Newsletter* (February 1996), p. 1. While Mazzone’s comments refer specifically to the use of an *offence* as a “stick,” the same argument can be made with respect to private negligence actions.

115. “In a controversial demolition binge last summer, hundreds of playground structures were levelled ... because they did not meet new specifications set by the Canadian Standards Association. Engineering student Alfredo Montenegro says the revised standards were not intended to be applied to existing equipment that could, perhaps, have been modified to make it safer. Erring on the side of caution, many school boards and regional governments decided to demolish the structures ...” (V. Galt, “Child’s Play a Challenge for Engineers,” *The Globe and Mail*, December 4, 2001).

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considering the issue. And anti-competitive aspects would be open to challenge under competition or antitrust laws (as discussed later in this chapter).

There are a number of examples of actions in negligence that turned on whether a voluntary standard was followed. For example, in *Visp Construction v. Scepter Manufacturing Co.*,<sup>116</sup> a pipe manufactured to meet Canadian Standards Association (CSA) standards burst. The plaintiff sued the defendant manufacturer arguing that the pipe was defective in its construction. The court ruled that the defendant had exercised due diligence in ensuring that the pipe was properly produced. Judge Anderson emphasized the merits of adhering to the CSA standard, stating, “I find and conclude that the CSA specification was a reasonable standard for the defendant to have adopted, and that [the defendant] took reasonable steps to ensure that its product met that standard.”<sup>117</sup>

Another case in which a manufacturer demonstrated due diligence through its adherence to a voluntary standard was *Meisel v. Tolko Industries Ltd.*<sup>118</sup> In this case a construction worker who fell through a roof constructed with wood supplied by the defendant sued the defendant for the injuries he sustained. The plaintiff attempted to use the voluntary standard for lumber companies to his advantage, arguing that the wood was improperly graded according to the National Lumber Grades Authority (NLGA) standard. The defendant disagreed and used expert testimony to demonstrate that the NLGA standards were followed in a manner common in the industry. Since the defendant followed both the industry practice and the NLGA standards in assessing the wood, the court concluded that it had exercised due diligence.

Just as evidence that one has followed voluntary standards can be used by a defendant to assist in establishing that he or she has exercised due diligence, failure to adhere to commonly accepted standards can be used by a plaintiff as evidence of negligence. For example, in *Reed v. McDermid St. Lawrence Ltd.*,<sup>119</sup> the plaintiff, an investor, sued her broker, arguing that he was negligent in failing to warn her of the volatility of her investment. At trial, the court found for the plaintiff, emphasizing that “the root of the basic ethic of the Investment Dealers Association [is] that a broker know his client. In this case, the form is evidence that the broker did not know his client. Among other things, the assessment to be made by the broker of the plaintiff’s ‘investment knowledge’ was left blank.”<sup>120</sup> Thus, the form, developed by the Investment Dealers Association, was taken to have codified industry standards, so that failure to fill out that form could be considered evidence of non-compliance with the standard of care.

While adherence or non-adherence to voluntary standards can provide vital evidence in negligence cases, it does not alone determine the result. Typically, the judicial approach to voluntary codes is that such codes are useful for determining industry practices and providing a comparison between a practice known to be safe and the practice used in a particular case. The approach of the Australian judiciary was

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116. (1991) 45 Const. L. Rep. 170 (Ont. Court Gen. Div.).

117. *Ibid.*, pp. 29–30.

118. [1991] B.C.J. No. 105 (SC).

119. (1991) 52 B.C.L.R. (2d) 265 (CA).

120. *Ibid.* This judgment was reversed on appeal, with the court ruling that the basic duty of the broker is to carry out the instructions of his or her client. Nonetheless, the decision is important because it demonstrates the potential value of voluntary codes to consumers.

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summed up by Justice Duggan in *Benton v. Tea Tree Plaza*: “Care must be taken not to attach too much importance to standards in cases such as the present. Failure to follow a standard does not, without more, establish negligence.”<sup>121</sup>

The presumption of the court that breaching a voluntary standard does not in itself prove negligence is not unique to Australia. In a recent British case, the court ruled that a breach of the Professional Code of Solicitors is not by that fact alone synonymous with negligence.<sup>122</sup> The action of the plaintiffs, based largely on the lawyer’s breach of the Code, was defeated. Common-law Canadian courts approach voluntary codes in much the same way as their common-law Australian and British counterparts. In *Murphy et al. v. Atlantic Speedy Propane Ltd.*,<sup>123</sup> the defendant installed a gas dryer and propane tanks at the plaintiff’s house. The dryer later started a fire that destroyed the house. The defendant argued that he had followed the industry norm described in the *Code for Propane Burning Appliances* and that the dryer met CSA standards. Despite the defendant’s compliance with the voluntary code followed by the industry, the judge found the industry practice unsafe, ruling in favour of the plaintiff and stating that the defendant “cannot hide behind the industry practice.”<sup>124</sup>

A recent regulatory case pertaining to the issue of appropriate standards of care from New Zealand adds a new wrinkle to the way in which courts will use voluntary codes as evidence of due diligence. In *Department of Labour v. Waste Management N.Z. Limited*,<sup>125</sup> the defendant company was defending a charge under the *Health and Safety in Employment Act* after an employee died while using a machine leased by the defendant. The case turned on whether the machine was unsafe. In its defence, the company argued that its machine met the American standard for such machines. However, the judge ruled that meeting the American standard was insufficient, since the American standard may have been inferior to the New Zealand standard as a result of the way it was developed, or the circumstances surrounding its development.<sup>126</sup> Although the specific reasoning adopted by the New Zealand court in this case has not been applied in Canada, it does raise several interesting issues. For instance, should Canadian courts give preference to Canadian standards over American or international standards? Should the courts consider the development process of the particular standard? Should the courts consider the context (political and social) in which the standard was developed? These issues are discussed later in this chapter.

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121. *Benton v. Tea Tree Plaza* (1995) No. SCGRG 94/417, Judgment No. 5144 (SC of South Aus.), p. 30. In this case, the plaintiff had fallen over a curb that was 50 millimetres higher than the Australian Standards Association (ASA) standard. The court used the standard as a yardstick to compare the curb in question with a curb height it presumed safe. Had the curb in this case exceeded the ASA standard by only a few millimetres, the court might have reached a different result. The verdict was not based on the fact that the curb exceeded the height mandated by the ASA, but that it exceeded that height by a large amount.

122. *Johnson v. Bingley and Others*, *The Times* (London), February 28, 1995 (QB).

123. (1979) 103 D.L.R. (3d) 545 (NSSC).

124. *Ibid.*, p. 555.

125. [1995] CRN No. 40040511262 (Dist. Ct. — Auckland).

126. *Ibid.*, p. 9.



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In certain circumstances, it may be possible to bring tort actions in one jurisdiction to address corporate activities that have occurred in another jurisdiction. Recently, there has been a flurry of legal actions in the United States and the United Kingdom pertaining to alleged wrongful corporate activity in developing countries. Voluntary codes and standards can play important roles in such litigation, as part of court explorations of what constitutes “reasonable care.” Codes of conduct can play key roles in both demonstrations by corporations that they are living up to appropriate standards of care or, alternatively, in judicial determinations of liability against those corporations that fail to meet them. In the United States, the key instrument for such actions has been the *Alien Tort Claims Act*<sup>127</sup> of 1789. Pursuant to this Act, non-American plaintiffs (aliens) can bring actions against parties with affiliations to the United States in American courts for civil wrongs that are violations of customary international law or a treaty of the United States. Although originally the Act was used primarily to address actions of individuals who were State actors (and thus subject to international treaties and customary law), courts in recent years have adopted a more broad interpretation, leading to litigation against corporations on grounds of complicity in human rights violations.<sup>128</sup>

In the United Kingdom, several court actions have led to multimillion dollar settlements by multinationals with subsidiary operations in developing countries.<sup>129</sup> A leading U.K. litigator involved in some of the key decisions to date has stated, “In the light of the House of Lords decision ... multinationals would be well advised to take active measures to ensure that the working conditions at their worldwide operations comply with the standards they would be expected to meet at home or with international standards.” In an article concerning the use of the *Alien Tort Claims Act* to address corporate responsibility, Professor Ralph Steinhardt of the George Washington University Law School brings together codes of conduct and interjurisdictional tort litigation as follows:

... corporations have demonstrated that they are willing to adopt voluntary codes of conduct and to exploit those segments of the markets that make consumption and investment decisions on the basis of a company’s perceived commitment to human rights. ... [M]arket incentives and ... liability litigation are not mutually exclusive and ... can actually reinforce one another. ... [I]t does seem clear that the prospect of litigation may have accelerated the voluntary, marketplace initiatives and that litigation will define the primitive minimum beneath which the market will not operate.<sup>130</sup>

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127. USC (Annotated) § 1350.

128. See, e.g., discussion of *Doe v. Unocal* (2000) and *Wiwa v. Royal Dutch Petroleum Company* (2000) in R. Steinhardt, *Litigating Corporate Responsibility* (2001) at <[www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm](http://www.lse.ac.uk/collections/globalDimensions/seminars/humanRightsAndCorporateResponsibility/steinhardtTranscript.htm)>.

129. See, e.g., discussion of litigation against Thor Chemicals, RTZ Corporation, and Cape plc, in R. Meeran, “Victims of Multinational Corporations: What Avenues are Available?” *Mealey’s Litigation Report: Asbestos*, March 23, 2001.

130. Steinhardt (footnote 128).

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Initiatives such as the Mining Minerals and Sustainable Development Project,<sup>131</sup> the U.S./U.K. Voluntary Principles on Security and Human Rights<sup>132</sup> for resource-based companies, and the International Code of Ethics for Canadian Businesses<sup>133</sup> can all be seen as industry-driven efforts to articulate global standards of care, and, as Steinhardt suggests, they may in part be stimulated by the type of interjurisdictional tort litigation that has become increasingly common in the United States and the United Kingdom.<sup>134</sup>

In summary, it is clear that voluntary codes can be useful to courts in tort actions, both as examples of safe or appropriate practices and as evidence of typical industry practices. While voluntary codes are important factors in any tort action, they alone do not determine the outcome. The increasing prevalence of voluntary codes might have the effect of stimulating improvements in industry practice in a particular sector. This can occur in two ways. First, if the voluntary standard is adopted by a significant portion of the sector, this may assist the court in reaching the conclusion that it is the standard of care for the sector. Members of industry who ignore the standard may have difficulty defending a tort suit. Since, in many instances, the cost of defending oneself or obtaining a court award is greater than meeting the voluntary standard in the first place, it may induce many organizations to comply with the standard. Second, a voluntary standard that is not adopted by the sector may still be useful for courts as a benchmark for comparison. Judges may make a tacit assumption, for example, that a voluntary standard illustrates a safe practice in a particular situation. Even when the actual sector practice is different (and seems adequate), the court may refer to the voluntary standard to demonstrate that the company did not use due diligence when ensuring that the public was safe. Since firms or organizations may risk liability when they do not adhere to the standard in question, some may conform to the higher standard even when they are satisfied that the current practice is safe.<sup>135</sup>

### *Negligence Liability of Code Development and Implementation Bodies*

The second issue that arises when considering the connection between negligence and voluntary codes is whether bodies entrusted with developing codes and ensuring compliance with them could be held negligent if they fail to keep the code up to date, neglect to adequately notify affected parties of changes to its terms or otherwise fail to ensure its effective implementation, or if the code itself is not adequate. Unless shielded from liability by statute, code bodies can be held to the same standard of care as

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131. For more information about this initiative go to <[www.iiied.org/mmsd](http://www.iiied.org/mmsd)>.

132. For more information about this initiative go to <[www.state.gov/g/drl/rls/2931.htm](http://www.state.gov/g/drl/rls/2931.htm)>.

133. For more information about this initiative go to <[www.cdp-hrc.uottawa.ca/globalization/busethics/codeint.html](http://www.cdp-hrc.uottawa.ca/globalization/busethics/codeint.html)>.

134. The United States and the United Kingdom would appear to be magnets for such litigation, in part because many large multinationals have headquarters or significant operations in these jurisdictions (i.e. the corporate structures are not just empty corporate shells with no funds available, as in some developing countries). Nevertheless, a significant threshold to meet in bringing such actions is establishing that American and U.K. courts are appropriate fora for such litigation, when compared with the courts in the developing countries. This point is discussed by both Steinhardt (footnote 128), and Meeran (footnote 129).

135. See, e.g., the reaction of several school boards to the introduction of revised playground safety standards, as discussed earlier.

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anyone else and can be held liable if their negligence leads to injury.<sup>136</sup> For example, liability was imposed on the company that developed and implemented the *Good Housekeeping* Seal of Approval (the Hearst Corporation) in a case involving injury from negligently manufactured shoes bearing the Seal. The court emphasized *Good Housekeeping*'s voluntary involvement in the marketing process for its own gain, the loan of its reputation to the product through its endorsement, and the consumer's reliance upon this endorsement.<sup>137</sup>

Industry associations can also be liable when the codes they develop are considered inadequate. In *King v. National Spa and Pool Institute Inc.*,<sup>138</sup> the estate of a man who died after diving into a swimming pool sued the trade association that promulgated the standards that the manufacturer and installer of the pool relied on. The Supreme Court of Alabama found that the trade association owed a duty of care to the user of the pool, since it was aware that manufacturers and installers relied on its standards. The court stated, "It is well settled under Alabama law that one who undertakes to perform a duty [that it] is not otherwise required to perform is thereafter charged with the duty of acting with due care."<sup>139</sup> The National Spa and Pool Institute's voluntary undertaking to promulgate minimum safety design standards "made it foreseeable that harm might result to the consumer if it did not exercise due care."<sup>140</sup>

In a later case, *Meneely v. S. R. Smith, Inc.*<sup>141</sup> the State of Washington's Court of Appeals held that a trade association such as the National Spa and Pool Institute owes a duty of care when formulating its safety standards and a duty to warn the ultimate consumer about the risk of injury. "By promulgating industry wide safety standards that pool and board manufacturers relied upon, [the National Spa and Pool Institute] voluntarily assumed the duty to warn Mr. Meneely and other divers of the risk posed by this type of board. ... It failed to exercise reasonable care in performing that duty, when it did not change the standard after it knew that studies showed the pool and board combination was dangerous for certain divers."<sup>142</sup> The Court also stated that the National Spa and Pool Institute assumes a duty of care "when it undertakes the task of setting safety standards and fails to change those standards or issue warnings after it becomes aware of a risk posed by the standards."<sup>143</sup> According to the Court, the National Spa and Pool Institute's duty of care "arose from its voluntary assumption of the task of

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136. Some code development bodies may be protected by statute from negligence suits, such as certain government-operated standards development bodies.

137. *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969). The foregoing taken directly from P. Schuck, "Tort Liability to Those Injured by Negligent Accreditation Decisions," in C. Havighurst, ed., "Private Accreditation in the Regulatory State," *Law and Contemporary Problems* 57:4 (Autumn 1994), p. 192.

138. 570 So. (2d) 612 (Ala. 1990).

139. *Ibid.*, p. 614.

140. *Ibid.*, p. 616.

141. [2000] WA-QL 1055 No. 18036-1-III (August 3, 2000) Court of Appeals, State of Washington.

142. *Ibid.*, para. 44.

143. *Ibid.*, para. 5.

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formulating safety standards, knowing that the pool industry would conform its products to those standards.”<sup>144</sup>

It is difficult to say at this point exactly what effect the National Spa and Pool Institute cases will have on voluntary codes activities of industry associations in the United States, but it is reasonable to assume that it should discourage such activities unless they are undertaken with great care. Some American commentators have suggested that multistakeholder standards organizations, such as the American National Standards Institute (ANSI) (i.e. *not* industry associations) that follow specified operational “game rules” (i.e. the ANSI procedures, including those pertaining to openness, balance of stakeholders, consensus and regular revision), may be in a good position to defend against such negligence actions.<sup>145</sup>

### *Negligence Class Actions and Codes*

Even when a code is in place and appears to set an appropriate standard of care for a particular sector or activity, there may still be significant obstacles facing those injured by the negligence of others as they attempt to bring legal actions to protect their rights. These obstacles often revolve around inadequate time, resources and expertise to see such actions through to completion. Moreover, as with contract actions by consumers, any one individual may be harmed to such a relatively minor extent that he or she might feel that a legal action would not be worth the trouble. Yet, when taken together, many individual instances of harm might reflect significant damage to a community or segment of the population. As discussed earlier, when modernized class action laws are in place, negligence actions by a small number of individuals on behalf of a larger group become more feasible.<sup>146</sup>

## **Government Regulatory Regimes and Voluntary Codes**

Government regulatory regimes and voluntary codes are intertwined in a wide variety of ways. In this section of the chapter, several of the key aspects are discussed. First, an examination of the relation between laws prohibiting deceptive practices and voluntary codes is provided. Then, the roles of voluntary codes in regulatory enforcement are explored. The regulatory implications of use of voluntary codes for business, non-governmental organizations and governments are examined. With respect to governmental implications, the legal effects of regulator participation in voluntary codes, regulatory incorporation of voluntary codes, the use of voluntary codes as supplements to regulatory enforcement, the use of compliance information from voluntary codes in regulatory enforcement, and government support of “beyond compliance” voluntary codes are each discussed.

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144. *Ibid.*, para. 29.

145. A. Marasco, *Standards Development: Are You At Risk?* (1999), available at <[www.ansi.org/news\\_publications/other\\_documents/risk.aspx?menuid=7](http://www.ansi.org/news_publications/other_documents/risk.aspx?menuid=7)>. See also J. Q. Smith, J. P. Bolger and A. Marasco, *Products Liability Claims Against Voluntary Standards Developers: An Update on Recent Developments*, (1996).

146. See Cochrane (footnote 107).

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### **Regulatory Prohibitions of Deceptive Business Practices and Voluntary Codes**

Most jurisdictions have laws in place prohibiting firms from engaging in deceptive or misleading business practices.<sup>147</sup> Deceptive claims made by firms about their activities and products as they relate to voluntary codes and standards have led to courts imposing legal liability in a number of circumstances.<sup>148</sup> In the United States, laws have been put in place that allow individuals to bring actions concerning allegedly deceptive business practices.<sup>149</sup> In one such case, still before the courts, a private attorney general lawsuit was brought against Nike Inc. and five of its corporate officers, alleging that, in the course of a public relations campaign that revolved around its code of conduct, Nike made misrepresentations regarding its labour practices in its Asian contractor factories.<sup>150</sup> In other cases, apparel firms have settled out of court.<sup>151</sup>

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147. In Canada, see *Competition Act*, R.S.C. 1985, c. C-34, s. 52; *Ontario Business Practices Act*, R.S.O. 1990, c. B. 18, s. 2. In the United Kingdom, see the *Trade Descriptions Act, 1968*, s. 14. In the United States, see *Federal Trade Commission Act* 15 USC, s. 5(a), and the unfair competition and false advertising law provisions within the California *Business and Professions Code*, para 17200 et seq. In Australia, see the *Trade Practices Act, 1974*, ss. 52 and 53. In Europe, see the European Union's *Misleading Advertising Directive* 84/450.

148. See discussion of American court actions below. Examples from Australia of such actions include *Re: Robert George Quinn and Brian Alexander Given*, (1980) 41 F.L.R. 416, in which a company falsely represented that its fire extinguishers met Australian standards. Other examples from Australia include *Re: Evaline Jill Hamlyn and Moppet Grange Pty. Ltd.* (1984) Nos. G375-377 of 1983 (Fed. Ct. of Aus.), in which the manufacturer of children's night garments incorrectly represented that the garments met Australian flammability requirements; *Re: Malcolm David Lennox and Megray Pty. Ltd.*, (1985) Nos. VG23 to VG28 of 1985 (Fed. Ct. of Aus.), in which the manufacturer affixed Australian Standards Association (ASA, now Standards Australia) labels to bicycle helmets that were not yet ASA-approved.

149. The federal *Lanham Act* provides a civil action to anyone who is or is likely to be damaged by a commercial misrepresentation of goods or services:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action

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Per 15 U.S.C. para. 1125(a)(1). See Meidinger (footnote 19), for discussion of use of the *Lanham Act* in the context of environmental certification programs. In California, private attorney general actions can be brought to address incidents of consumer deception pursuant to the unfair competition law provisions within the *Business and Professions Code*, para. 17204.

150. *Kasky v. Nike Inc.* 27 Cal. 4th 939 (California Supreme Court, 2002). Nike has maintained that the action curtails its rights to freedom of expression. See discussion of the case focussing on its constitutional aspects later in the chapter.

151. In 1999, lawsuits were launched that alleged that several large U.S. garment retailers were engaging in unfair and deceptive business practices contrary to the California *Business and Professions Code* by advertising their garments as being "Sweatshop Free." This legal action led to several financially significant settlements in 2002, and agreements by the retailers that their contractors will comply with a new code of conduct, with independent monitoring. See R. Collier and J. Strasburg, "Clothiers Fold on Sweatshop Lawsuit," *San Francisco Chronicle*, September 27, 2002.

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In a number of ways, governments are explicitly linking their regulatory regimes prohibiting deceptive business practices with voluntary code programs. In 2002, the Canadian Competition Bureau announced that it was considering adopting a voluntary standard on environmental claims developed through ISO (ISO 14021) as a guideline to assist in interpreting the *Competition Act's* deceptive advertising provisions as they apply to environmental claims.<sup>152</sup> Some governments have developed regulatory offences prohibiting deceptive practices associated with misuse of voluntary religious food certification and labelling programs. Several American states have passed legislation specifically prohibiting false labelling of food as halal (i.e. in compliance with Islamic food preparation standards) or as kosher (i.e. in compliance with Jewish food preparation standards).<sup>153</sup> In essence, these laws can be considered as supplements to the non-governmental halal and kosher voluntary food preparation certification regimes.<sup>154</sup> Under 1988 regulations promulgated by the U.K. government, the Advertising Standards Authority (a non-statutory, privately funded, voluntary organization devoted to maintaining high standards in the advertising industry) was explicitly recognized as an “established means” for purposes of controlling the content of non-broadcast advertising.<sup>155</sup> This is an example of two programs devoted to reducing the instances of deceptive business practices — one a governmental program employing a conventional regulatory prohibition approach, the other a non-governmental voluntary code program — being formally linked in order to enhance overall effectiveness.

### **Regulatory Enforcement and Voluntary Codes**

Voluntary codes can elaborate on the requirements contained in regulatory legislation, and thereby be used in both in determinations of regulatory liability and sentencing. A good point of departure for understanding the role of voluntary codes in regulatory enforcement is an examination of the nature and operation of regulatory offences. The main type of offence used in Canadian regulatory legislation enforcement is called the strict liability offence.<sup>156</sup> With this type of offence, once the Crown has

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152. See <<http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02206e.html>>.

153. See, e.g., information at <[www.ifanca.org/halal.htm](http://www.ifanca.org/halal.htm)> (halal) and at <[www.jlaw.com](http://www.jlaw.com)> (kosher).

154. However, in a July 2000 judgment, the New York Eastern District Court ruled that statutory provisions designed to protect New York consumers against false labelling of food as kosher were unconstitutional, as a violation of the First Amendment because they were interpreted as endorsing and advancing religion. See discussion on this point later in this chapter.

155. *Control of Misleading Advertisements Regulations 1988* (SI 1988 No. 915), passed pursuant to the *Trade Descriptions Act, 1968*.

156. For more detailed discussion of regulatory offences in Canada, see K. Webb, “Regulatory Offences, the Mental Element, and the Charter: Rough Road Ahead,” *Ottawa Law Review* (1989), p. 419. The due diligence defence is also widely available in U.K. and New Zealand regulatory legislation, and to a lesser extent in Australia. In the United States, the due diligence defence is generally *not* available for strict liability offences. See K. Webb, *Regulatory Offences: The Quest for a Non-Criminal Approach to Penal Liability* (Doctor of Laws thesis, University of Ottawa, 1999). For a discussion of U.S. strict liability offences in the environmental context, with a focus on the use of ISO 14001, see S. W. Rosenbaum, *ISO 14001 and the Law* (California: AQA Press, 1998), p. 26. However, even in jurisdictions where no due diligence defence exists, companies that have put in place voluntary compliance programs, such as ISO 14001, are less likely to run afoul of the law and, when they do, may be able to use adherence to the terms of the program to mitigate the severity of sentences

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proven the facts of the offence beyond a reasonable doubt, the accused will be convicted unless he or she establishes on a balance of probabilities that every reasonable action was taken to avoid the commission of the offence.<sup>157</sup> This is often referred to as a “due diligence” or “reasonable care” defence.

The process of determining what constitutes reasonable care in the circumstances, and whether reasonable care has actually been exercised, is not unlike the process of determining liability in a civil action of negligence. In fact, the strict liability offence has been referred to as an offence of negligence for this reason.<sup>158</sup> As with negligence actions, courts look to evidence of industry standards when considering due diligence defences. The existence of a voluntary code or standard, prepared and applied by industry, can be of considerable assistance in the court’s determinations of reasonable care.

In *R. v. Domtar*,<sup>159</sup> the defendant was charged with a violation of the *Ontario Health and Safety Act* after a Hudson’s Bay Company employee was killed while using a compactor leased by the accused to the Hudson’s Bay Company. The compactor lacked a safety mechanism required by the standard established by ANSI that would have prevented the death of the employee. Justice of the Peace McNish concluded that non-compliance with the ANSI standard constituted evidence of a lack of due diligence on the part of Domtar. However, Domtar was ultimately acquitted because the nature of the accident was unforeseeable and stemmed from factors other than the unsafe machine. Nevertheless, judicial acceptance of use of the ANSI standard in this case illustrates how voluntary industry benchmarks of acceptable conduct can be employed in regulatory enforcement actions.

The New Zealand case of *Department of Labour v. Waste Management N.Z. Limited*<sup>160</sup> (discussed earlier) provides further insight into the issue of regulatory liability. The accused company was charged under an employment health and safety statute after one of its garbage compactor machines crushed the user of the machine. The compactor complied with an American standard. However, as noted above, the court ruled that meeting the American standard was insufficient, since an American standard may have been less stringent than the New Zealand standard. In his decision Justice O’Donovan stated:

It seems to me that political and other factors may very well determine the nature of a standard. ... A standard formulated in the United States against the background of legislation in that country might very well be different from one which needs to be formulated in this country having

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imposed. See, e.g., J. Kaplan, “The Sentencing Guidelines: The First Ten Years,” *Ethikos* (November–December, 2001). See also the draft U.S. environmental sentencing guidelines, discussed below.

157. For example, in an environmental context, the facts to be proved might be that emissions emanating from the accused’s factory caused or potentially caused harm to the environment. In a consumer setting, the Crown might have to prove that a representation concerning a product or service was made, that it was misleading or potentially misleading, that it was made by the accused, and that there was ensuing harm or potential harm to consumers.

158. Justice Dickson in *Strasser v. Roberge* (1979) 103 DLR (3d) 193, p. 202.

159. [1993] O.J. No. 3415 (Ont. C.J. — Gen. Div.).

160. [1995] CRN No. 40040511262 (Dist. Ct. — Auckland).

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regard to our legislation. ... I am not satisfied in this case that adherence to the American standard on the part of this defendant serves to discharge the defendant's obligations under the New Zealand statute.<sup>161</sup>

Although this case has not as yet been applied in Canada, it does raise some interesting issues. When several standards exist, should a Canadian court give more weight to a domestic standard (e.g. CSA) as compared to that of ANSI or the American Society for Testing and Materials, for instance? Perhaps more importantly, it suggests that courts might begin to look more carefully at how standards were made, and by whom. For example, in the development of the standard, were Canadian consumer, environmental or other affected groups able to participate on an even footing with those of industry? Who made the final decision, and how?<sup>162</sup> As a final point, if government has participated in the development of a voluntary code standard, this may have implications for regulatory enforcement (discussed in greater detail below).

Industry-developed standards can also play a role in regulatory sentencing. Recently, some Canadian courts have required compliance with ISO 14001 environmental management system (EMS) standards as a term of sentence in several regulatory enforcement actions.<sup>163</sup> One commentator has suggested that programs such as ISO 14001 — which can involve independent certifications that a firm has successfully passed an EMS audit — may be of particular use in sentencing by “judges who may be lacking the experience and time to devise an appropriate organizational structure for environmental compliance.”<sup>164</sup> In apparent recognition of the potentially constructive role that voluntary environmental management systems can play in furthering the objectives of legislation, the *Canadian Environmental Protection Act, 1999*<sup>165</sup> now specifically requires that, in imposing a sentence, a court is to take into account “whether any remedial or preventive action has been taken or proposed by or on behalf of the offender, including having in place an environmental management system that meets a recognized Canadian or international standard.”<sup>166</sup> The same legislation now also expressly authorizes the court to make orders “directing the offender to implement an

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161. *Ibid.*, p. 9.

162. For example, the North American bicycle helmet industry uses four major standards that vary in how they are developed and how stringent they are. See Morrison and Webb, “Helmets Standards and Regulations,” Chapter 11, below.

163. In *R. v. Prospec Chemicals* (1996) 19 CELR (NS) 178 (Alta. Prov. Ct), following a finding of guilt for exceeding sulphur emission limits contrary to Alberta environmental legislation, defence counsel proposed that Prospec be permitted to seek ISO 14001 certification as part of the court-ordered sentence. The judge agreed, ordering Prospec to complete the ISO program and post a letter of credit for \$40,000, subject to forfeiture if the company failed to comply with the certification order. Other similar cases include *R. v. Van Waters & Rogers Ltd.* (1998) 220 AR (315) (Alta. Prov. Ct); *R. v. Calgary (City)* (2000) 272 AR 161, 35 CELR (NS) 253 (Alta. Prov. Ct); *R. v. Corotec (formerly PCI Inc.) and Zadeh* (1998) (Ont. Prov. Ct.), as reported in Environment Canada, *Court Orders Unique Environmental Penalties*, press release, August 20, 1998, available at <[www.ec.gc.ca/press/pen0898\\_n\\_e.htm](http://www.ec.gc.ca/press/pen0898_n_e.htm)>.

164. Environmental lawyer Diane Saxe, as reported in J. Melnitzer, “Fix Environmental Snags Before Seeking ISO 14000 Certification,” *Law Times*, June 16–22, 1997, pp. 14–15.

165. S.C. 1999, c. 33.

166. S. 287 (c).



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environmental management system that meets a recognized Canadian or international standard.”<sup>167</sup> In the United States, draft sentencing guidelines stipulate that adherence to the terms of environmental compliance programs can considerably reduce the penalties imposed.<sup>168</sup>

The fact that courts can draw on the existence of voluntary codes and standards in determining regulatory (or tortious) liability and in imposing sentences is of considerable significance to industry, government, non-governmental organizations and others in the community. Most notably, it suggests that all parties must recognize the importance of voluntary initiatives (i.e. parties need to seriously consider the implications of participating or not participating in the development of such initiatives, and of complying with them), since, on the one hand, adherence to the terms of such programs can reduce the likelihood of regulatory (or tortious) liability and, on the other, failure to abide by the terms of such programs could assist in court determinations of liability.

### *Implications for Industry*

At an industry level, firms considering developing voluntary programs need to be aware from the outset that their efforts could have regulatory implications. A voluntary industry program may through creation of a benchmark standard of care expose member companies to legal liability.<sup>169</sup> At the same time, a firm that does *not* participate in an industry voluntary code or standard regime may nevertheless have the code or standard imposed on it by a court through a regulatory enforcement action or tort lawsuit. In this way, the management of firms who believe they can take a “free ride” on the positive industry image produced by others who adhere to a voluntary program without actually complying themselves may have an unpleasant surprise awaiting them when their non-compliance with the terms of the program subsequently plays a role in a court’s determination of regulatory or tortious liability or as part of sentencing.

In one way, the prospect of a voluntary program establishing a benchmark that can, in effect, be imposed by the courts on free riders may create an incentive for reluctant industry members to participate in such programs. After all, involvement in

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167. Subs. 291 (1) (e).

168. The draft guidelines are available at <[www.usss.gov/publicat/environ.pdf](http://www.usss.gov/publicat/environ.pdf)>. For a discussion concerning them, and the role of environmental management systems, see E. Orts, “Reflexive Environmental Law,” *Northwestern University Law Review* 89 (1995), pp. 1227–1340, especially pp. 1281–1283. The environmental compliance programs must involve a commitment of resources and a “management process” that is reasonably calculated “to achieve and maintain compliance with environmental requirements.” (p. 1282)

169. Brian Wastle, vice-president, Canadian Chemical Producers’ Association, has indicated that in the initial phase of development of the Responsible Care voluntary initiative, legal counsel had noted the potential liability flowing from adoption of the Responsible Care principles (personal communication with the author, September 1996). The fact that a firm or sector would develop or comply with a voluntary program in spite of potential liabilities suggests that there may be strong “non-regulatory” motivations for such programs. A recent survey of 580 U.S. manufacturing plants suggests that, while regulatory compliance was an important motivator for adopting environmental management systems such as ISO 14001, so was the prospect of cost savings, improved business performance and responding to community, worker and customer concerns. See R. Florida and D. Davison, “Why Do Firms Adopt Advanced Environmental Practices (and Do They Make a Difference)?” in C. Coglianese and J. Nash, eds., *Regulating From the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington: Resources for the Future, 2001), Chapter 4.

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program design will at least give a firm some ability to influence the terms of the standards. The prospects of free riders being held liable at least in part because they are not complying with a voluntary program is perhaps some solace to firms who participate in the formulation and implementation of such programs. In short, the possible imposition by the courts of a voluntary code or standard on a non-participant may represent a counterargument to those who maintain that voluntary programs fail to address the free rider problem.

The question can legitimately be asked, How voluntary is a code or program if it can be imposed by a court on a firm against its will? A code or program is voluntary in the sense that legislation or regulations (and the tort of negligence) do not *require* compliance with the terms of the voluntary program, and courts are generally not *required* by legislation or regulations or common law to accept a voluntary code or standard as the benchmark of acceptable industry behaviour, or to use such codes or standards in sentencing.<sup>170</sup> Indeed, from one case to another, a court can choose to draw on the existence of a pre-established voluntary program or not. A voluntary measure developed by an industry association is one way of attempting to meet the reasonable care/due diligence standard, but individual firms are free to articulate and implement their own systems. As long as the individual firm can demonstrate to the satisfaction of the court that the approach developed by that firm constitutes reasonable care or due diligence, there is no need to use an existing code program developed by an industry association. Similarly, with respect to sentencing, a court may devise its own requirements that a firm must meet as part of a sentence, and need not rely on an existing code or standard developed by industry. Thus, at first instance, a firm can decide against using an existing industry voluntary code or standard, if it has the documentation to demonstrate to a court that its own approach constitutes reasonable care.

### ***Implications for Non-governmental Organizations***

Non-governmental organizations need to seriously consider the merits of initiating or participating in the development and implementation of voluntary programs in light of the considerable role such programs can play in stimulating good conduct from industry, and in influencing judicial interpretations of regulatory and tortious liability and sentencing. NGO involvement can help encourage adoption of more rigorous standards and stronger inducements for implementation.<sup>171</sup> At the same time, NGOs need to

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170. Even the *Canadian Environmental Protection Act, 1999*, discussed above, only requires courts to “take into account” environmental management systems, and in sentencing, merely authorizes (but does not require) courts use environmental management standards. In both cases, these are discretionary powers.

171. In J. Braithwaite and P. Drahos, *Global Business Regulation* (footnote 22), the authors acknowledge the perception of many actors in the NGO sector that consider ISO standards to be voluntary, toothless and therefore unimportant. They nevertheless argue that this perception is wrongheaded and that increased NGO participation would be strategic (pp. 282–283). Increasingly, environmental organizations seem to be recognizing the benefits of establishing direct relations with industry through the vehicle of voluntary programs. Mike McCloskey, chair of the American Sierra Club, is reported as saying, “The time is right for corporations and environmentalists to deal directly with each other and not filter everything through government. The companies that sign CERES Principles [a voluntary initiative concerning environmental responsibility] identify

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consider how direct involvement in industry programs will be perceived by their members and the broader community.<sup>172</sup>

### *Implications for Government*

For regulators, the potential benefits flowing from initiation of or participation in non-regulatory voluntary initiatives or support of their use may appear to be considerable. The potential of such initiatives includes the following:

- assisting in elaborating on the meaning and operationalization of acceptable regulatory conduct;
- decreasing incidents of non-compliance from taking place;
- assisting enforcers in identifying likely compliant and non-compliant actors;
- stimulating “beyond regulatory compliance” behaviour; and
- assisting courts in structuring the behaviour of firms found in non-compliance.

On the other hand, government involvement in or support of voluntary initiatives that are operated in conjunction with regulatory regimes can raise serious questions about the ability of regulators to remain neutral and effective in enforcement and ready to introduce new legislation or regulations as necessary. These issues are discussed below.

### **Government Participation in Voluntary Codes Supporting Regulatory Activities**

Taken together, the fact that voluntary codes and standards can have the enforcement-oriented benefits listed above would appear to suggest that government participation in developing these initiatives is necessary to ensure that they are as rigorous as possible. Should governments fail to provide such input, there is the risk that the codes and standards produced without their participation will be considered reasonable by judges even though they will be viewed as inadequate by government. Involvement by government in the development of voluntary initiatives can also be seen as providing needed guidance to the private sector about what constitutes reasonable care or due diligence for the purposes of regulatory liability.

At the same time, it is important to recognize that government participation in or support of voluntary initiatives can be taken into account by courts in subsequent legal actions — and not necessarily in ways that governments might want. To illustrate:

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themselves as ones that organizations like mine should approach in our desire to forge a new relationship.” See J. A. Smith III, “The CERES Principles: A Voluntary Code for Corporate Environmental Responsibility,” *Yale Journal of International Law* 18 (1993), pp. 307–317, p. 309.

172. For insights on the perspective of environmental non-governmental organizations concerning voluntary standards development, see, e.g., T. Burrell (footnote 41). On the other hand, Canadian *consumer* organizations appear to have been on the whole more willing to participate in voluntary codes/standards activities, as demonstrated by their involvement in privacy, e-commerce, genetically modified labelling and other non-regulatory initiatives. At the international level, the Consumer Policy Committee has been established within ISO, the International Organization for Standardization. At this point, no parallel ISO environmental or worker policy committees exist.

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- As part of a due diligence defence raised by an accused who is adhering to a voluntary standard, the involvement of government in the formulation of the standard could be taken as evidence of its inherent reasonableness, and thus assist the accused in avoiding liability.<sup>173</sup>
- An accused firm known to be complying with a voluntary standard developed with input from government could claim that, because of government involvement, an enforcement action against it is unjustified and therefore the prosecution should not be allowed to continue.<sup>174</sup>
- Depending on the precision of the language used and the nature of commitments made, arrangements between regulators and firms in support of use of particular voluntary programs (e.g. memoranda of understanding or contracts)<sup>175</sup> may raise questions about their potential to fetter or influence enforcement discretion, and the openness, accessibility and fairness of such arrangements (particularly in the eyes of those who were not able to participate), as well as the legal status of such arrangements.<sup>176</sup>
- In the event of harm to the public or the environment stemming from an incident of non-compliance by a firm, involvement of regulators in a voluntary initiative adhered to by that firm could be a factor in a tort action by the affected victims against the government.<sup>177</sup>

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173. It would be necessary for the accused to demonstrate how compliance with the voluntary standard related specifically to the alleged incident of non-compliance (i.e. adherence in general to a management system approach is not sufficient). As noted earlier, courts are beginning to look more closely at the origins and development of voluntary standards: see, e.g., discussion of the New Zealand *Department of Labour v. Waste Management N.Z. Limited* case, and U.S. *Meneely v. S.R. Smith, Inc.* case. In both decisions, the courts carefully examined who was involved and the process of development of voluntary standards. This laudable judicial scrutiny could very well encompass the roles played by governments in developing and implementing voluntary standards, as evidence of the reasonableness of the standard in the eyes of the participating government.

174. The accused here would be attempting to characterize the enforcement action as constituting an abuse of process (see K. Webb, *Pollution Control in Canada: The Regulatory Approach in the 1980s* [footnote 28], pp. 46–49, or an officially induced error (see, e.g., *R. v. Cancoil Thermal Corp.* (1986) 52 CR (3d) 188). See also North American Commission for Environmental Cooperation (CEC), *North American Environmental Law and Policy* (Cowansville, Que.: Les éditions Yvon Blais Inc., 1998), esp. pp. 51–57.

175. In Canada, memoranda of understanding have been reached between governments and industry on several occasions. See, e.g., discussion of the Ontario Ministry of Environment-Environment Canada-Dofasco memorandum of understanding in L. Lukasik, “The Dofasco Deal,” in R. Gibson, ed., *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview Press, 1999), pp. 141–148. In the United States, the state of Wisconsin is in the final stages of operationalizing a contractual “cooperative agreement” program for leading environmental performers and those seeking to make large environmental gains. See discussion in National Academy of Public Administration, *Environment.Gov: Transforming Environmental Protection for the 21st Century* (Washington: National Academy of Public Administration, 2000), pp. 49–50.

176. See discussion in Webb (footnote 174), pp. 44–46. See also CEC, *North American Environmental Law and Policy* (footnote 174), pp. 41–45 and 60–64.

177. In a series of recent cases, Canadian governments have been held liable in situations of mal- or non-enforcement of legislation. If government officials participate in the development of a voluntary code or standard, or otherwise endorse a voluntary code or standard regime once in operation, they could be held liable if an individual or individuals, or an organization, were subsequently injured, and the code or standard deemed inadequate. When the Crown is sued, the court makes a distinction between two types of governmental decisions: policy decisions and operational decisions. As Justice Cory explained in *Just v. British Columbia* [1990] 1 W.W.R. 385 (S.C.C.), “... true policy decisions should be exempt from tortious claims so that

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In an indirect manner, the potential for such legal issues to arise reinforces the point that regulators need to act in a publicly accountable and transparent manner when participating in or supporting voluntary programs. In Canada<sup>178</sup> and the United States,<sup>179</sup> some efforts have been made toward providing guidance on federal participation in the development and use of voluntary consensus standards and in conformity assessment activities.<sup>180</sup> In short, just as industry needs to think carefully about the implications of developing non-regulatory measures before becoming involved, so too government involvement in the development and use of voluntary measures having an impact on determinations of regulatory liability should be undertaken only after carefully considering the advantages and possible negative consequences of such involvement. When government participation does take place, effort must be made to ensure that it is done in an open and scrupulously fair manner.

### **Voluntary Codes Incorporated into Regulatory Law**

It is not uncommon for governments to incorporate the terms of non-governmental, voluntary codes and standards into laws, and indeed Canadian, American and other governments have done so for many years.<sup>181</sup> For example, the CSA hockey helmet standard has been referentially incorporated in federal legislation;<sup>182</sup> provisions of the *CSA Model Code for the Protection of Personal Information* are

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governments are not restricted in making decisions based upon social, political or economic factors. However, the implementation of those decisions may well be subject to claims in tort” (p. 403). The doctrine from *Just* was applied in *Swanson and Peever v. Canada* (1991) 124 N.R. 218. In this case a plane owned by Wapiti Aviation crashed, killing a number of passengers. Because Wapiti Aviation became insolvent, an action was launched against the federal government, since Transport Canada was aware of Wapiti’s repeated safety violations and failed to take action to prevent an accident. The court ruled that Transport Canada’s decision not to take action against Wapiti was not a policy decision, but one of operation, since the decision was not based on political, social or budgetary factors. When the court finds that the governmental action that is the subject of the lawsuit is an operational decision, the plaintiff must still establish that the Crown owed a duty of care to the injured party, that the Crown breached the duty of care, and that actual harm ensued. These remain significant hurdles to overcome before the Crown will be held liable for enforcement actions when the existence of a voluntary code context is a relevant factor. See also CEC, *North American Environmental Law and Policy*, *ibid.*, esp. pp. 58–59.

178. Industry Canada, *Standards Systems: A Guide for Canadian Regulators* (Ottawa: Industry Canada, 1998), available at <[http://strategis.ic.gc.ca/sc\\_mrksv/regaff/stdguide/engdoc/english.pdf](http://strategis.ic.gc.ca/sc_mrksv/regaff/stdguide/engdoc/english.pdf)>.

179. For example, Office of Management and Budget, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (February 19, 1998), available at <[www.whitehouse.gov/omb/circulars/a119/a119.html](http://www.whitehouse.gov/omb/circulars/a119/a119.html)>, as discussed in Meidinger (footnote 19), p. 10170.

180. In Canada, guidance is also provided concerning governmental involvement in voluntary code initiatives that are not part of the standards system. See, e.g., Office of Consumer Affairs and Regulatory Affairs Division, Treasury Board Secretariat (Canada), *Voluntary Codes: A Guide for Their Development and Use* (Ottawa: Industry Canada and Treasury Board Secretariat, 1998), available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00880e.html>>.

181. See, generally, D. J. Lecraw, *Voluntary Standards as a Regulatory Device* (Ottawa: Economic Council of Canada, 1981); Industry Canada, *Standards Systems: A Guide for Canadian Regulators* (footnote 178); R. Hamilton, “The Role of Non-governmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health” *Texas Law Review* 56 (1978), p. 1329.

182. As discussed in Morrison and Webb, “Helmet Standards and Regulations,” Chapter 11, below.

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included in federal legislation;<sup>183</sup> firms in several Canadian jurisdictions are required by regulation to establish environmental management systems to the ISO 14001 standard or equivalent;<sup>184</sup> the U.S. Occupational Safety and Health Administration converted a large number of voluntary health and safety standards into regulatory requirements;<sup>185</sup> toy manufacturers and importers in Hong Kong are required to comply with the International Voluntary Toy Safety Standard established by the International Committee of Toy Industries, a European Standard (EN71) or an American Standard (ASTM F963);<sup>186</sup> the Brazilian state of Acre has made certification under the Forest Stewardship Council's sustainable forestry program a requirement for practising forestry in the state;<sup>187</sup> and Zimbabwe has incorporated ISO 14001 into its regulatory system.<sup>188</sup>

In the usual course of events, it would appear that legislative and regulatory incorporation of the terms of non-governmental standards and codes raises few technical issues,<sup>189</sup> as long as the process of incorporation is done in the same open, fair and accessible manner that characterizes the promulgation of normal legislation and regulations. The position taken here is that it really does not matter *where* a legislative or regulatory obligation originally comes from, as long as those obligations are approved through normal legislative and regulatory processes. For example, given that legislative and regulatory obligations must have a rational foundation based on evidence to pass muster under trade agreements,<sup>190</sup> or under domestic requirements,<sup>191</sup> those legislative and regulatory obligations that originated as voluntary standards need to undergo the same stringent review and justification as any other proposed legislative or regulatory obligation. This said, properly developed voluntary standards that are the product of open, accessible and fair rules-based consensus processes should have a certain amount

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183. The *Personal Information Protection and Electronic Documents Act*, SC 1999-2000, C-5, as discussed in Bennett, "Privacy Self-Regulation," Chapter 8, below.

184. See discussion of Nova Scotia pipeline regulations, New Brunswick gas distributors legislation and Alberta LEAD Program (which will make implementation and maintenance of an environmental management system a licence term and specify the minimum elements of the EMS in the licence), in S. Wood, "Green Revolution or Greenwash? Voluntary Environmental Standards, Public Law and Private Authority in Canada," in *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2004).

185. Meidinger (footnote 19), p. 10170.

186. Pursuant to the 1992 Hong Kong *Toys and Children's Products Safety Ordinance*, available at <[www.info.gov.hk/customs/eng/major/consumer/toys\\_e.html](http://www.info.gov.hk/customs/eng/major/consumer/toys_e.html)>.

187. See E. Meidinger, "Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think," *Environmental Law Reporter* 31 (2001), pp. 10162–10179, pp. 10166–10167.

188. See P. Stenzel, "Can the ISO 14000 Series Environmental Standards Provide a Viable Alternative to Government Regulation?" *American Business Law Journal* 37 (2000), pp. 237–279, p. 276 (as reported in Meidinger, *ibid.*, pp. 10166–10167).

189. Technical issues include determining the appropriate limits on the legislative ability to incorporate by reference (e.g. when there is no specific power to do so), and the status of indicating in legislation that the referentially incorporated standard is applicable "as amended from time to time" (is this a proper delegation of legislative authority?). See Industry Canada, *Standards Systems: A Guide for Canadian Regulators* (footnote 178).

190. See, e.g., discussion of trade agreements and voluntary codes, below.

191. In the U.S., when administrative bodies incorporate standards, they are "subject to judicial review and must produce decisional records sufficient to persuade reviewing courts that their decisions were rational and based on adequate evidence." See Meidinger (footnote 187), p. 10170.

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of “momentum” when considered for inclusion into legislation or regulations, in the sense that they have already undergone multistakeholder scrutiny and perhaps also have been in operation in the marketplace and found to be practical. It is probably in light of this that legislation has been passed in some jurisdictions that obliges the use of properly developed multiparty standards in legislation and regulation whenever possible,<sup>192</sup> and key trade agreements obligate member countries to use relevant international standards as a basis for technical regulations whenever possible.<sup>193</sup> Presumably, if there were substantive or procedural concerns with to-be-incorporated voluntary standards, these would emerge in the legislative and regulatory promulgation process and be dealt with appropriately. Certainly, the mere fact that an obligation or approach being considered for a statutory or regulatory provision may have originated in a voluntary standard or code should *not* be justification for a *less rigorous* screening than that provided through the regulatory development process applying to any other proposed provision.

### **Voluntary Codes Supplementing Regulatory Enforcement**

Even when they are not made mandatory by incorporation into regulatory law, voluntary programs can still play an important role in regulatory enforcement. Particularly in light of resource constraints faced by many regulatory bodies, government inspectors and other enforcement officials may welcome the use by the private sector of voluntary approaches with the potential to decrease the enforcement burden. In a number of ways, industry adherence to the terms of voluntary programs can reduce government enforcement costs. While monitoring by regulators of all firms is essential, a company that has put in place voluntary programs or systems<sup>194</sup> designed to decrease the likelihood of offences taking place<sup>195</sup> may not need the same degree of attention from inspectors and can hence save investigation, enforcement and remedial corrective action costs.<sup>196</sup>

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192. For example, see the U.S. *National Transfer and Advancement Act of 1995*, 15 U.S.C. § 3701 (1996). As noted by Meidinger, the statute requires agencies to use voluntary standards, unless doing so would be “inconsistent with law or otherwise impractical,” and to report decisions not to use such standards to the Office of Management and Budget. See Meidinger, *ibid.*, p. 10170.

193. See, e.g., the World Trade Organization’s *Agreement on Technical Barriers to Trade*, discussed in greater detail below.

194. For example, companies that have put in place effective consumer, worker or environmental protection management systems (particularly those subject to third-party audits).

195. This is not to suggest that firms that adhere to such systems will never find themselves in violation of regulatory requirements, any more than individuals who take their vehicles for service checks before long trips will never subsequently experience car trouble.

196. One of the findings in National Academy of Public Administration, *Environment.Gov.* (footnote 175), was the following:

The emergence of ISO 14001 and other voluntary, private efforts by firms to identify and manage their environmental responsibilities is likely to raise the level of compliance and create some opportunities for pollution prevention. ... Although third-party registration is not a guarantee of a firm’s compliance, state and federal regulators are justified in presuming that certified firms are less likely to pose compliance problems than uncertified firms, and thus less desirable as targets for inspection. That conclusion could change if the integrity of the third-party registration process were to be compromised. (p. 61)

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Moreover, self-identification by industry of which firm is complying with voluntary programs, and which is not, can help government target inspection and investigation efforts.<sup>197</sup>

For all of these reasons, and in spite of questions about enforcement even-handedness that may arise,<sup>198</sup> governments are increasingly putting in place programs of regulatory relief or financial incentives to encourage firms to use compliance-enhancing voluntary programs. Although regulatory relief initiatives are not widespread,<sup>199</sup> regulators in the United Kingdom have offered the prospect of reduced inspections to those firms putting in place ISO 14001 environmental management systems.<sup>200</sup> The United States Environmental Protection Agency has announced the Performance Track program that, among other things, will include “a low priority for inspection targeting purposes” for firms with strong compliance records, an environmental management system of some form (not necessarily ISO 14001 or one audited by a third party), appropriate public reporting and outreach, and a commitment to

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197. This may take many forms, involving both third-party registrars and industry associations. Concerning registrars, when an ISO 14001 registrar finds “significant non-conformances” it must notify the firm immediately. If the firm fails to correct the problem, the registrar would be obligated to suspend or terminate the firm’s registration (see NAPA, *ibid.*, p. 41). Because ISO 14001 registration information is public, any removal of a firm’s registration status could be a trigger for governmental inspection. With respect to industry associations, in the interests of keeping a good public image, industry associations may come forward with information concerning “bad actors” in their sector. For example, J. Rees, in *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago: University of Chicago Press, 1994), talks of an industry (the nuclear industry) concerned about its image as a whole, and therefore motivated to develop voluntary programs, monitor compliance and alert authorities to the existence of non-complying parties who could damage the sector’s reputation. Similarly, the advertising industry in Canada, the United States and the United Kingdom attempts, through its own voluntary standards and adjudicative systems, to maintain a positive public image, which includes referring cases of non-compliance to authorities. For example, the American Better Business Bureau’s National Advertising Division (BBB NAD) referred a file regarding advertisements of the Nuclear Energy Institute to the Federal Trade Commission. The Institute’s advertisements touted environmental benefits of nuclear energy that the BBB NAD found questionable. See Better Business Bureau, *Nuclear Energy Advertising Compliance Referred to Government*, press release, May 13, 1999, available at <[www.newyork.bbb.org/alerts/19990501.html](http://www.newyork.bbb.org/alerts/19990501.html)>. In the U.K., since 1988, there have been 10 referrals from the non-statutory, non-governmental, self-regulatory Advertising Standards Authority (ASA) to the U.K. government’s Office of Fair Trading (which has a statutory power to seek an injunction for consistent breaches of the ASA codes). ASA, *Misleading Advertisements The Law*, available at <[www.asa.org.uk/issues/background\\_briefings](http://www.asa.org.uk/issues/background_briefings)>.

198. As discussed above, these could translate into legal actions or defences with respect to due diligence, officially induced error, abuse of process, procedural unfairness and tort liability.

199. According to K. Kollman and A. Prakash, “Green by Choice? Cross-National Variations in Firms’ Responses to EMS-Based Environmental Regimes,” *World Politics* 53 (2001), pp. 399–430, in the United States, “regulators reacted to ISO 14001 with skepticism and have not actively promoted it by offering significant regulatory relief...” (p. 421). While this has generally been the case, see discussion of new EPA performance track and Connecticut initiatives below.

200. “The British government has ... offered firms some limited amounts of regulatory relief by using ... ISO ... as a reducing factor in the risk assessment calculations used to determine frequency of site inspections.” Kollman and Prakash, *ibid.*, p. 422. See also J. Cascio, *Implications of ISO 14001 for Regulatory Compliance*, paper presented to the Fourth International Conference on Environmental Compliance and Enforcement, Thailand, 1996, p. 3, available at <[www.inece.org/4thvol1/cascio.pdf](http://www.inece.org/4thvol1/cascio.pdf)>.



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pollution reduction and compliance.<sup>201</sup> Connecticut regulators are providing benefits such as expedited permit reviews, reduced fees, less frequent reporting, facility-wide permits and public recognition for firms that are registered to ISO 14001, have adopted approved principles of sustainability and have good compliance records,<sup>202</sup> and other states are in the process of setting up similar programs.<sup>203</sup> Some jurisdictions have also offered financial assistance<sup>204</sup> and tax breaks.<sup>205</sup> At the end of the day, rigorous, consistent enforcement that detects and appropriately addresses non-compliant behaviour remains an essential component of and the point of departure for any government strategy designed to encourage the private sector to develop and adhere to voluntary programs.

### **Use of Compliance Information from Voluntary Codes in Regulatory Enforcement**

Encouragement by regulators of industry use of voluntary programs could conflict with the desire of prosecutors to use conformity-related information developed by and disclosed to firms as part of voluntary program implementation (e.g. through the services of private auditors, contracted by the firms) as evidence of non-compliance with laws. Use by prosecutors of this sort of information may discourage companies from engaging in voluntary conformity measurement activities if such conformity-related information could be used against them in enforcement actions.<sup>206</sup> The somewhat uneasy compromise that appears to have emerged is for regulators to refrain from attempts to gain access to such information unless a specific investigation is under way, triggered by

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201. See NAPA (footnote 196), p. 47. NAPA notes that EPA's performance track programs will succeed only if the agency finds a way to live up to its promises of inspecting participating firms less often, and rewarding high achievers with new regulatory flexibility (ibid.).

202. State of Connecticut, *An Act Concerning Exemplary Environmental Management Systems*, Substitute House Bill No. 6830, Public Act No. 99-226 (1999), available at <[www.cga.state.ct.us/ps99/Act/pa/1999PA-00226-R00Hb-06830-PA.htm](http://www.cga.state.ct.us/ps99/Act/pa/1999PA-00226-R00Hb-06830-PA.htm)>.

203. See, e.g., discussion of Wisconsin and Oregon programs in NAPA (footnote 196), pp. 49–51, which were reaching operational stages at the time of writing of the NAPA report.

204. According to Kollman and Prakash (footnote 199), pp. 421–422, in the United Kingdom, regulators “have taken great pains to promote EMS-based policies by linking them to other voluntary initiatives and by offering small and medium-size firms financial help in implementing them.”

205. In Canada, one province (Nova Scotia) “offered a corporate income tax credit to assist Nova Scotia companies with costs of achieving ISO 9000 or 14001 certification.” See Wood (footnote 184), p. 22.

206. In Environment Canada's *Enforcement and Compliance Policy for the Canadian Environmental Protection Act, 1999*, March 2001, available at <[www.ec.gc.ca/CEPARegistry/documents/policies/candepolicy/CandEpolicy.pdf](http://www.ec.gc.ca/CEPARegistry/documents/policies/candepolicy/CandEpolicy.pdf)>), the “power and effectiveness of environmental audits as a management tool” is recognized and encouraged (p. 17). Environment Canada enforcement officers are to conduct inspections and investigations in a manner that will not inhibit the practice or quality of auditing (p. 17). Under the policy, environmental audit reports are not to be requested during routine inspections, but audits may be required when enforcement officers have reason to believe that an offence has taken place and there are no other means to obtain the information (p. 17). In the United States, the Environmental Protection Agency “has not offered an attorney-client type of privilege to third-party auditors. This makes the prospects of using such auditors less appealing to U.S. firms, which face the stiffest environmental liability laws in the world.” See Kollman and Prakash (footnote 199), p. 421. At the state level, on the other hand, almost half the states have adopted laws granting some immunity to organizations that carry out environmental audit programs, report violations and take corrective action. Rosenbaum, *ISO 14001 and the Law* (footnote 156), p. 23.

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reasonable belief that an offence has taken place.<sup>207</sup> In some jurisdictions, immunity from regulatory action may be granted to firms that carry out approved audit programs and agree to report violations and take corrective actions.<sup>208</sup>

### **Government Support of “Beyond Compliance” Voluntary Codes**

In some circumstances, the careful, slow, formal and scientific nature of regulatory decision making, and the need to develop legal solutions comparable to those being created in other jurisdictions, may impede the ability of governments to respond rapidly to pressing problems.<sup>209</sup> Examples of this from Canada include the backlog of toxic chemicals yet to be fully and appropriately screened as part of the process of review established under the *Canadian Environmental Protection Act, 1999*,<sup>210</sup> and the as yet unrealized efforts of Canadian governments to devise comprehensive regulatory responses to global warming emissions.<sup>211</sup> In both cases, the federal government, working with a range of partners, has played a lead role in developing non-regulatory, voluntary programs that encourage firms to reduce or eliminate the use of certain toxic substances<sup>212</sup> and lessen the levels of emissions causing climate change<sup>213</sup> at an accelerated rate, in advance of regulatory requirements. Similarly, considerable experimentation with “beyond compliance” programs has been undertaken in the United

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207. This is the Canadian approach, as discussed above.

208. See Rosenbaum (footnote 156), describing the situation in some American states.

209. See generally the summary of the limitations of command and control regulatory approaches in the environmental context, in Orts (footnote 168), pp. 1236–1241.

210. See discussion of this in the report of the Commissioner of the Environment and Sustainable Development, *Managing the Risks of Toxic Substances* (Ottawa: Office of the Auditor General, 1999), Chapter 4.

211. See discussion of this in the report of the Commissioner of the Environment and Sustainable Development, *Responding to Climate Change: Time to Rethink Canada's Implementation Strategy* (Ottawa: Office of the Auditor General, 1998), Chapter 3, available at <[www.oag-bvg.gc.ca/domino/reports.nsf/html/c8menu\\_e.html](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c8menu_e.html)>.

212. Through the Accelerated Reduction/Elimination of Toxics (ARET) program, and the Voluntary Challenge and Registry initiative pertaining to reduction of Canada's greenhouse gas emissions. See discussion of ARET in report of the Commissioner of the Environment and Sustainable Development (footnote 210), p. 5. According to this report, ARET has been credited with leading to reductions in usage far in excess of what could be established through the regulatory process (see esp. para. 4.91). Two commentators have said “The federal government would not have been able to achieve the reductions realised under ARET by relying on the *Canadian Environmental Protection Act*, which regulates less than 10 per cent of ARET's 117 substances; it has neither the procedural tools to assess quickly the toxicity of so many substances, nor the necessary enforcement capacity to apply a purely regulatory approach.” See F. Bregha and J. Moffet, *From Challenge to Agreement? Background Paper on the Future of ARET* (Ottawa: Resource Futures International, December 8, 1997), p. 2. For a more critical perspective, see D. Van Nijnatten, “The ARET Challenge,” Chapter 6, and “The Day the NGOs Walked Out,” Chapter 7, in R. Gibson, ed., *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview Press, 1999), pp. 93–109.

213. Regarding the climate change issue, although the Commissioner of the Environment and Sustainable Development, in his report *Responding to Climate Change* (footnote 211), was generally highly critical of the lack of progress through legislation and regulations, he was considerably more positive regarding the Climate Change Voluntary Challenge and Registry (VCR) Program. “The VCR Program, launched in early 1995 by federal, provincial and territorial energy and environment ministers, is the single most important new program established under the NACPC [National Action Plan for Climate Change]” (para. 3.131). More information concerning the VCR program can be found at <[www.vcr-mvr.ca](http://www.vcr-mvr.ca)>. For a contrary view, see R. Hornung, “The VCR Doesn't Work,” Chapter 10, in Gibson, *ibid.*, pp. 134–140.

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States.<sup>214</sup> While both laudable and understandable, the challenge will be to ensure that promotion of voluntary efforts in this regard does not impede the ability and desire of governments to move forward decisively with regulatory approaches and rigorous enforcement whenever this is possible.<sup>215</sup>

### **Corporate Governance and Voluntary Codes**

Laws pertaining to corporate governance have the potential to stimulate corporations to be more open, transparent and accountable in their decision making, to be more accessible to shareholders (if not to a broader range of stakeholders), and to stimulate firms to put in place voluntary codes that demonstrate proactive risk management concerning a range of issues that might affect profitability.

The collapse of Enron and Worldcom and the subsequent promulgation into law of the *Sarbanes-Oxley Act of 2002*<sup>216</sup> in the United States signal the advent of a new era of controls on corporate governance and public disclosures of public corporations in United States, and will undoubtedly have a ripple effect on other jurisdictions and corporations around the world.

Among other things, Section 302 of the *Sarbanes-Oxley Act* requires that the chief executive officer and the chief financial officer of public corporations must each certify, in each annual or quarterly report filed with the Securities and Exchange Commission, that the officer has reviewed the report and that based on the officer's knowledge, the report does not contain an untrue statement of a material fact or omit to state a material fact, and the financial statements fairly present in all material respects the financial condition and operational results of the company. Moreover, the officers are responsible for establishing and maintaining internal controls designed to ensure that material information is made known to the officers in a timely manner, and that the officers have evaluated the effectiveness of those controls and have presented their conclusions in that regard in the relevant report. It remains to be seen exactly how *material fact* will be defined, but it would be reasonable to conclude that failure to disclose problems pertaining to environmental, worker, community, human rights and other issues that might affect the profitability of a corporation could fall within the meaning of *material fact*. Arguably, codes of conduct that proactively address such activities would decrease the likelihood of material fact disclosures becoming necessary.

Under section 406 of the *Sarbanes-Oxley Act*, public corporations are required to disclose whether or not (and if not, why not) the corporation has adopted a code of ethics for its senior financial officers, applicable to all key corporate officers. The code of ethics must cover conflicts of interest, disclosure policies and compliance with governmental requirements. As used within the context of *Sarbanes-Oxley Act*, the notion of *ethics* seems very much to be centred around notions of legal compliance.

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214. See, e.g., discussion of the Environmental Protection Agency's Project XL (excellence and leadership) and Star Track initiatives, and related state innovations, in NAPA (footnote 196).

215. See comments by environmentalists and labour representatives in Moffet, Bregha and Middelkoop, "Responsible Care," Chapter 6, below.

216. Public Law 107-204, 116 Stat. 745, 15 USCS 7201.

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Some might question whether corporate voluntary codes concerning environmental, worker, community, human rights protection and other objectives that extend beyond legal requirements are consistent with the fiduciary obligations of corporate directors to their shareholders. The suggestion here is that such codes are entirely consistent insofar as their use is intended to enhance the profitability of firms, and to demonstrate this to shareholders and other stakeholders. In addition to implementing voluntary codes to proactively address environmental, worker, community and other issues that might otherwise interfere with profitability, corporations may turn to voluntary codes as a way of responding to the desire of shareholders for more open and accessible corporate governance.<sup>217</sup>

Quite apart from the *Sarbanes-Oxley Act*, commentators in the pre-Enron era had noted that the disclosure provisions of the 1934 *Securities Act* (ss. 14(a)) give the Securities and Exchange Commission the authority to require disclosure as “necessary or appropriate in the public interest or for the protection of investors.”<sup>218</sup> This provision could easily be interpreted as encouraging firms to put in place codes that would indicate good corporate management and diminish the likelihood of problems arising that would necessitate public interest or investor protection-type disclosures.

In the United Kingdom, since July 2000, trustees of occupational pension schemes have a duty established by regulation to disclose their policy on socially responsible investment in their Statement of Investment Principles.<sup>219</sup> Arguably, these requirements will stimulate corporations to draw on voluntary codes as a means of demonstrating that they are meeting pension law requirements.<sup>220</sup> The shareholder proposal process provided under the *Canadian Business Corporations Act* has recently been amended to give shareholders a limited right to add items to the agendas of annual meetings.<sup>221</sup> This sort of provision has been used by social activist shareholders to stimulate changes to environmental, labour and other practices of corporations.<sup>222</sup> Provisions of this type can be used to stimulate firms to develop codes in response to shareholder proposals.

Taken together, although none of the recent corporate governance reforms *mandates* that firms put in place voluntary codes addressing environmental, worker,

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217. For example, in the U.S., the Coalition for Environmentally Responsible Economies (CERES) principles, enunciated initially by an association of socially responsible investment firms and public pension funds, which then blossomed into a broader multistakeholder alliance. The 10-point CERES code of corporate environmental conduct has been publicly endorsed by more than 50 companies. See <[www.ceres.org](http://www.ceres.org)>.

218. See, e.g., R. Steinhardt (footnote 128); and C. Williams, “The Securities and Exchange Commission and Corporate Social Transparency,” *Harvard Law Review* 112 (1998), pp. 1197–1311.

219. *Occupational Pension Schemes (Investment) Regulations 1996* (SI 1996 No. 3127), which came into force in July 2000.

220. See, e.g., Association of British Insurers, *Investing in Social Responsibility: Risks and Opportunities* (2001), available at <[www.abi.org.uk/Display/File/364/csr\\_Report.pdf](http://www.abi.org.uk/Display/File/364/csr_Report.pdf)>, for an example of Corporate Social Responsibility voluntary guidelines developed to respond (in part) to the new regulations.

221. The *Canada Business Corporations Act*, c. S-11, was amended under the *Act to Amend the Canada Business Corporations Act*, S.C. 2001, c. 14.

222. See, e.g., shareholder activist propositions of the U.S. Walden Asset Management group, which, according to a recent report, have led to significant changes in several U. S. companies. The report is available at <[www.waldenassetgmt.com/social/shareholder.html](http://www.waldenassetgmt.com/social/shareholder.html)>.

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community and other issues affecting the firms, the reforms do “create the space” for voluntary codes to be used to further statutory obligations oriented at enhancing stakeholder (and, in turn, shareholder) transparency, accountability and accessibility.

### **Public Law Fairness Constraints on Voluntary Codes**

Do public law conceptions of procedural fairness apply to the operation of a voluntary code program so that, for example, disgruntled participants in a voluntary code program can appeal to the courts on the same grounds of procedural fairness as those that would apply to a conventional public regulatory or administrative program in situations of apparent unfair code administration? It should be noted that in Canada, government bodies are subject to common law and Charter obligations of natural justice, procedural fairness and natural justice.<sup>223</sup> A good starting assumption would be that, generally, insofar as a *government*-supported voluntary code program is endorsed, operated and/or funded by a State body, and affects serious interests of individuals, that program might be under a higher obligation to adhere to rules of fairness and “natural justice” than a non-government-supported, private voluntary code program operated by a private body. While it would seem that this is indeed the assumption of many judges, it seems to be overridden in certain cases (more so in some jurisdictions than in others), when courts conclude that there is a significant “public” element to an otherwise privately operated voluntary code regime.

There appear to be two important and difficult thresholds that need to be overcome before public law concerns with procedural fairness and natural justice obligations would be considered to apply to the operations of voluntary code programs. The first requires a determination of whether a “public body” is involved. When a voluntary code is developed directly by government, it is difficult to argue that a public body is not involved. For example, a government-funded and -operated environmental labelling program would seem to be subject to public law obligations of fairness.<sup>224</sup> Use of the government procurement power in support of voluntary code programs could also trigger public law procedural fairness obligations.<sup>225</sup> When government officials only participate in the development of the voluntary code or standard, it is less clear what public law fairness obligations would apply.<sup>226</sup> Use of standards bodies represents

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223. See generally J. Evans, H. Janish, D. Mullan and R. Risk, *Administrative Law: Cases, Text and Materials*, 4th ed. (Toronto: Emond Montgomery, 1995). For an example, see *Martineau and Butters v. Matsqui Institution Disciplinary Board* [1978] 1 S.C.R. 118.

224. Originally, the Canadian Environmental Choice (EcoLogo) program was administered directly by the federal government. Administration is contracted out, but the draft guidelines for new types of EcoLogo products are published in the *Canada Gazette*. For an in-depth discussion of the EcoLogo program, see Harrison, “Canada’s Environmental Choice Program,” Chapter 10, below.

225. For example, if the federal government required, for federal contracts over a certain size, contractors to comply with an environmental management system code or standard or a human rights code or standard. For a general discussion of the fairness requirements associated with the federal procurement power, see K. Webb, “Thumbs, Fingers and Pushing on String: Legal Accountability in the Use of Federal Financial Incentives,” *Alberta Law Review* 21 (1993), pp. 501–535.

226. Other than the due diligence, abuse of process, officially induced error and procedural fairness considerations discussed above in the context of regulatory enforcement activities.

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another area in which there are no clear answers.<sup>227</sup> When an industry association, a non-governmental organization, a group of industry and NGO representatives, or a group of professionals initiates and develops a code, it is more difficult to characterize such bodies as public. The *Ripley*<sup>228</sup> decision discussed above, concerning the refusal of the court to apply the Charter to a disciplinary action of a privately organized investment organization, is indicative of judicial attitudes on such matters.

It is interesting to note that in certain circumstances, U.K. courts have ruled that seemingly private organizations, with no statutory basis, can be subject to public law rules of procedural fairness. One notable example of this is the case of *R. v. Panel on Take-overs and Mergers*,<sup>229</sup> in which the court found that because of the public-oriented function performed by the non-governmental Panel on Takeovers, its long, historically close relationship with government, and the fact that the Panel was referred to in legislation, the body was subject to public law procedural obligations. The case of *McInnes v. Onslow Fane*,<sup>230</sup> concerning the operations of the non-governmental British Boxing Board of Control, is another example of a U.K. court taking special notice of the public character of a private self-regulatory body.<sup>231</sup>

The U.K. Advertising Standards Authority (ASA), a non-statutory, privately funded, voluntary organization devoted to maintaining high standards in the advertising industry, has also been held to be a public body for purposes of procedural fairness. Under 1988 regulations promulgated by the U.K. government, the ASA was explicitly recognized as an “established means” for purposes of controlling the content of non-broadcast advertising.<sup>232</sup> When an advertiser, agency or publisher persistently or deliberately breaches the ASA’s codes, the ASA can ask the Director-General of the Office of Fair Trading (a governmental office) to use its discretionary powers to seek an injunction through the courts. In June 1989, a U.K. court declared that, since the ASA was clearly exercising a public law function, its procedures (as distinct from the content of its adjudications) were subject to judicial review.<sup>233</sup> The court tested the ASA

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227. In Canada, the federal government is the custodian of the standards process through a Crown corporation, the Standards Council of Canada. Standards developers, such as the Canadian Standards Association, are non-profit corporations that are not part of government.

228. See footnote 92.

229. See footnote 54.

230. [1978] 1 W.L.R. 1520.

231. The case is discussed in greater detail later in the chapter. It should be noted that in continental Europe, it is not uncommon to see public law status bestowed on chambers of commerce. This is the case in France, Germany, Italy, Austria, Spain, Luxembourg and the Netherlands, but not in the United Kingdom. See G. Fallon and R. Berman Brown, “Does Britain Need Public Law Status Chambers of Commerce?” *European Business Review* 12 (2000), pp. 19–27, p. 20.

232. *Control of Misleading Advertisements Regulations 1988* (SI 1988 No. 915).

233. See Advertising Standards Authority (footnote 76).

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procedures and found them to be “perfectly proper and satisfactory.”<sup>234</sup> Here we see an example of a private self-regulatory body evolving into a government recognized body, and its processes being recognized as fair by the courts.

It is difficult to predict whether Canadian courts will, in the right circumstances, follow the U.K. lead in holding public-oriented, private voluntary codes to public law notions of fairness. So far they have not, although there has been some willingness to use notions of fairness associated with private contractual law to much the same effect as those decisions founded in public law. In Canada, generally, as one moves from statutory-required decision making, in which departments, regulatory agencies and administrative officers have principal roles, and decisions pertain directly to the liberty and security of individuals, to instances of voluntary, non-government-led rule making and rule implementation, the potential scope and intensity of public law “fairness” concerns would appear to diminish. In the context of a voluntary code decision-making body, when the “public” threshold can be met (i.e. when it can be determined that a voluntary code administrative body is a public body or is exercising a public function), the second threshold then needs to be addressed.

The second threshold concerns the question of whether an individual’s rights, interests, property, privileges, security or liberty have been affected so as to trigger application of public conceptions of procedural fairness. Two possible scenarios in which these might arise are, first, between code administrators and individual members in a disciplinary capacity, and second, between the code administrators or firms that operate codes and the affected public. With respect to the former, the *Ripley* case discussed earlier indicates the Canadian judicial reluctance to characterize private self-regulatory bodies as being subject to Charter protections, even though an argument can be made that such bodies might in some respects be protecting the public through their actions. Concerning public law legal actions by affected citizens against private code administrators or private sector members of a code, one could envisage situations in which citizens might be harmed by action or inaction in a voluntary code context,<sup>235</sup> but so far no such cases have materialized.

At this point, then, the likelihood in Canada of public law concerns with procedural fairness, natural justice or *Charter* protections applying to non-governmental voluntary codes appears comparatively small. However, even though *public law* notions of fairness may not directly apply to private voluntary code administration, we have seen in earlier discussion of the decision of *A.A.A. Khan Transport Inc. v. Bureau d’éthique commerciale de Montréal Inc.* that Canadian courts may find that *private contract law* conceptions of fairness may necessitate that code administrators meet basic procedural obligations, such as providing a member being disciplined with a notice that a complaint has been laid, and giving that member the opportunity to respond to the complaint before

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234. Lord Justice Glidewell, in *R. v. Advertising Standards Authority* (footnote 77). Subsequent challenges to the ASA’s procedures have also found them to be satisfactory. See, e.g., *ASA Welcomes High Court Victory*, January 17, 2001, available at <[www.asa.org.uk/news/show\\_news.asp?news\\_id=57&news\\_section=General](http://www.asa.org.uk/news/show_news.asp?news_id=57&news_section=General)>. (See also *SmithKline Beecham plc v. Advertising Standards Authority* [2001] EWJ No. 49 Queen’s Bench Division, Administrative Court, 17 January 2001.)

235. For example, when a government-approved or -supported body administering a voluntary code is alleged to have treated an individual complainant improperly, in terms of procedural fairness or a deprivation of security of person.

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being removed from the organization. Moreover, the decisions of the U.K. courts with regard to the Advertising Standards Authority indicate that the application of public law notions of fairness to non-governmental code administration bodies are not out of the question, particularly when there is an observable “public” dimension to a non-governmental regime. Synthesizing the foregoing, those voluntary code operators who wish to err on the side of caution might decide to include notice and comment, openness, transparency and other procedural fairness elements in their voluntary code regimes to ensure that their programs operate in a manner consistent with public and private law concepts of fairness, and thereby decrease the likelihood of legal challenge on such grounds.

### **Constitutionally Protected Freedom of Expression and Voluntary Codes**

In both Canada and the United States, freedom of expression is constitutionally protected.<sup>236</sup> Certain forms of commercial communications have been interpreted by Canadian and American courts as being accorded protection as well, although fewer protections than those provided to other safeguarded forms of expression.<sup>237</sup> In view of these interpretations, the question can legitimately be asked: are public statements made by company officials in support of a firm’s code of conduct subject to constitutional protections, so that such statements are not actionable under deceptive marketing legislation?

Nike Inc.’s statements and actions concerning the employees of its subcontractors provide an illustration of how the constitutional protections may apply. In the early 1990s, Nike began receiving criticism for sweatshop conditions at its contractors’ factories.<sup>238</sup> The company responded by putting in place a memorandum of understanding (i.e. a code of conduct) between itself and its contractors that required its contractors to comply with local minimum-wage laws, overtime regulations, child labour laws, occupational safety and health rules, and other requirements designed to ensure a humane workplace.

In 1996, a *New York Times* columnist wrote two editorials accusing Nike Inc. of exploiting Asian labour. The CEO of Nike replied in a letter to the editor, making various statements in defence of Nike’s labour practices. In 1998, Marc Kasky, a California man, brought a legal suit against Nike, claiming that the corporation engaged in misleading advertising contrary to the state’s *Business and Professions Code*. California’s law permits an individual to sue as a private attorney general on behalf of all the state’s residents without having to show that anyone has been injured. Kasky indicated that the CEO’s comments in the *New York Times* were misleading in light of subsequent third-party audit reports (leaked to the public through media accounts) that alleged that certain

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236. In Canada, see s. 2 of the *Canadian Charter of Rights and Freedoms*. In the United States, see the United States Constitution’s First Amendment and the Fourteenth Amendment’s due process clause.

237. In Canada, see, e.g., *R.J.R. Macdonald v. Attorney General of Canada*, [1995] 3 S.C.R. 1999; in the United States, see *Bolger v. Youngs Drug Products Corp.* (1983) 463 U.S. 60.

238. The following account of the events leading up to the legal action between Marc Kasky and Nike Inc. draws substantially on R. Parloff, “Can We Talk?” *Fortune*, September 2, 2002.



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Nike contractors in Vietnam and China were paying less than the minimum wage. When Kasky read about the audit, he is reported to have said, “It struck me as false advertising. The Nike code of conduct is marketing their products. They’re marketing it to me under false grounds.”<sup>239</sup>

In a decision rendered in May 2002, the California Supreme Court ruled that Nike’s statements were commercial speech designed to maintain and increase its sales and profits, and, as such, were subject to only minimal First Amendment protections.<sup>240</sup> Therefore, Kasky was entitled to take Nike to trial, and he could prevail if he were to show that the company’s communications were misleading, either in what they asserted or what they left out.<sup>241</sup>

On the face of it, the California Supreme Court’s decision appears reasonable: it is clear that a significant reason why firms develop and implement codes that address environmental, labour, consumer, human rights, animal protection and other aspects of their activities, and make communications concerning them, is to maintain or enhance their customer base and commercial opportunities. When firms are not accurate in public communications they make concerning activities addressed in their codes, it is difficult to understand on what basis such inaccuracies should not be subject to laws against deceptive statements. The ruling in now way hinders the ability of corporations to engage in public debate on issues such as the role of corporations in ensuring environmental or worker protection; it only constrains their ability to make misleading assertions about particular corporate practices in the course of public debate. Arguably, the California Supreme Court’s interpretation will encourage firms to exercise greater care when making statements about their codes and their activities — for example, by putting in place management systems to ensure that claims are backed up by day-to-day practice. On the other hand, it may have a chilling effect on firms making claims that they cannot support. In this way, the law will reward firms that make accurate statements about their codes and discourage those that do not, thereby maintaining a level, competitive playing field.

## **Constitutionally Protected Freedom of Religion and Voluntary Codes**

In both Canada and the United States, freedom of religion is constitutionally protected.<sup>242</sup> Can such protections affect the operation of commercially oriented voluntary codes that relate to religious practices? Some court interpretations suggest that it can. As part of both the Islamic and Jewish faiths, non-governmental food preparation certification and labelling standards have been established and are administered through religious bodies (halal foods are those prepared in compliance with Islamic standards,

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239. Ibid.

240. *Kasky v. Nike, Inc.* (footnote 150).

241. At the time of writing, the California Supreme Court’s ruling had been appealed to the United States Supreme Court, but had not yet been heard.

242. In Canada, see s. 2 of the *Canadian Charter of Rights and Freedoms*. In the United States, see the United States Constitution’s First Amendment.

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and kosher foods are those prepared in compliance with Jewish standards).<sup>243</sup> These religious-based food certification and labelling programs operate around the world, typically with little or no government support. In certain American states, legislation has been passed that specifically prohibits false labelling of food as either halal or kosher.<sup>244</sup> In essence, these laws can be considered to be supplements to the non-governmental halal and kosher voluntary code regimes in place. However, in a July 2000 judgment, the New York Eastern District Court ruled that statutory provisions designed to protect consumers against false labelling of food as kosher were unconstitutional, as a violation of the First Amendment because they were interpreted as endorsing and advancing religion.<sup>245</sup> Although the decision throws into question the ability of U.S. governments to regulate halal or kosher food programs, it does not challenge the private operation of such programs. In this regard, it represents another example of how governments may be constrained from regulatory action for some activities in ways that do not constrain private voluntary regimes.

## **Federated State Interjurisdictional Constraints on Voluntary Codes**

One of the reasons why governments in federated states may initiate, participate in or sponsor voluntary measures is to overcome interjurisdictional constraints that hamstring their ability to develop more conventional legal instruments. For example, federal and provincial governments in Canada share constitutional authority over environmental and consumer protection activities. It is frequently difficult for the federal and provincial governments to determine exactly who has what authority in a particular area, and to reach agreement on coordinated legislative action. In such situations, governments may turn to voluntary measures either as transitional instruments (while coordinated, harmonized federal-provincial legislative solutions are being negotiated) or as supplements to legislative approaches. In a federal-provincial setting, such voluntary measures may be more quickly developed and implemented than may legislated measures. Thus, for example, a coalition of Canadian government and other stakeholders has devised and implemented voluntary measures pertaining to the reduction of excess packaging,<sup>246</sup> the protection of personal information,<sup>247</sup> the reduction of toxic

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243. See, e.g., information at <[www.ifanca.org/halal.htm](http://www.ifanca.org/halal.htm)> (halal) and <[www.jlaw.com](http://www.jlaw.com)> (kosher).

244. Ibid.

245. See *Commack Self-Service Kosher Meats, Inc. v. Rubin* 106 F. Supp. 2d 445 (U.S. Eastern District Court of New York, 2000).

246. See discussion of National Packaging Protocol in the report of the Commissioner of the Environment and Sustainable Development, *Working With the Private Sector*, (Ottawa: Office of the Auditor General, 2000), Chapter 8, pp. 10–11, available at <[www.oag-bvg.gc.ca/domino/reports.nsf/html/C0menu\\_e.html](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/C0menu_e.html)>. According to the report, the protocol has been successful in meeting its objectives, ahead of schedule.

247. See discussion of the *CSA Model Code of Personal Information* in Bennett, “Privacy Self-Regulation,” Chapter 8, below. Provisions of the CSA Model Code have been incorporated into federal legislation (the *Personal Information Protection and Electronic Documents Act*, S.C. 1999-2000, C-5, discussed earlier in this chapter), and may eventually become the basis for provincial legislation.

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substances,<sup>248</sup> consumer protection principles for electronic commerce,<sup>249</sup> the reduction of substances contributing to climate change,<sup>250</sup> measures for enhancing biodiversity,<sup>251</sup> and a national financial services ombuds-service.<sup>252</sup> In federated States, these programs, while not necessarily as effective as harmonized legislative initiatives, demonstrate the potential of voluntary initiatives as policy instruments capable of avoiding jurisdictional barriers faced by laws and, in some cases, in responding more rapidly and in a more cost-effective manner to a particular policy problem than can intergovernmental legislated approaches.

### **Voluntary Codes and Competition Law**

Adam Smith wrote that when competitors get together the conversation often ends in a conspiracy against the public.<sup>253</sup> Since many voluntary codes involve competitors coming together to make standards and rules, and to implement them in ways that may affect others, it is no wonder that suspicions arise about such arrangements. There is little doubt that voluntary codes agreed to by some but not all businesses in a particular sector may have the effect of reducing competition and creating barriers to the entry of other players into the marketplace, and thereby reduce market competitiveness. Businesses that do not join a dominant industry association and adhere to its rules may suffer economically by being denied access to essential facilities and otherwise excluded from an activity or industry.<sup>254</sup> This type of injury can adversely affect consumers, since it may reduce competition in a particular industry and prevent new businesses from entering the industry.

There are a number of cases in which courts have held that businesses used voluntary code arrangements with the intent of hurting the commercial viability of rivals. In *Hydrolevel Corp. v. American Society of Mechanical Engineers (ASME)*,<sup>255</sup> the jury

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248. See discussion of the Accelerated Reduction/Elimination of Toxics (ARET) program earlier.

249. Available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01180e.html>>. At the time of writing, an accompanying *Canadian Code of Practice for Consumer Protection in Electronic Commerce* was being finalized.

250. See Canada's Climate Change Voluntary Challenge and Registry initiative, discussed earlier.

251. See description of the Biodiversity Stewardship in Resource Industries (BSRI) initiative at <[www.cbin.ec.gc.ca/about/default\\_e.cfm](http://www.cbin.ec.gc.ca/about/default_e.cfm)>. According to the inaugural newsletter of the BSRI initiative, "The BSRI is a multi-stakeholder initiative involving government, industry and conservation groups. It is not a federal government initiative. Federal government departments are participating in order to catalyze action and provide facilitative services. The initiative builds on the fact that there is a strong interest among conservation groups and industry to improve their dialogue in order to develop new conservation initiatives and partnerships. Faced with the 'spongy stick' of the new *Species at Risk Act*, industry needs to do this." Note that the *Species at Risk Act* was passed in 2002, bringing to a close a nine-year legislative process.

252. For more information concerning this initiative, see <[www.fin.gc.ca/news01/01-124e.html](http://www.fin.gc.ca/news01/01-124e.html)>.

253. A. Smith, *An Inquiry Into the Nature and Causes of The Wealth of Nations*, 1776 (London: Oxford University Press, 1997), Vol. 1, Bk. 1, Ch. 10, Pt. 2.

254. See R. Heidt, "Populist and Economic v. Feudal: Approaches to Industry Self-Regulation in the United States and England," *McGill Law Journal* 34:1 (1989), p. 41.

255. 635 F. 2d 118 (2d Cir. 1980).

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found that the individual defendants, important members of ASME, a standards-setting body, had acted to protect their companies from competition by rivals by suggesting, in the name of ASME, that the competitors' products were unsafe when in fact they were safe.<sup>256</sup>

However, voluntary codes — including standards developed through formal standards bodies — also have the potential to *increase* efficiency. Voluntary codes can more readily allow new small companies to compete with large established companies. For example, a merchant or product that meets standards and receives a logo or label for this can, to some extent, minimize the advantage of more established larger competitors, who can rely on past advertising and reputation. Labels and logos, which are often part of voluntary code schemes, can also help consumers distinguish between companies and products, allowing the consumer to reward those that meet credible standards.

In the context of American antitrust law, judicial treatment of voluntary codes has undergone a remarkable transformation, from hostility in the early years, to qualified acceptance today. Initially, American courts were very reluctant to support the use of voluntary code-type arrangements. In the 1941 case of *Fashion Originators Guild of America v. Federal Trade Commission*,<sup>257</sup> a unanimous U.S. Supreme Court ruled that even though the Guild was pursuing a legitimate goal, self-regulation was fundamentally unacceptable. The *Fashion* case drew on the 1935 judgment in *Federal Trade Commission v. Wallace*.<sup>258</sup> In *Wallace*, the court condemned self-regulation in the coal industry aimed at preventing unscrupulous dealers from misrepresenting their coal. The court rejected any attempt at self-regulation as illegitimate in principle, noting “It is not the prerogative of private parties to act as self-constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic and restrictive measures their conceptions thus formed.”<sup>259</sup> The court’s refusal to allow any industry self-regulation out of fear that the industry would abuse the power is termed the “jealousy impulse” by commentator Robert Heidt.<sup>260</sup> Heidt postulates that this impulse may arise from the uniquely American experience with vigilantes. According to this theory, the court’s fear of the Ku Klux Klan and other similar manifestations of private rule has resulted in an extreme judicial reluctance to allow private groups to exercise substantial power.<sup>261</sup>

The American judicial hostility toward industry self-regulation has been tempered in recent years by an innovative approach that emerged in 1978 to deal with the antitrust aspects of voluntary codes. The approach, formulated by the so-called Chicago School, seeks to maximize economic efficiency. The court’s role in this approach is to determine whether the restrictions resulting from self-regulation are justified by increased efficiency. The court attempts to determine whether the restriction will result in lower prices or better products for consumers, or will help to overcome market

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256. See also *Structural Laminates v. Douglas Fir Plywood Association* 261 F. Supp. 154 (D. Or. 1966).

257. 312 U.S. 457 (1941).

258. 75 F. 2d 733 (8th Cir. 1935).

259. *Ibid.*, p. 737.

260. Heidt (footnote 254), p. 49.

261. *Ibid.*, p. 57.

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imperfections such as free riders. The result is that the Chicago School approach tolerates most self-regulation, except when it serves to fix prices or other terms of sale.<sup>262</sup>

Although the Chicago School approach has been criticized for failing to consider non-economic factors,<sup>263</sup> it continues to be given significant weight by the American courts and has recently been reaffirmed by the Supreme Court.<sup>264</sup>

In keeping with the more tolerant approach to voluntary codes taken by American courts in recent years, leading American regulatory officials have also endorsed self-regulatory approaches, except when they are used to put new rivals or new forms of competition at a disadvantage.<sup>265</sup> The use of clear and fair procedures has been expressly acknowledged as helping prevent abuses of the self-regulation process.<sup>266</sup> It would appear that properly functioning formal standards bodies, which operate with meaningful participation of all stakeholders, according to a transparent, rules-based process, are in a good position to withstand challenges that their operation contravenes antitrust laws.<sup>267</sup> The Chicago School approach is unique to the United States. The British approach differs substantially. In the first place, the British courts, unlike their American counterparts, have never been as hostile toward industry self-regulation. In fact, British courts have long viewed industry self-regulation as a complement to the formal justice system. An important British case that illustrates the deference shown to self-regulatory bodies by the British courts is *McInnes v. Oslow Fane* (discussed earlier).<sup>268</sup> This case dealt with the British Boxing Board of Control, an organization with no governmental authority. The Board had devised a licensing system to control people who wished to participate in boxing. The plaintiff in the matter was an applicant rejected by the Board.

The court upheld the Board's decision and noted that "there are many bodies that, though not established or operating under the authority of statute, exercise control, often on a national scale, over many activities that are important to many people, both in providing a means of livelihood and for other reasons."<sup>269</sup> In contrast to the American approach, the court indicated that it would give wide discretion to self-regulatory organizations, stating, "There are many reasons why a license might be refused to an applicant of complete integrity, high repute and financial stability. Some may be wholly unconnected with the applicant, as where there are already too many licenses for the good of boxing under existing conditions."<sup>270</sup> This statement would likely shock those

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262. *Ibid.*, p. 45. The seminal case in the Chicago School approach was the 1978 decision *National Society of Professional Engineers v. United States* 435 U.S. 679 (1978).

263. *Ibid.*, p. 61.

264. *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.* 472 U.S. 284 (1985).

265. See R. Pitofsky, Chairman, Federal Trade Commission, "Self Regulation and Antitrust," prepared remarks for presentation at the D.C. Bar Association Symposium, Washington, February 18, 1998, available at <[www.ftc.gov/speeches/pitofsky/self4.htm](http://www.ftc.gov/speeches/pitofsky/self4.htm)>. Although Chairman Pitofsky's remarks are explicitly stated to be his, not necessarily reflecting those of the Commission or other Commissioners, they have been posted on the FTC Web site since 1998.

266. *Ibid.*

267. See generally, A. Marasco (footnote 145), and J. Q. Smith, J. P. Bolger and A. Marasco (footnote 145).

268. See footnote 230.

269. *Ibid.*, p. 1527.

270. *Ibid.*, p. 1532.

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familiar with the American conception of competition law, since it suggests that a private group acting without governmental authority could legitimately decide to restrict competition in a particular industry. American courts would clearly not accept this.<sup>271</sup>

In *Greig v. Insold*,<sup>272</sup> the traditional governing bodies of cricket, the International Cricket Conference (ICC) and the Test and County Cricket Board (TCCB), banned players who participated in matches sanctioned by the World Series Cricket Party from playing in ICC and TCCB matches. In a challenge of the ban heard by a British court, a group of players who were banned by the ICC and TCCB argued that the ban was a restraint of trade. The court ruled that the actions of the ICC and TCCB were justified, since they were “in a sense custodians of the public interest.”<sup>273</sup> The public interest the court was protecting was that cricket be “properly organized and administered.”<sup>274</sup> The court tacitly, and without further elaboration, determined that the ICC and TCCB were the custodians of that interest. Heidt has concluded that this approach is far different from that of American courts, which would tend not to concern themselves with protecting a particular organization, even if it were traditionally ingrained.<sup>275</sup>

British courts have not emulated the largely economic approach of the Chicago School, preferring to consider non-economic factors such as the necessity of the sanctions for preserving the self-regulatory body, and the public-oriented role of the body in society. A case that illustrates the British approach is *Re: Association of British Travel Agents, Ltd. Agreement*.<sup>276</sup> This involved around enforcement measures used by the Association of British Travel Agents (ABTA) to stabilize their membership. These measures had the effect of preventing members from dealing with non-members. The restrictions limited competition between members, as well as nearly eliminating foreign travel agents from the British market, since few foreign travel agents were ABTA members. In supporting the Association’s sanctions, the British court looked at four factors: how much the restrictions injured third parties, whether the restrictions were necessary to preserve the Association, whether the restrictions threatened the existence of non-members, and whether the restraint is customary in the industry. Ultimately, the court ruled that the restrictions were necessary to preserve the association and were not severe enough to drive non-members out of business.

In addition to the actions of U.K. courts concerning voluntary codes, the U.K. Office of Fair Trading (OFT) has also been called upon to review potentially anti-competitive practices concerning voluntary codes. In 1996, the OFT was called upon to review the activities of the U.K. “95 Plus” Buyers Group, which was organized by the

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271. See, in contrast, *Hoover v. Ronwin*, 466 U.S. 558 (1984).

272. *Greig v. Insold* [1978] 1 W.L.R. 302.

273. *Ibid.*, p. 347.

274. *Ibid.*, p. 347.

275. Heidt (footnote 254), p. 76.

276. *Re: Association of British Travel Agents, Ltd. Agreement* [1984] I.C.R. 12.

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World Wildlife Fund for Nature.<sup>277</sup> Its 84 members, largely U.K. retail wood product traders, distributors and retailers, initially stipulated that they would only receive wood products that were certified by the Forest Stewardship Council's sustainable forestry program. In an apparent response to the OFT review, the buyers group broadened their purchasing stipulation to encompass both "FSC certification or comparable certification schemes."

In Canada, it is a criminal offence to "conspire, combine, agree or arrange to restrain or injure competition unduly."<sup>278</sup> Nonetheless, the *Competition Act* provides a defence for those whose arrangement relates to the exchange of statistics, the definition of product standards, the definition of terminology used in an industry, protection of the environment, or the standardization of containers used by an industry.<sup>279</sup> However, this defence does not apply when the arrangement results in a reduction of competition in respect of prices, quantity or quality of production, markets or customers, or when the alliance prevents or deters anyone from entering or expanding a business.<sup>280</sup> According to the Commissioner of Competition, the defence will fail not only when the agreement is explicitly directed at reducing competition, but also when the indirect effect is to substantially reduce competition.<sup>281</sup>

So far, the courts have not considered a case in which the defences and exceptions contained in ss. 45(3) and 45(4) have been used.<sup>282</sup> However, in a Competition Bureau publication on strategic alliances, an example is provided that illustrates the Bureau's typical treatment of voluntary codes. In the example, the four largest manufacturers in an industry that is under pressure to be more environmentally responsible create an alliance to develop new technology for reducing emissions. In this example, the alliance falls under one of the ss. 45(3) defences, namely protecting the environment.<sup>283</sup> On the basis of the Competition Bureau's discussion, it would appear that the Commissioner will only initiate an inquiry when, for example, the environmental goal of the alliance required a reduction of final product outputs rather than of emissions.<sup>284</sup> The publication also notes that there is less chance of anti-competitive behaviour when all interested parties are involved in the development process.<sup>285</sup> In light of the uncertainty concerning what constitutes acceptable and unacceptable voluntary

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277. The following information is derived from "Industry Rounds on FSC," *Forestry and British Timber*, 1996, and Department of Foreign Affairs and International Trade (Canada), *Forests: A National Experience*, submitted to the World Trade Organization's Committee on Trade and Environment, and its Committee on Technical Barriers to Trade, March 11, 1998, WT/CTE/W/81 G/TBT/W/61, p. 20.

278. *Competition Act*, R.S.C. 1985 c. C-34, s. 45(1)(d)

279. *Ibid.*, s. 45(3).

280. *Ibid.*, s. 45(4).

281. Director of Investigation and Research (Canada), *Strategic Alliances Under the Competition Act* (Hull, Que.: Ministry of Supply and Services, 1995), p. 8.

282. *Ibid.*

283. *Competition Act*, s. 45(3)(i).

284. Director of Investigation and Research (footnote 281), p. 18.

285. *Ibid.*

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code activity, from a competition law perspective, the Competition Bureau has invited firms contemplating entering into a voluntary code-type arrangement to take advantage of the Bureau's advisory opinion services.<sup>286</sup>

Although the Bureau's interpretation of the provision does not have the force of law, and is merely an indication by the Commissioner as to whether a proposal is likely to attract liability under the Act, the opinion will provide a basis for assessing the risk of prosecution under the Act, and may provide the foundation for a defence. The Canadian Chemical Producers' Association has twice sought and received approval for their Responsible Care program, as discussed by Moffet, Bregha and Middelkoop in their chapter in this volume.

Canadian courts have in some cases found the actions of industry associations to be anti-competitive, and in others have allowed the activities to continue. In *R. v. Electrical Contractors Association of Ontario*<sup>287</sup> a voluntary association of electricians was found to have unduly lessened competition by restricting membership in the organization.<sup>288</sup> However, successful actions against self-regulatory associations are rare in Canada, an apparent indication that the courts do not view them in the same critical manner evidenced historically in the United States. The case of *R. v. British Columbia Fruit Growers Association et al.*<sup>289</sup> illustrates the amount of leeway Canadian courts will give to self-regulatory bodies. In this case, the growers association, composed of many members of the industry, adopted a rule that prevented storage facilities from offering their services to non-members. This effectively limited independent fruit growers to selling their products fresh. The court acquitted the fruit growers association, noting that non-members could still sell their fruit.

Because any sort of cooperation between competitors is viewed with suspicion, it would appear to be prudent for industry associations attempting to establish voluntary codes to solicit the participation of outside interests from the very outset of code development. Voluntary codes developed through a transparent process and with the meaningful involvement of outside interest groups are less likely to trigger suspicions of collusion because participation of outside groups representing, for example, consumer interests, diminishes the likelihood of anti-competitive and collusive behaviour taking place. Early consultation with the Competition Bureau (including seeking an advisory opinion from the Bureau) would appear to be prudent for any industry association considering developing a voluntary code.

## **Trade Agreements and Voluntary Codes**

Trade agreements, such as those developed and implemented through the World Trade Organization, are systems of rules established by member countries that typically have the objectives of open, fair and undistorted competition across participating

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286. *Ibid.*, p. 14.

287. *R. v. Electrical Contractors Association of Ontario and Dent* [1961] O.R. 265.

288. Note that this case demonstrates court scrutiny of industry associations, but does not pertain to voluntary codes.

289. *R. v. British Columbia Fruit Growers Association et al.* (1986) 11 C.P.R. (3d) 183.



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jurisdictions.<sup>290</sup> To achieve these objectives, the agreements restrict the ability of member countries to adopt measures (including laws, technical regulations and “standards”)<sup>291</sup> that impede trade, unless the measures take an approved form and can be justified as compatible with certain identified and legitimate public policy objectives (e.g. protection of health and safety and the environment).<sup>292</sup> Typically, measures are required to be transparent, non-discriminatory and the least trade-restrictive in order to fulfil a legitimate objective<sup>293</sup> and, when possible, governments are to use international standards established by recognized bodies as the basis for technical regulations and national standards.<sup>294</sup> Processes are established to allow member-States to challenge measures that might be considered improperly trade-restrictive, and to compel member-States that are challenged to justify their measures according to a rules-based approach.<sup>295</sup> When findings by a properly constituted trade panel or appellate body show that a measure is unjustifiably trade-restrictive,<sup>296</sup> and once all subsequent procedural requirements are met and avenues of appeal are exhausted, then the member-State that has been found to have engaged in improperly restrictive trade may face significant trade sanctions.

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290. So described in World Trade Organization, *Trading into the Future* (Geneva: WTO, 1999), p. 7.

291. In the context of the WTO’s *Agreement on the Application of Sanitary and Phytosanitary Measures* (the “SPS Agreement”; 1997, available at [www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm)), *measures* is described as including “all relevant laws, decrees, regulations, requirements and procedures ...” (Annex A, para. 1). In the context of the WTO’s *Agreement on Technical Barriers to Trade* (the “TBT Agreement”), the possible use of technical regulations and standards is the focus of concern. A *technical regulation* is described as a document “which lays down product characteristics or their related processes and production methods ... *with which compliance is mandatory*” (Annex 1, para. 1; emphasis added) and a *standard* is described as a document “approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, *with which compliance is not mandatory*. It may include ... symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” (Annex 1, para. 2; emphasis added) Thus, depending on the meaning of *recognized bodies*, many voluntary codes could be considered standards. This is discussed in detail below.

292. For example, the TBT Agreement recognizes “... that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, ... subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.” (Preamble)

293. See articles 2 and 5 of the SPS Agreement and Article 2 of the TBT Agreement.

294. See, e.g., Article 3, para. 1 of the SPS Agreement, which states that, to harmonize SPS measures on as wide a basis as possible, Members shall base their SPS measures on international standards, guidelines or recommendations ... .” See also Article 2.4 of the TBT Agreement. When challenged, a Member whose regulations are inconsistent with existing international standards is required to provide a justification for the variance. If the variance is not in conformity with categories provided in the trade agreement, the measure may be found to be contrary to the agreement. For example, see the decisions of the WTO Dispute Panel and Appellate Body in the U.S.-E.U. dispute concerning hormones in beef, which ruled that there was inadequate scientific evidence to show a serious identifiable health risk that would justify EU regulations prohibiting the use of hormones in beef, in variance from existing CODEX standards. See discussion in P. Holmes, “The WTO Beef Hormones Case: A Risky Decision?” *Consumer Policy Review* 10 (March–April 2000), pp. 61–70.

295. For example, see the process for dispute settlement in Article 11 of the SPS Agreement, which references Articles XXII and XXIII of the General Agreement on Trade and Tariffs, 1994.

296. For example, see the decisions of the WTO Dispute Panel and Appellate Body in the U.S.-E.U. dispute concerning beef hormones (footnote 294).

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Trade agreements appear to take a less restrictive approach towards the use of voluntary approaches than they do towards the use of laws and regulations. For example, trade panels have held that provisions in the General Agreement on Tariffs and Trade (GATT)<sup>297</sup> restrict the ability of countries to prohibit imports on the basis of the way products are produced, and have held that GATT also restricts the ability of countries to take trade action for the purpose of attempting to enforce its own domestic laws in another country (extra-territoriality), even when the trade action is designed to protect animal health or exhaustible natural resources.<sup>298</sup> On the other hand, properly constituted voluntary standards — including those that address non-product-related process and production methods (e.g. sustainable forestry practices) and are affiliated with labelling regimes — would appear to be<sup>299</sup> less restricted by trade agreements such as WTO.<sup>300</sup> In effect, by significantly constraining the ability of member countries to use laws and technical regulations to address non-product-related process and production method issues, such as sustainable forestry practices, trade agreements indirectly create an incentive for developing and using voluntary measures as another way of achieving the

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297. See, especially, GATT Article I (which prohibits discrimination between importing countries), III (which prohibits discrimination between importing and domestic producers) and XI (which constrains imports).

298. See e.g., discussion of the U.S.-Mexico tuna-dolphin dispute, and the 1991 GATT panel decision concerning this dispute, in WTO, *Trading into the Future* (footnote 290), p. 49. Note that, while holding that Member countries could not prohibit imports because of the way the products were produced, nor could the United States engage in extraterritorial application of its own laws in other countries, the panel also ruled that a U.S. law requiring labelling of tuna products as “dolphin-safe” (leaving to consumers the choice of whether or not to buy the product) did not violate GATT rules because it was designed to prevent deceptive advertising of all tuna products, whether imported or domestically produced (Ibid). It should also be noted that the report of this panel, and the report of a subsequent panel on the same issue, was never adopted (Ibid). Moreover, these decisions were made under the pre-WTO, GATT dispute settlement process. Thus, for all these reasons, it is not clear just how “authoritative” this interpretation of the GATT provisions is. A later, 1998, WTO Appellate Body decision concerning U.S. restrictions on the importation of shrimp, while holding that the restriction was contrary to GATT provisions, has been interpreted by some commentators as implicitly suggesting that a production method could serve as a criterion for differentiation if the method contributes to the protection of a migrating species at risk of extinction, if there was a nexus to the jurisdiction imposing the restriction (e.g. the turtles migrated through the U.S.), and if the measure was reasonably related to the ends it was to achieve, and was not disproportionately wide in scope and reach. See, S. Droge, *Ecological Labelling and the World Trade Organization* (Discussion Paper No. 242), (Berlin: Deutsches Institut für Wirtschaftsforschung, February 2001), p. 13, available at <[www.diw.de/deutsch/produkte/publikationen/diskussionspapiere/docs/papers/dp242.pdf](http://www.diw.de/deutsch/produkte/publikationen/diskussionspapiere/docs/papers/dp242.pdf)>; see also I. Cheyne, “Trade and the Environment: The Future of Extraterritorial Unilateral Measures after the Shrimp Appellate Body,” *Web Journal of Current Legal Issues* 5 (2000), available at <<http://webjcli.ncl.ac.uk/2000/issue5/cheyne5.html>>.

299. The expression “would appear to be” is purposely used, to emphasize the fact that no authoritative decision has been made on this point at the time of writing.

300. On this point, Droge (footnote 298), p. 17, concludes as follows:

The investigation of relevant WTO-rules shows that non-product-related criteria used in governmental eco-labelling programmes are not explicitly regulated under the WTO-legal regime. ... In cases where [sic] labels are voluntary it should be more difficult to prove [sic] a violation of WTO-rules. Labels from private initiatives are even harder to control through WTO mechanisms, because WTO rules are tailored for international official regulation rather than for private programmes.

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same or similar public policy objectives.<sup>301</sup> This is one of the likely reasons why governments and non-governmental bodies are turning to market-oriented voluntary standards to stimulate and influence private sector activity at home and elsewhere. Thus, for example, the Canadian federal government is participating (with a variety of other stakeholders) in the development of standards pertaining to the voluntary labelling of foods that are, or are not, products of gene technology,<sup>302</sup> while mandatory regulations on the same issue would appear to be more vulnerable to challenge under a WTO agreement. But even though subject to fewer restrictions, the development and implementation of voluntary standards may still directly or indirectly be subject to constraints through trade agreements. These points are discussed below.

The WTO Technical Barriers to Trade (TBT) Agreement governs technical regulations and voluntary standards relating to product characteristics or their “*related processes and production methods*” (emphasis added) and associated labelling requirements. However, it is considerably less clear whether the TBT’s rules apply to *non-product-related* processes and production methods (e.g. rule regimes that pertain to how a product is made but are typically not apparent in the characteristics of the product itself, such as processes concerning sustainable forestry or fisheries, good labour practices, and humane treatment of animals). Commentators have suggested that a review of the history of the negotiation of the TBT Agreement reveals that non-product-related process and production methods were explicitly excluded from discussions during the Uruguay Round.<sup>303</sup> The WTO’s Trade and Environment Committee has stated that the subject of how to handle, under the TBT Agreement, labelling used to describe the way a product is produced, as distinct from the product itself, “needs further discussion,”<sup>304</sup> while countries continue to debate whether the TBT rules should apply.<sup>305</sup>

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301. This is not to suggest that voluntary codes or standards may not have trade distorting effects, but rather that it is harder for trade agreements to constrain these effects. For example, if a code or standard were to be developed or implemented in such a manner that only products from a certain jurisdiction could comply with its criteria, it might be discriminatory and trade distorting. The Association of South East Asian Nations (ASEAN) has stated that, given the absence of an internationally agreed-upon definition of sustainable forest management, efforts to ensure that forestry products only come from sustainably managed forests could impede market access (WTO, *Trade and Environment News Bulletin*, TE/023, May 14, 1998). However, as discussed above and below, it is unclear to what extent the relevant WTO agreements apply to voluntary codes and standards concerning non-product-related process and production methods — particularly those developed and implemented by private non-governmental organizations.

302. For information concerning this standard, see <[www.pwgscc.gc.ca/cgsb/032\\_025/standard-e.html](http://www.pwgscc.gc.ca/cgsb/032_025/standard-e.html)>.

303. See Droge (footnote 298), pp. 10–11, citing S. Chang, “GATTing a Green Trade Barrier: Eco-Labeling and the WTO Agreement on Technical Barriers to Trade,” *Journal of World Trade* 31 (1997), pp. 137–159, p. 147.

304. WTO, *Trading into the Future* (footnote 290), p. 47.

305. For example, Canada’s position is that the TBT Code of Good Practice should be interpreted “to provide for ecolabelling programs that include the use of certain standards based on non-product-related PPMs provided that these programs are developed according to multilaterally-agreed guidelines in order that the possibility of discrimination and trade distortion is minimized.” Department of Foreign Affairs and International Trade (Canada), *Canada’s Position on the TBT Code of Good Practice*, submitted to the World Trade Organization’s Committee on Trade and Environment, and its Committee on Technical Barriers to Trade, February 21, 1996, WT/CTE/W/21, G/TBT/W/21, paragraph 16). On the other hand, Egypt “and other countries” are on record as saying that the TBT Code of Good Practice should not apply to process-related standards. See WTO, *Trade and Environment News Bulletin* (footnote 301), p. 9.

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For the purposes of the TBT Agreement, a standard is defined as a document approved by a “recognized body,” that provides, for common and repeated use, rules for products or related processes and production methods, *with which compliance is not mandatory*, and may also include or deal with terminology, symbols or labelling requirements as they apply to a product, process or production method.<sup>306</sup> Leaving aside the issue of “related processes and production methods,” a plain language reading of this definition would suggest that many voluntary codes — including the chemical producers’ Responsible Care program, the sustainable forestry management program of the Forest Stewardship Council (FSC), and the sustainable fisheries management program of the Marine Stewardship Council (MSC) — could qualify as “standards,” since they are non-legislatively required rules designed for common and repeated use. But, is the term *standard* as used in the TBT Agreement limited to documents that emerge from formalized, State-sanctioned (i.e. “recognized”) systems (such as those of the Standards Council of Canada, the British Standards Institution, or the American National Standards Institute)? Or are standards that emerge from more informal, less systematized processes (such as those of the FSC and MSC) also subject to the TBT rules? The key to determining which type of standard (or voluntary code) qualifies for coverage under the Agreement seems to be the meaning of the phrase *recognized body*. Unfortunately, the phrase is not defined in the TBT Agreement, so one is compelled to engage in a somewhat frustrating and not entirely fruitful hunt through the Agreement, its Annexes, and beyond, for clues about the defining characteristics of a recognized body.<sup>307</sup>

Annex 3 of the TBT Agreement sets out the *Code of Good Practice for the Preparation, Adoption and Application of Standards*. Among other things, standardizing bodies that have accepted the Code are required to notify the ISO/IEC Information Centre of this fact, to be non-discriminatory in their treatment of products, to not develop standards with a view to creating unnecessary obstacles to trade, to publish a work program at least once every six months, to allow a period of at least 60 days for the submission of comments on draft standards by interested parties, to take into account the comments received, and to promptly publish the standard once accepted.<sup>308</sup>

According to Paragraph B, the Code is “open to acceptance by any standardizing body within the territory of a Member of the WTO, whether a central governmental body, a local government body, or a non-governmental body; to any governmental regional standardizing body one or more members of which are Members of the WTO; and to any non-governmental regional standardizing body one or more members of which are situated within the territory of a Member of the WTO.” So a standardizing body can be a governmental or non-governmental body, and also a regional governmental or non-governmental standardizing body.

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306. TBT Agreement, Annex 1, para. 2.

307. Note that Annex 1 does not stipulate that a standard is a document *developed* by a recognized standardizing body, but rather that it is “approved” by one. The significance of this is unclear. It could mean that the trigger for application of the TBT Agreement, and the focus of attention, is not necessarily the standardizing body that drafted the standard, but rather the body that uses it (and therefore, by its actions, approves it). Alternatively, it could be argued that a standardizing body that drafts standards ultimately approves them, and so the drafting and approving functions belong to one and the same body. Either interpretation is plausible.

308. TBT Agreement, Annex 3, paras. C, D, E, J, L, N and P, respectively.

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*Central government body* is defined as “central government, its ministries and departments or any body subject to the control of the central government in respect of the activity in question.” Following this definition, the Standards Council of Canada would appear to qualify, since it is a creature of federal legislation (a Crown corporation) and it reports to Parliament through the Minister of Industry. *Local government body* is defined as “government other than a central government [e.g. states, provinces, etc.], its ministries or departments or any body subject to the control of such a government in respect of the activity in question.” Following this definition, it would appear that the Bureau de normalisation du Québec would qualify, since it is a local government body, and is a creature of the Quebec government. *Non-governmental body* is defined as “a body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation.”<sup>309</sup> On its face, this would appear to encompass industry bodies, environmental or consumer bodies, or multistakeholder non-governmental bodies that develop documents intended for repeated use (i.e. standards) with which compliance is mandatory, insofar as industry, environmental, consumer, or multistakeholder non-governmental bodies can impose their standards on participants in their programs.

As of November 8, 2001, the Standards Council of Canada is the only Canadian body that has notified the ISO/IEC Information Centre of acceptance of the TBT Code of Good Practice, and is therefore acknowledging that it is under an obligation to meet the requirements of the TBT Code. Because the Standards Council of Canada is the custodian of the standards process in Canada, this would appear to mean that the standards development organizations that the Council has recognized are also now subject to the Code of Good Practice.<sup>310</sup> Similarly, the American National Standards Institute is the only U.S. standards body to have notified the ISO/IEC Information Centre, and the British Standards Institute is the only British standards body to have done the same. A total of 136 standardizing bodies from 94 countries have notified the ISO/IEC Information Centre. The vast majority of the notifying bodies appear to be government-created or -approved bodies.

According to the Code’s paragraph B, the Code addresses itself only to national, local and regional standardizing bodies. What about those that are international in scope? In its *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade* (2000),<sup>311</sup> the WTO TBT Committee noted that international standards, guides and recommendations are important elements of the agreement, forming a basis for national standards, technical regulations and conformity assessment procedures, with the objective of reducing trade barriers. Nevertheless, the Committee also noted that adverse trade effects might arise from standards emanating from international bodies that have no procedures for soliciting input from a wide range of interests. The Committee observed that a diversity of bodies were involved in the

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309. TBT Agreement, Annex 1, para. 8.

310. For example, the four standards development organizations recognized by the Standards Council of Canada are the Bureau de normalisation du Québec, the Canadian Standards Association, the Canadian General Standards Board, and Underwriters Laboratories of Canada.

311. WTO document G/TBT/9, November 13, 2000, (00-48111), available at [www.dfait-maeci.gc.ca/tna-nac/documents/WTO-TBT-13-e.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/WTO-TBT-13-e.pdf).

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preparation of international standards (the report stipulates that this could encompass intergovernmental or non-governmental bodies specialized in standards development or involved in other related activities), and that different approaches and procedures were adopted by them in their standardization activities. For this reason, the Committee agreed that there was a need to develop principles that would clarify and strengthen the concept of international standards under the Agreement and contribute to the advancement of its objectives. In this regard, in Annex 4 of the Review, the Committee articulated a set of principles it considered important for international standards development. Annex 4 stipulates that international standardizing bodies should embody such principles as transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and the need to take into consideration the special circumstances of developing country interests.

While, as discussed, there is a designated official repository for national and regional standards bodies that wish to declare compliance to the Agreement's Code of Good Practice (the ISO/IEC Information Centre), there is no similar repository for international standardizing bodies wishing to declare compliance to the principles set out in Annex 4 of the TBT Committee's Second Triennial Review. As a result, although it would be possible for any international standardizing body to self-declare its intention to abide by WTO-approved principles of operation, third parties (including the author) cannot turn to a centralized documentation centre such as the ISO/IEC Information Centre to ascertain at a glance which bodies have indicated their intention to comply with the principles. Just as national and regional standardizing bodies have done, it would be useful for international standardizing bodies — including ISO, IEC, CODEX and perhaps some of the newer bodies — to declare their observance of WTO principles of good operation. And it would be useful for the WTO or some other body to establish a central repository of names of international standardizing bodies that have declared their compliance with Annex 4 principles.<sup>312</sup>

In 1999, apparently recognizing that their standards development, accreditation and labelling practices may have WTO TBT implications, several of the more recently created non-governmental international voluntary codes/standards bodies — including the Forest Stewardship Council, the Marine Stewardship Council, the International Federation of Organic Agriculture Movements, the International Organic Accreditation System, Social Accountability International, Fairtrade Labelling Organizations International, and the Conservation Agriculture Network — formed the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance.<sup>313</sup> A key objective of ISEAL is positive environmental and social change “through the implementation of international standards-setting and accreditation systems that comply

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312. Self-declaration — whether by a national, regional or international standardizing body, governmental or non-governmental — should not be accepted as the final word on the subject. Ultimately, some form of authoritative third-party assessment of the veracity of these self-declarations may need to be undertaken. Ross Wraight, Chief Executive of Standards Australia International, and Vice President Technical and Chairman, ISO Technical Management Board, has suggested that ISO should accredit other standardizing organizations to write ISO standards. See R. Wraight, “ISO: What Do We Need to Do Next?” *ISO Bulletin*, May 2001.

313. The following information is derived from documents available from the ISEAL Web site, <[www.isealliance.org](http://www.isealliance.org)>.

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with internationally accepted criteria; that do not act as technical barriers to trade ...”<sup>314</sup>  
In 2001, following a review of member practices, ISEAL published documents identifying possible weaknesses with its standardizing practices. A three-step process was proposed to bring ISEAL member standard-setting activities into line with a generic standard-setting methodology, as follows:

- production of a standard-setting methodology guidance document for ISEAL standard-setting members’ core standards, based upon ISO/IEC directives and the WTO-TBT Code of Practice, Annex 4;
- a standard-setting methodology for the production of certifier core standards and national/regional variations and interpretations of core standards based on need rather than political reasons; and
- a peer review process, administered by the ISEAL Secretariat, to ensure that the standard-setting methodology is being followed by each of the ISEAL standard-setting members. (This peer review is intended to provide checks and balances on the standard-setting activities of all ISEAL members.)<sup>315</sup>

The efforts of ISEAL members are significant in at least three respects: they provide evidence of recognition by them that their current practices might not meet WTO TBT requirements and principles and that they believe these requirements *may apply* to them or have implications on their acceptability in the eyes of other parties; evidence of a desire to bring these practices in line with such requirements and principles; and evidence of a desire to be seen as credible and accepted international standardizing bodies (and, perhaps, therefore, more likely to have their standards accepted and used by both State and non-State parties).

On the basis of a reading of the TBT Agreement and its Annexes, the TBT Committee Second Triennial Review document and its Annexes, the list of national and regional standardizing bodies that have notified the ISO/IEC Information Centre of their intention to comply with the TBT Code of Good Practice, and the activities of ISEAL, it is at best unclear whether the TBT Agreement does, in fact, apply to private voluntary codes and standards activities, such as those engaged in by industry associations, multistakeholder groups of private sector firms, environmental groups, labour groups and aboriginal groups, and individual firms — particularly those that have developed non-product-related process and production method standards. However, even assuming that the TBT Agreement were found to apply to non-product-related processes and production method standards, such as those concerning sustainable forestry practices, and to apply to the activities of non-conventional private standards bodies such as industry associations or the FSC, this would not necessarily present an insurmountable barrier to the development and application of TBT-compatible standards by these bodies. As the activities of ISEAL show, such bodies could respond by developing and implementing their voluntary standards in ways that comply with the requirements and principles set out in the TBT Agreement and Annexes, as well as subsequent requirements and principles stipulated by the TBT Committee, such as Annex 4 of the

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314. ISEAL Alliance, “Mission Statement,” *Membership Requirements: Public Requirements*, Public Draft 2 (July 4, 2001).

315. *ISEAL Member Standard-Setting Review Public Background Document*, Issue 1 (July 2001).

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Second Triennial Review (e.g. concerning transparency, openness, impartiality and consensus, relevance and effectiveness, coherence and addressing developing country interests). If they did so, it is difficult to see how their standards could be considered unacceptable for purposes of WTO analysis.

Because it is member-States that are the direct signatories of trade agreements such as GATT, the TBT Agreement and the SPS Agreement — and not individual firms, multistakeholder groups or standards bodies — it seems clear from a reading of the relevant provisions that, at first instance, the obligations associated with WTO-acceptable standards apply to *governments*, and not to conventional or unconventional standards bodies. This is not to suggest that the operations of standards bodies (of any sort) are not controlled or influenced by such trade agreements. But such operations are affected indirectly, through the obligations of member-States. Of particular significance is Article 4.1 of the TBT Agreement, which stipulates that member-States are under an obligation “*to ensure that their central government standardizing bodies*” accept the Code of Good Practice, and that member-States must also “*take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies ... accept and comply with ...*” the Code of Good Practice.<sup>316</sup> Moreover, Article 4.1 goes on to state that member-States are

*not to ... take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.* (emphasis added)

In light of these provisions, it seems clear that member governments have positive and negative obligations to ensure that non-governmental standardizing bodies comply with the terms of the TBT Agreement, even if these “reasonable measure” obligations are of a lesser nature than those applying to central government standardizing bodies. In carrying out these “reasonable measure” obligations, it would appear that the behaviour of non-governmental standardizing bodies can be influenced or controlled by member governments through at least three techniques:

- *Leading by example.* Governments could draw on the standards that emanate from bodies operating in compliance with TBT criteria, but not draw on standards developed by bodies operating in a manner inconsistent with such criteria. This could manifest itself in direct incorporation by governments of such standards in regulations, use of such standards in procurement and governmental voluntary instruments, or by adhering to such standards in government operations. In this way,

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316. At this point, the question of what constitutes “reasonable measures” has not been the subject of an authoritative interpretation or adjudication. Pursuant to Article 14, a Member may invoke dispute settlement procedures including a WTO Dispute Settlement Body when a Member considers that another Member has not achieved satisfactory results under Article 4 (and other articles) and its trade interests are “significantly affected.” Exactly what would be the consequences of such actions, and the meaning of “significantly affected” have not been the subject of an authoritative interpretation or adjudication.



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bodies that develop standards in accordance with WTO-approved criteria would be encouraged, and those that are not TBT-compatible would be discouraged.

- *Providing support for TBT-compatible standards activity.* This could entail developing guides for code development and implementation,<sup>317</sup> interpretive assistance, and tax incentives for firms adopting TBT-compatible standards. If a TBT-compatible standard for voluntary codes were to be promulgated by a body such as ISO, this could assist bodies developing voluntary codes, and could be used by governments as a practical yardstick to distinguish TBT-compatible from non-TBT-compatible voluntary codes activity.<sup>318</sup>
- *Discouraging non-TBT-compliant standards activity.* This could include governments bringing actions against bodies engaging in or supporting standards activities seen to be incompatible with the TBT Agreement.<sup>319</sup>

In these ways, through the activities of member-States, the activities of conventional and non-conventional standards bodies alike can be brought in line with TBT obligations.

To summarize the foregoing, trade agreements constrain the ability of governments to regulate in ways that distort trade, and to a lesser extent, constrain the ability of governments to use voluntary approaches. Members (i.e. governments) are obligated to use international standards as the basis for their regulations and national standards, unless variances from those international standards can be justified under certain exceptions. Trade agreements may restrict governments from using laws and technical regulations to achieve certain objectives when it would appear voluntary approaches may be less constrained. By so doing, trade agreements indirectly create an incentive for development and use of voluntary measures as another way of achieving the same or similar public policy objectives. However, even subject to fewer restrictions, the development and implementation of voluntary standards may still be directly or indirectly subject to constraints through trade agreements.

Members are obligated to ensure that their central government standardizing bodies accept and comply with a Code of Good Practice, and are to take “reasonable

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317. For example, in 1998, following the lead of counterparts in Australia and New Zealand, the Office of Consumer Affairs, Industry Canada, working in conjunction with the Regulatory Affairs Directorate, Treasury Board (since disbanded), published *Voluntary Codes: A Guide for Their Development and Use* (footnote 180). This guide sets out suggested best practices, including the value of openness and transparency. In its current form, however, it does not specifically refer to or draw on the TBT Code of Good Practice.

318. This would be similar to government use of ISO 14021, which provides guidance concerning what constitutes acceptable environmental claims. Governments use ISO 14021 to help them interpret their deceptive advertising legislation.

319. For example, according to one report, a U.K. Office of Fair Trading review of the activities of a Buyers Group organized by the World Wildlife Fund that was purchasing exclusively from the Forest Stewardship Council (FSC) led to the group reorienting its purchasing activity to “FSC certification or *comparable certification schemes*.” See Department of Foreign Affairs and International Trade (Canada) (footnote 277). For another example, Colombia has claimed that its flower sector had encountered difficulties with market access because private organizations in certain importing countries had promoted a campaign to denigrate Colombian flowers. According to the government of Colombia, these organizations had developed eco-labelling schemes that had conditions that were unacceptable to Colombian exporters, discriminatory and prohibitively costly. See WTO, *Trade and Environment News Bulletin*, footnote 301.) Thus, the government of Colombia, on its own initiative, or in cooperation with other governments, could bring legal actions to challenge the alleged problematic standards.

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measures” to ensure that local and regional governmental and non-governmental standardizing bodies accept and comply with the Code of Good Practice. Recently, the TBT Committee articulated principles of good practice for international standardizing bodies similar to those in place for national, local, regional governmental and non-governmental bodies, but there is no central official repository for international standardizing bodies wishing to declare compliance with the principles. As a result, although it would be possible for an international standardizing body to declare its intention to abide by WTO-approved principles, third parties cannot turn to a centralized documentation centre to ascertain which bodies have declared their intention to be in compliance.

The application of WTO agreements to non-conventional voluntary codes and standards activity, such as that of industry associations, NGO-led ventures, or multistakeholder arrangements, is unclear. It is member-States that are signatories to trade agreements, not private sector actors and NGOs. At best, such private standards activity would appear to be indirectly affected by such agreements. When such bodies develop *non-product-related* process and production standards (e.g. sustainable forestry management standards, good labour practices, humane treatment of animals, etc.), there is even greater uncertainty about the application of, for example, the TBT Agreement (which expressly defines standards in terms of *product-related* process and production standards). To fulfil their obligation to take “reasonable measures” to ensure that private standardizing activities comply with the Code of Practice, member-States could lead by example, thus providing support for TBT-compatible standards activity and discouraging non-TBT compliant activity. There do not appear to be significant obstacles preventing non-governmental bodies from developing and implementing private voluntary codes and standards in a manner compatible with TBT criteria, and, moreover, the criteria do not appear to be unduly onerous. Indeed, the efforts of certain non-governmental standards bodies to make their practices TBT-compatible show both a willingness and a capability to make these changes, and recognition that compatibility with WTO agreements such as the TBT Agreement may have implications for them.

## **Conclusions: the Next Generation of Law-Voluntary Codes Relations**

As is evident from the many examples in this volume, industry, NGOs, standards organizations and governments develop, participate in and support voluntary codes for a host of reasons that do not relate in any direct manner to the legal system. For example, some of the non-legal impulses underlying voluntary initiatives include meeting consumer demand, increasing operational efficiency and effectiveness, responding to supplier demand, enhancing public image, addressing worker, shareholder, investor and community concerns, and countering NGO pressure. By the same token, however, we have seen in this chapter that there is a tangled and complex relationship between the legal system and voluntary measures. The law can and does play an important role in shaping and structuring voluntary codes, through implicit or explicit threats of legal action when appropriate and prompt voluntary actions are not taken, through enabling instruments and processes such as contract law, through legislation that explicitly

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encourages use of voluntary instruments, and through legislation pertaining to competition, misleading practices and trade law that can constrain the development and implementation of certain voluntary measures.

We have also seen that, while laws have a significant effect on voluntary codes, so too do voluntary codes on laws, acting as precursors, refining or elaborating vague legal concepts, extending the ability of the State to address activities outside its legislative jurisdiction, employed by judges and regulators as interoperable parts in legal regimes, substituted in some circumstances for legislation when effective development and application of law are difficult, and used to enhance the performance and the credibility of government bodies and government regulatory programs. Analysis suggests that both regulatory and voluntary code approaches to rule making and implementation have their advantages and disadvantages, so that, in the final analysis, the key challenge is determining how to make both approaches as effective as possible and determining when they can be used to maximum advantage.

Voluntary initiatives that are developed in an open and fair manner with the meaningful participation of all affected stakeholders and effectively implemented — particularly those that subject to independent third-party conformity assessment — can supplement regulatory and private law approaches at the same time as they are reinforced by the legal system. In countries with well-developed regulatory and justice systems, where governments rigorously enforce laws and promptly respond to new problems, a favourable environment for the development of voluntary codes is created. Where the existing regulatory regimes and justice systems are weak (as might be the case in developing countries), voluntary codes may in some cases provide a stronger impetus for private sector action than do legal regimes in those jurisdictions.<sup>320</sup>

While a positive symbiotic relationship between the legal system and voluntary measures might seem to resemble the proverbial and elusive “win-win” situation, it is also apparent that the various rule systems of NGO-supported bodies, industry associations, conventional standards bodies and regulators are competitors, vying for public and market credibility, legitimacy and acceptance.<sup>321</sup> It is clear that all parties concerned need to thoroughly understand the legal implications of such initiatives before becoming involved. As we have seen, there are many ways in which the regulatory, tort, contract, competition and trade law, and other legal aspects of voluntary measures can trip up the unwary. No firm, industry association, standards organization, government, court, NGO or private citizen is immune to the legal effects of poorly planned or implemented voluntary initiatives. The potential for legal liability can discourage governments, the private sector and NGOs from participating in such initiatives.

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320. See, e.g., S. Pargal and D. Wheeler, “Informal Regulation of Industrial Pollution in Developing Countries: Evidence from Indonesia,” *Journal of Political Economy* 104 (1996), pp. 1314–1327; and Kernaghan Webb and David Clarke, “Other Jurisdictions,” Chapter 13, below.

321. This is perhaps most evident in the discussion of competing sustainable forestry management rule systems, in Gregory T. Rhone, David Clarke, and Kernaghan Webb, “Sustainable Forestry Practices,” Chapter 9, below. See also discussion of recent government efforts to seek certification from the Forest Stewardship Council, the Marine Stewardship Council, and ISO, as referred to in footnote 19. This idea of competing rule systems seems to be a repetition of earlier experiences in medieval times, as discussed in T. Walde in “Non-Conventional Views on Effectiveness: The Holy Grail of Modern International Lawyers,” *Austrian Review of International & European Law* 4 (1999), pp. 164–203, p. 201.

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In Canada, to date, voluntary initiatives have spread with little government effort to give them formal recognition or to encourage their development (the publication of the *Voluntary Codes: A Guide for Their Development and Use* and the operation of the on-line Voluntary Codes Research Forum notwithstanding). In some ways, this bodes well for the future of voluntary initiatives in Canada. It suggests there is already the proper “climate” for voluntary measures (in the form of demanding and well-informed consumers, innovative firms and industry associations, a diversity of capable, high-profile consumer, environmental, health, human rights and other non-governmental organizations, a competitive marketplace, a basic framework of regulatory laws with adequate enforcement, a comparatively efficient and fair justice system and a modern national standards system), so that government officials, judges, and private sector and NGO representatives tend to turn to voluntary measures instinctively with minimal prompting.

Indeed, one can argue that the self-regulatory “systems” now being developed in Canada and elsewhere may offer a glimpse of the regulatory landscape of the future: against a backdrop of government regulations, industry associations transforming themselves from being simply lobbyists to brokers for the development and implementation of rules on their members, NGOs moving from protest groups “on the outside looking in” to developers and implementors of codes, and respected participants in the codes of others, and governments and courts providing the framework for all these activities to happen, but tending to play more of a reinforcing and facilitating role unless direct regulatory or enforcement action is needed.

Alternatively, governments could more consciously and explicitly encourage and structure the development of voluntary initiatives, and integrate them into statutory regimes. In this regard, probably the most innovative developments are emerging in Europe.<sup>322</sup> An attempt to explicitly “build” a voluntary environmental program on a legislative base is currently being undertaken by the European Union through the Eco-Management and Audit Scheme (EMAS).<sup>323</sup> The legal framework for EMAS, launched in 1993, encourages industry (and other organizations) to adopt explicit and comprehensive environmental management procedures, as verified and audited by independent third parties. In the future, EMAS may become a mandatory system in

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322. A recent European study on “soft law” (defined as rules other than laws, regulations and contracts, or a set of instruments applied by professionals on their own initiative or in cooperation with others, or on the basis of State authorization, to be applied on a consensual basis, with no legal force) suggests that there is greater development of “soft law” concepts in Anglo-Saxon countries as opposed to those in Europe. It may be that Europeans are more comfortable with government-initiated voluntary initiatives, and less at ease with private sector measures. See <[www.europa.eu.int/comm/consumers/index\\_en.html](http://www.europa.eu.int/comm/consumers/index_en.html)>. Distinctions in approach are discussed in greater detail in Webb and Clarke, “Other Jurisdictions,” Chapter 13, below.

323. As discussed in E. Orts (footnote 168).

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Europe, but for now it is not. There are currently no statutory penalties for failing to put in place an EMAS. As of 2003, there were close to 4000 registered EMAS sites in Europe.<sup>324</sup>

The ISO 14001 environmental management system standard, which is available for use by business and other organizations throughout the world, represents a similar initiative to EMAS, except that it was developed without the statutory encouragement along the lines of the European approach.<sup>325</sup> According to the most recent survey available from ISO, there were more than 36 000 ISO 14000 certificates awarded worldwide by the end of 2001, 49 percent in Europe (in 1996, Europe accounted for 63.58 percent of ISO 14000 certificates), 38 percent in the Far East and Australia/ New Zealand, 9 percent in the Americas, and 2.5 percent in Africa/West Asia.<sup>326</sup>

Another example of a legislated approach to voluntary codes comes from the United Kingdom's Office of Fair Trading (OFT). In 2001, the U.K. government announced its intention to introduce new legislation to establish a scheme for giving formal approval to good codes of practice.<sup>327</sup> The approach, which came into effect in 2002, involves promoting sound core principles for codes of practice, publication of which codes have been approved or rejected, communication to consumers of the benefits of the overall scheme and the benefits of dealing with businesses that comply with approved codes, introduction of a seal of approval for approved codes so consumers can see whether a trader is committed to code standards, and removal of the seal from codes that fail to deliver.<sup>328</sup> This builds on existing U.K. OFT legislation that creates a statutory duty on OFT to encourage trade associations to prepare codes of good practice.<sup>329</sup>

Whether the current, largely "hands-off," approach to voluntary initiatives seen outside of Europe, or a more aggressive and systematic approach following the European examples, will ultimately prevail, is difficult to say now.<sup>330</sup> What is clear is that voluntary

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324. See the EMAS Web site, <[www.europa.eu.int/comm/environment/emas/index\\_en.htm](http://www.europa.eu.int/comm/environment/emas/index_en.htm)>.

325. In 2001, the EMAS scheme was revised to incorporate ISO 14001 as its environmental management component. EMAS goes beyond ISO 14001 in a number of ways, most notably the requirement to make relevant information available to the public and other parties. See EMAS, *EMAS and ISO/EN ISO 14001: Differences and Complementarities* (April 2001), available at <[http://europa.eu.int/comm/environment/emas/pdf/factsheet/fs\\_iso\\_en.pdf](http://europa.eu.int/comm/environment/emas/pdf/factsheet/fs_iso_en.pdf)>.

326. ISO, *The ISO Survey of ISO 9000 and ISO 14000 Certificates, Eleventh Cycle: Up to and Including 31 December 2001*, available at: <[www.iso.ch/iso/en/prods-services/otherpubs/pdf/survey11thcycle.pdf](http://www.iso.ch/iso/en/prods-services/otherpubs/pdf/survey11thcycle.pdf)>.

327. See U.K. Department of Trade and Industry, *Enterprise Act*, available at <[www.dti.gov.uk/ccp/enterpriseact/intro.htm](http://www.dti.gov.uk/ccp/enterpriseact/intro.htm)>.

328. These details are outlined in the U.K. Department of Trade and Industry White Paper (1999), *Modern Markets, Confident Consumers* (footnote 78), especially pp. 26–30.

329. Section 124 of the *Fair Trading Act 1973*, as discussed in R. Thomas, "Alternative Dispute Resolution: Consumer Disputes," *Civil Justice Quarterly* (1988), pp. 206–218, p. 208.

330. Commentator Geunther Teubner has suggested that it is more realistic to "replace the over-optimistic model of 'incentives through legal norms' by the more modest 'social order from legal noise'." G. Teubner, "The Invisible Cupola," in G. Teubner, L. Farmer and D. Murphy, eds., *Environmental Law and Ecological Responsibility: The Concept and Practice of Ecological Self-Organization* (Chichester: John Wiley and Sons, 1994), pp. 17–47, p. 33.

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measures are playing an increasingly important role in a host of policy contexts, in Canada and elsewhere, and that a clear-headed understanding of the legal implications of such initiatives is essential for all stakeholders.

Analysis suggests that the incentives in Canada to participate seriously in voluntary initiatives are closely but somewhat accidentally linked to a number of legal instruments or stimuli, such as the threat of regulations, as well as prosecutions, and tort and contract liability. These legal instruments are rarely specifically framed or applied so as to promote the development and use of voluntary initiatives. Perhaps an intelligently integrated and well-focussed strategy of credible regulatory threats, exemplary regulatory prosecutions, tort legal suits and contract law actions might provide a powerful boost for voluntary initiatives. This type of “strategic” encouragement of voluntary initiatives might be more effective at stimulating effective voluntary action than either the current “hands-off” approach or the more interventionist European statute-based approach. If successful, this approach could be supplemented through strategic and coordinated use of economic instruments and education campaigns.