

Chapter 1

Understanding the Voluntary Codes Phenomenon

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Introduction

Few would dispute that the command-and-control regulatory model (comprising legislation and regulations) is the pre-eminent instrument used today for developing and implementing norms of acceptable and unacceptable individual and corporate conduct. After all, statutes articulate societal positions on important issues; they are the products of democratically elected legislatures; and they establish the frameworks for command-and-control regulatory approaches, which are enforced by specialized government agencies, backed up by the courts. Regulatory regimes pertaining to consumer, environmental, worker, and health and safety protection, and many other areas, have made considerable progress in improving the lives of millions. But for all of its strengths, the command-and-control regulatory approach is not without limitations, including expensive and protracted development and enforcement processes;¹ jurisdictional constraints on subject matter, approach and scope;² vulnerability to inconsistent and inadequate enforcement, due to staff and resource cutbacks and associated downturns in government and public attention; and a tendency toward inflexibility and overformality, which can lead to adversarial and legalistic “going by the book” attitudes to compliance.³ Some commentators have begun to speak of command-and-control regulation reaching the limits of its capabilities and starting to break down under its own weight.⁴

1. See, e.g., itemizations of limitations associated with environmental legislation in C. Coglianese and J. Nash, eds., *Regulating from the Inside: Can Environmental Management Systems Achieve Policy Goals?* (Washington: Resources for the Future, 2001), especially Chapter 1. A Canadian example of cost and time issues associated with regulations is the process of amending the *Metal Mining Liquid Effluent Regulations*, which began in 1990, involved dozens of studies and consultations with hundreds of stakeholders, cost in excess of \$1 million, is estimated to necessitate an expenditure of \$2 million annually to enforce, and was only completed in June 2002. Information derived from conversations with Department of Environment officials, and from the Regulatory Impact Assessment Statement (RIAS) and revised regulations. The RIAS and revised regulations are published in the *Canada Gazette*, Part II, June 6, 2002, pp. 1412–1462, available at <<http://canadagazette.gc.ca/partII/2002/20020619/html/sor222-e.html>>.

2. Constitutional division-of-power constraints are particularly a factor in federations where legislative authority is split between federal governments and states/provinces/*landers*, such as is the case in Canada, the United States, Australia and Germany. For example, in Canada, as determined by the *Constitution Act, 1867*, the federal government can only legislate to the extent of its powers; the provinces can only legislate to the extent of their powers; both levels of government are constrained by the *Canadian Charter of Rights and Freedoms*, and the ability of a government to develop legislation having extraterritorial effect is limited. Similar constraints are in place in other jurisdictions. These issues are discussed in greater detail in Kernaghan Webb and Andrew Morrison, “The Law and Voluntary Codes: Examining the ‘Tangled Web’,” Chapter 5, below.

3. See, e.g., E. Bardach and R. A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982); and Coglianese and Nash (footnote 1).

4. Speaking particularly about environmental law, but noting a similar phenomenon in industrial labour organization law, Professor Eric Orts in “Reflexive Environmental Regulation,” *Northwestern University Law Review* 89 (1995), pp. 1227–1340, p. 1241, suggests that “juridification” has set in, in light of the sheer volume

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In apparent recognition of these limitations, and of the potential value of other approaches, governments and scholars have begun in recent years to recognize the role of other techniques, including use of non-governmental voluntary code and standards initiatives.⁵ Unlike conventional command-and-control regulatory approaches, voluntary codes harness market, peer and community energies to influence behaviour, and draw on the infrastructure of intermediaries such as industry associations, standards organizations and non-governmental organizations for rule development and implementation. In a way, the renewed interest by governments in non-State approaches to governing takes us full circle: voluntary rule systems have been used since earliest times to articulate shared norms and to structure interpersonal relations, and indeed pre-date the modern State.

Religion, culture, tradition and notions of morality and ethics are all examples of cooperative, trust-based non-governmental processes and techniques that have long been employed and continue to play important roles in providing a framework for social and commercial conduct.⁶ For thousands of years, merchant behaviour has been controlled through non-governmental techniques.⁷ In the Middle Ages in Europe (and much earlier elsewhere), merchant guilds regulated virtually every aspect of a given commercial activity, from market access through means of production, product quality and price, enforcement of contracts, and even an element of welfare protection for guild members and their families.⁸ While guilds have faded in importance with the rise of the

of environmental legislation that is building up:

Environmental juridification points to a critical weakness of the command-and-control approach. There are cognitive limits to protecting the environment through detailed orders. As new laws are passed to regulate critical areas and old laws are revised to close or open loopholes, the legal system's capacity actually to process the material becomes impaired. Eventually, traditional command-and-control regulation breaks down under its own weight. (*Footnotes omitted*)

5. See, e.g., discussion in I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); N. Gunningham, P. Grabosky and D. Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); K. Harrison, "Voluntarism and Environmental Governance," in E. Parson, ed., *Governing the Environment: Challenges and Trends* (Toronto: University of Toronto Press, 2001), Chapter 5; M. Priest, "The Privatization of Regulation: Five Models of Self-Regulation," *Ottawa Law Review* 29 (1998), pp. 233–302, p. 236.

6. For an insightful exploration of the importance of some of these non-State mechanisms and processes in commercial contexts, see F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (London: Penguin, 1995). Of course, religion, culture, tradition, morality and ethics, like law, are all techniques of control. They can be used to gain and maintain power, they can be manipulated and abused, and they too are rightly the subject of significant critical analysis. See, e.g., the writings of Jurgen Habermas and Michel Foucault on this topic in D. Browning and F. Fiorenza, eds., *Habermas, Modernity and Public Theology* (New York: Crossroads, 1992); J. Carrette, ed., *Religion and Culture by Michel Foucault* (Manchester: Manchester University Press, 1999).

7. J. Braithwaite and P. Drahos, in *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), p. 497, footnote 6, maintain that "strictly speaking, following Durkheim, the Christian church was the first great NGO [non-governmental organization] to supply a set of norms which regulated business practice." Even today, the preparation of food in compliance with religious edicts, such as those associated with halal (Muslim) and kosher (Jewish) foods, provides us with examples of non-governmental food certification systems. See Webb and Morrison, "The Law and Voluntary Codes," Chapter 5, below, for discussion of some of the legal aspects of halal and kosher regimes.

8. Needless to say, these guilds frequently had significant anti-competitive features. For a somewhat more detailed discussion of the history of economic self-regulation, see 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.

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State, private regulatory techniques that use non-governmental intermediaries to ensure compliance have continued to flourish against a backdrop of law. The Better Business Bureau, for example, had its origins in merchant “vigilance committees” first created in the late 1800s.⁹ Starting in 1899, various apparel companies agreed to comply with safe labour conditions and be inspected by the National Consumers League (NCL), and thereby were entitled to use the NCL’s “White Label” on their apparel.¹⁰ The International Chamber of Commerce first published its *Code of Advertising Practice* in 1937,¹¹ and many other forms of industry self-regulation were put in place throughout the 20th century.¹²

The recent interest of governments in voluntary codes seems to coincide with considerable activity in this area by private sector and civil society actors — and this is perhaps no accident. A key distinction between earlier use of voluntary instruments and that of today is that modern non-governmental voluntary activity takes place against a backdrop of extensive State regulation, and indeed is often (at least in part) a response to it. Consider the following examples:

As efforts to negotiate a global forest protection convention sputter, several major international environmental organizations (most notably, WWF, the World Wide Fund for Nature), working with retailers and others, spearhead the development of the Forest Stewardship Council (FSC) and its labelling program for products from sustainably harvested and managed forests. While initially facing much resistance from the forest extraction industry, and despite numerous “start-up” administrative difficulties, there are now more than 24 million hectares of FSC forests worldwide. At the same time, forest producers take leadership roles in developing their own voluntary sustainable forestry programs, in some cases using the services of standards development organizations such as the Canadian Standards Association. In addition to private sector use of the programs, governments in Canada and the United States have begun efforts to have their regulatory forest management regimes certified as being in compliance with the FSC program.¹³

9. History of the Better Business Bureau is discussed in David Clarke and Kernaghan Webb, *Market-Driven Consumer Redress Case Studies and Legal Issues* (Ottawa: Office of Consumer Affairs, Industry Canada, 2002), available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca01643e.html>>.

10. U.S. Department of Labor, Bureau of International Labor Affairs, *By the Sweat and Toil of Children: Consumer Labels and Child Labor* (Vol. IV) (Washington: U.S. Department of Labor, 1997), especially pp. 5–7.

11. See European Advertising Standards Alliance (EASA), *EASA Guide to Self-Regulation* (Amsterdam: EASA, 1999), p. 8.

12. See discussion in M. Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven: Yale University Press, 1982).

13. 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 intend to do so. In March 2001, “[the] Honourable John Snobelen, Minister of Natural Resources for the province of Ontario, and Dr. Maharaj Muthoo, Executive Director of the Forest Stewardship Council (FSC), initiated a bilateral process that will result in FSC certification of all Crown-owned forests managed in compliance with Ontario law and the products derived from those forests.” Per Ontario Ministry of Natural Resources, *Ontario First in World to Receive Environmental Forest Certification*, press release, March 23, 2001. The FSC and Canadian Standards

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In the early 1990s, Gap Inc., a major American apparel retailer, was the subject of negative media attention as a result of alleged non-compliance by its contractor-suppliers with a Gap Inc. voluntary code pertaining to treatment of workers located in developing countries. In theory, supplier factories in these developing countries are subject to a range of statutory protections pertaining to workers, but in practice there is often little enforcement. In the absence of effective State-based programs, codes imposed by retailers as a term of contract take on greater significance (the codes are voluntary in the sense of not being imposed by governments, but are nevertheless contractually binding on those supplier firms that agree to meet their terms). In response to allegations that suppliers were not complying with its code, Gap Inc. worked with its critics to revise and improve the terms of the code, and used local organizations to monitor supplier compliance with the code provisions. As this work progressed, several multistakeholder, industry-wide labour certification regimes were developed (such as the U.S. government-supported Apparel Industry Partnership/Fair Labor Association), with third-party monitoring, in a number of jurisdictions. Monitoring by local, developing country interests has become increasingly common.¹⁴

In anticipation of new regulations, and in an attempt to reduce the likelihood of another chemical plant disaster like that which occurred in Bhopal, the Canadian Chemical Producers' Association devises and implements "Responsible Care," a 152-point environmental management program pertaining to the research and development, manufacturing, transportation, distribution, waste management and community awareness aspects of the chemical industry. Over time, the program develops compliance verification and public reporting elements. The program is picked up by the chemical producers' associations in more than 40 countries, including the United States. Some claim that the program is being used to stymie needed new legislation and regulations.¹⁵

In theory, online merchants are subject to the same legislative requirements for consumer protection as those facing conventional "bricks and mortar" merchants, but government enforcement of consumer protection legislation to address Internet problems is hampered by jurisdictional difficulties. Moreover, many consumers have concerns about the reliability and integrity of online merchants. In response, a major United Kingdom consumer organization devises a voluntary code initiative pertaining to consumer protection in

Association programs are discussed in greater detail in Gregory T. Rhone, David Clarke and Kernaghan Webb, "Two Voluntary Approaches to Sustainable Forestry Practices," Chapter 9, below. Similar programs in other jurisdictions are discussed in Kernaghan Webb and David Clarke, "Voluntary Codes in the United States, the European Union and Developing Countries: A Preliminary Survey" (hereafter "Other Jurisdictions"), Chapter 13, below. Eco-labelling programs are discussed in Kathryn Harrison, "Promoting Environmental Protection Through Eco-Labeling: An Evaluation of Canada's Environmental Choice Program," Chapter 10, below.

14. Gap Inc.'s program is discussed in greater detail in Gregory T. Rhone, John Stroud and Kernaghan Webb, "Gap Inc.'s Code of Conduct for Treatment of Overseas Workers," Chapter 7, below. The Fair Labor Association and its competitors are discussed in greater detail in Webb and Clarke, "Other Jurisdictions," Chapter 13, below.

15. This program is discussed in greater detail in John Moffet, François Bregha and Mary Jane Middelkoop, "Responsible Care: A Case Study of a Voluntary Environmental Initiative," Chapter 6, below.

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electronic commerce, called Web Trader. Under the Web Trader program, online merchants that agree to abide by the terms of the code may display a logo on their Web site that indicates that they are in compliance with the code. Many U.K. businesses apply for and receive approval to use the logo. Following the U.K. lead, consumer organizations in nine other countries offer affiliated programs, in competition with similar, business-led initiatives.¹⁶

In several cases, Canadian courts require that companies convicted of environmental offences be registered as compliant with ISO 14001, a voluntary environmental management system (EMS) standard developed through the International Organization for Standardization (ISO), a non-governmental organization with a private sector focus. Subsequently, Canadian environmental legislation is amended to require courts, in their determinations of liability, to consider whether companies are complying with EMS standards, and gives the courts express authority to require compliance with EMSs as part of sentencing. Other jurisdictions offer expedited permitting and reduced inspections to companies complying with voluntary EMSs. Through these regulatory reforms, governments are in effect acknowledging the value of voluntary environmental management programs as adjuncts to regulatory regimes and are developing legislative structures that explicitly support use of such approaches.¹⁷

An Australian supermarket industry association develops and implements a voluntary code pertaining to the accuracy of its bar code scanners. An essential part of the program is the requirement that, if a consumer finds that there is a discrepancy between the price at the cash register and that on the product, he or she gets the product for free. Compliance rates are high, and complaints to government regulators are low, in part because the program creates incentives for both consumers and supermarkets to be vigilant. The program supports regulatory objectives against misleading advertising, but does so through non-regulatory, market mechanisms. Learning from their Australian counterparts, a similar program is developed in Canada, operated by major retail associations, and endorsed by the Canadian Competition Bureau.¹⁸

Using the services of a reputable Canadian standards development organization, the Canadian federal government, working in conjunction with provincial governments, industry associations and consumer organizations, develops a voluntary code pertaining to the protection of personal information. As the voluntary code is completed, a major industry association that has participated in the development of the code requests that it become the basis for federal and provincial laws. A federal law is developed that draws explicitly on the terms of the voluntary standard.¹⁹

16. This program is discussed in Webb and Clarke, "Other Jurisdictions," Chapter 13, below. It was terminated at the end of 2002.

17. As discussed in Webb and Morrison, "The Law and Voluntary Codes," Chapter 5, below.

18. The Australian code is discussed in Neil Gunningham, "Codes of Practice: The Australian Experience," Chapter 12, below. The terms of the Canadian program are available at <[http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwapj/ct02381e.pdf/\\$FILE/ct02381e.pdf](http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwapj/ct02381e.pdf/$FILE/ct02381e.pdf)>.

19. As discussed in Colin J. Bennett, "Privacy Self-Regulation in a Global Economy: A Race to the Top, the Bottom or Somewhere Else?" Chapter 8, below, and Webb and Morrison, "The Law and Voluntary Codes," Chapter 5, below.

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Environmental regulators in a developing country devise a pollution control public rating program, with the objective of creating incentives for compliance through honour and shame. Pursuant to a process involving an advisory panel with environmental organization representatives, individual emitters are rated using data from inspections, and the results are selectively made public through a press conference and Internet site. Research suggests the program galvanizes environmental performance by harnessing community pressure. Six other developing countries devise similar programs.²⁰

An industry association is told by a regulatory agency that, if it does not develop and implement customer service standards for its members, the regulatory agency will do it for them. The industry association puts in place standards, monitors compliance and establishes a tribunal to resolve consumer and industry disputes. The tribunal panel includes one consumer representative, one industry representative and a neutral chair (e.g. a retired judge). The decisions (including dissenting opinions) are publicly available. Individuals may still complain to the regulator, but in more than 10 years of operation, the decisions of the private tribunal have never been overturned.²¹

As these examples illustrate, voluntary codes are currently in place or being developed in Canada and around the world to address a wide variety of environmental protection, worker, consumer, community and other issues.²²

It is perhaps no accident that many of these codes have a significant international dimension. A strong argument can be made that voluntary codes have come into prominence as the result of a confluence of factors associated with globalization. Although difficult to define, globalization can be seen as a complex process of interdependency or convergence resulting from dramatically increasing levels of exchange in goods, information, services and capital.²³ Accompanying the process of globalization has been a growing belief among consumers in Western developed countries that corporations need to meet high standards of care wherever they operate: it is increasingly seen to be no longer acceptable for corporations to behave well “at home” while violating basic norms of consumer, worker, environmental and community

20. As discussed in Webb and Clarke, “Other Jurisdictions,” Chapter 13, below.

21. As discussed in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, below.

22. They are also increasingly the subject of scholarly attention. For recent publications, see, e.g., J. Bendell, ed., *Terms for Endearment: Business, NGOs and Sustainable Development* (London: New Academy of Business, 2000); C. Carraro and F. Lévêque, eds., *Voluntary Approaches in Environmental Policy* (Dordrecht: Kluwer, 1999); R. Gibson, ed., *Voluntary Initiatives: The New Politics of Corporate Greening* (Peterborough, Ont.: Broadview Press, 1999); V. Haufler, *A Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Washington: Carnegie Endowment for International Peace, 2001); J. Manheim, *Corporate Conduct Unbecoming: Codes of Conduct and Anti-Corporate Strategy* (St. Michaels, Md.: Tred Avon Institute Press, 1999); A. Prakash, *Greening the Firm: The Politics of Corporate Environmentalism* (Cambridge: Cambridge University Press, 2000).

23. See, e.g., Haufler, *ibid.*, p. 20, who states that industry self-regulation is one element of globalization. In H. Holm and G. Sorensen, eds., *Whose World Order? Uneven Globalization and the End of the Cold War* (Boulder, Colo.: Westview Press, 1995), p. 1, the authors define *globalization* as “the intensification of economic, political, social and cultural relations across borders.” For a thorough discussion of the concept and its implications, see A. Prakash and J. Hart, eds., *Globalization and Governance* (London: Routledge, 1999).

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protection elsewhere.²⁴ Aided by advances in telecommunications and information technology, and provoked in part by recognition of the weaknesses of international public lawmaking and implementation regimes, non-governmental organizations (NGOs) are playing an increasingly prominent role in devising voluntary codes, stimulating corporations to develop their own codes, and monitoring corporate behaviour.²⁵ With the widespread use of the Internet, and the proliferation of NGOs in developing countries with access to it, it is now possible for civil society networks to track corporate and governmental misbehaviour wherever it might be, and to communicate monitoring information around the globe virtually instantaneously.²⁶

In spite of preliminary evidence suggesting that codes can be effective in generating changes in behaviour,²⁷ there are many potentially problematic aspects of voluntary codes: those that are poorly designed or implemented can frustrate or mislead intended audiences, attract negative publicity, slow or prevent needed laws, have anti-competitive effects, create barriers to trade, and be difficult to enforce, particularly against those who do not want to participate (free riders).²⁸ In addition, voluntary codes can have significant legal implications for governments, industry, standards organizations and non-governmental organizations.²⁹ In short, while voluntary codes appear to show considerable promise as instruments for promoting public policy, there are also many aspects that raise questions about the roles and actions of all parties.

24. See, e.g., the results of the 1999 Environics International Millennium poll of 25,000 consumers in 23 countries, which indicated the increasing importance consumers are putting on the social responsibility leadership of companies. According to the survey, 67 percent of consumers in North America and Oceania had “punished” a company seen as not socially responsible in the past year, or considered doing same (*punishment* was defined as avoiding a product or speaking out about the company) or rewarded a company that had behaved in a socially responsible manner. This compared with 53 percent of North European consumers, 40 percent of Mediterranean, 37 percent of African and 31 percent of Latin American and Eastern European consumers. See Environics International, *Consumers Worldwide Expect Business to Achieve Social as Well as Economic Goals*, press release, September 30, 1999.

25. See comments to this effect by A. Florini, ed., in *The Third Force: The Rise of International Civil Society* (Washington: Japan Center for International Exchange and Carnegie Endowment for International Peace, 2000), and G. Gereffi, R. Garcia-Johnson and E. Sasser, “The NGO-Industrial Complex,” *Foreign Policy* (July–August 2001).

26. See particularly Florini, *ibid.*, pp. 220–224.

27. For example, as discussed in this volume, the Forest Stewardship Council has, through its affiliates, certified more than 24 million hectares of sustainably harvested forests; Gap Inc.’s program applies to its suppliers in 50 countries; the Fair Labour Association’s program applies to more than 5,000 suppliers; there are noted reductions in emissions from Responsible Care members, and companies that are registered to ISO 14001 claim environmental improvements. Of course, as with discussions of the impacts of conventional regulatory programs, it is difficult to attribute improvements to any particular voluntary code; moreover, there may be problems with the reliability of current data, and information concerning compliance with code commitments may not be forthcoming.

28. Per 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), p. 6. The Guide is available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00880e.html>>. See also discussion in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, below.

29. These points are discussed in detail in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, below.

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It was with these types of issues in mind that the Canadian Office of Consumer Affairs³⁰ launched the Voluntary Codes Project in 1996. The Project's original aims were to develop a better appreciation of the potential uses of voluntary codes for public policy purposes, and of their strengths and weaknesses, and to identify conditions conducive to success, roles of government, legal and public administration implications, and possible next steps. In the short term, the Project took the form of a research program involving both case studies and more in-depth explorations of the legal, public administration and other implications of voluntary codes, and the experience with voluntary codes in other jurisdictions.³¹ Some of those original studies have been modified and updated for this volume. The research program led to a multistakeholder symposium at which the studies and issues were further explored and discussed.³² At the symposium, support was expressed for the development of a guide to voluntary codes, similar to guides that had been developed in Australia and New Zealand.³³

Following the symposium, a multistakeholder working group was struck to develop the guide. *Voluntary Codes: A Guide for Their Development and Use*³⁴ is now in its second printing. The online Voluntary Codes Research Forum is now operated by the Office of Consumer Affairs, with close to 400 government, industry, non-governmental and academic members around the world.³⁵ An evaluative framework for improving voluntary codes has been published,³⁶ and the Office of Consumer Affairs continues to participate in the development and monitoring of voluntary approaches — currently, in the areas of electronic commerce, voluntary labelling of genetically modified foods, complaints handling and the electronic transfer of funds (debit cards).

This volume is a logical extension of the Office of Consumer Affairs' work in the area of voluntary codes, an opportunity to bring together in one place some of the thinking and experiences on voluntary codes that may assist all parties in developing a better understanding of the strengths, weaknesses and roles of these codes. Drawing on the scholarly network associated with the Carleton Research Unit on Innovation, Science and Environment at Carleton University (which, among other responsibilities, administered a third-party academic review of this volume in manuscript form), the volume is intended to assist in engaging the broader academic community in explorations of voluntary codes issues. Research in this volume suggests that, when properly developed and implemented, voluntary codes can represent innovative approaches to

30. Originally, the Office of Consumer Affairs partnered in this work with Treasury Board Secretariat's Regulatory Affairs Division. The Regulatory Affairs Division has since been disbanded.

31. Summaries of the draft studies are available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00880e.html>>.

32. A summary of the symposium is available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00819e.html>>.

33. The voluntary codes experience in Australia and New Zealand is described in Gunningham, "The Australian Experience," Chapter 12, below.

34. The Guide (footnote 28) is available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00880e.html>>.

35. For more information about the Forum, go to <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00973e.html>>.

36. Available at <<http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca00880e.html>>.

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addressing the concerns and needs of consumers, workers, environmentalists, communities and individual citizens, while at the same time helping companies to be more competitive. They can encourage companies and organizations to conduct themselves in ways that benefit both themselves and the broader community, and can harness market, community and peer pressures. However, in light of the significant problems that can arise from poorly thought out and inadequately implemented codes, it is hoped that it is apparent that the decision to participate in a voluntary code should only be undertaken after a thorough examination of the issues surrounding use of such instruments.

Voluntary Codes Defined

The title of this volume links voluntary codes with three concepts: private governance, the public interest and innovation. Given the centrality of these terms to the volume, a brief exploration of their meaning is in order at the outset. *Voluntary codes*, as used here, are:

- commitments not required by legislation or regulations;
- agreed to by one or more individuals or organizations;
- intended to influence or control behaviour; and
- to be applied in a consistent manner or to reach a consistent outcome.³⁷

Several important points about this conception of voluntary codes deserve emphasis or explanation. First, even though a voluntary code is not legislatively required, this is not to suggest that there are no legal aspects to it, or implications flowing from its use; nor is it to intimate that at least part of the impetus for a code's development may not be legal in nature (for example, to forestall the likelihood of new regulations being developed or to decrease legal liability).³⁸ Second, while industry-wide voluntary codes may attract the most attention, it is entirely possible for an individual firm to develop a voluntary code for application only to itself or to its suppliers.³⁹ Third, the voluntary codes contemplated in this definition must include both commitments and application: a code without mechanisms to ensure its application is simply a statement of intent.⁴⁰ Frequently, voluntary codes are used in conjunction with a labelling or logo program, to signal to audiences that a particular product or member is in compliance with a code. Fourth, this definition of voluntary codes is sufficiently broad to capture the normative

37. This is a paraphrase of the definition of voluntary codes found in *Voluntary Codes: A Guide for Their Development and Use* (footnote 28), p. 2.

38. See Webb and Morrison, "The Law and Voluntary Codes," Chapter 5, below.

39. Indeed, a single-firm voluntary code is the subject of one of the case studies in this volume ("Gap Inc.'s Code of Conduct," Chapter 7, below). Moreover, as Kathryn Harrison discusses in her chapter, "Canada's Environmental Choice Program," Chapter 10, below, industry-wide compliance may not be desirable since compliance with a code and use of a label may be intended to show leadership and to gain a competitive advantage.

40. See Colin J. Bennett's contribution to this volume ("Privacy Self-Regulation," Chapter 8, below) for a typology of voluntary instruments, including commitments, codes and standards.

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standards of formal, recognized standards bodies⁴¹ such as the International Organization for Standardization (ISO), the Canadian Standards Association (CSA), and its counterparts in other jurisdictions, as well as those normative documents developed by firms, NGOs and other entities outside the formal standards system. Thus, from a functional standpoint, ISO or CSA standards are simply voluntary codes developed through formal standards systems. Both voluntary codes and standards are the subject of examination in this volume, and both terms are used as appropriate throughout this volume.

Voluntary Codes and Private Governance

As used here, *private governance* is intended to encompass the full range of ways that organizations not directly affiliated with the State attempt to organize their affairs.⁴² It encompasses activities of both those engaged in the commercial sector as well as those in civil society. The names used by commentators to describe elements or types of private governance are breathtaking in their variety and creativity: some of the terms used include informal regulation, private regulation, communitarian regulation, self-regulation, co-regulation, reflexive law, soft law, self-management, corporate social responsibility, and techniques that go “beyond compliance.”⁴³ Each of these terms is intended to connote or emphasize a distinctive attribute of a particular type of private governance. Taken together, for the purposes of this volume, *private governance* can be seen as a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken by non-State parties.⁴⁴ It includes

41. According to the World Trade Organization’s *Agreement on Technical Barriers to Trade*, a standard is 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 (Geneva: WTO, 1994), available at <www.wto.org/english/docs_e/legal_e/17-tbt.pdf>; emphasis added. An exploration of the significance of this definition to voluntary codes activities of groups such as the Forest Stewardship Council is undertaken in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, below.

42. The definition of *private governance* provided here draws on the definition of *global governance* in Commission on Global Governance, *Our Global Neighbourhood* (Oxford: Oxford University Press, 1995), p. 2. In the Commission’s definition, governance purposefully encompasses public, civil society and commercial actors and activities. While the focus here is on non-State actors and instruments (and, hence, private governance), as the conclusion of this volume discusses, ultimately, a multipartite conception of governance shows considerable promise as a way of bringing to bear the full range of parties and instruments on any public policy problem.

43. In addition to the publications referred to above, see A. King and M. Lenox, “Industry Self-Regulation Without Sanctions: The Chemical Industry’s Responsible Care Program,” *Academy of Management Journal* 43:4 (2000), available at <www.aom.pace.edu/amj/August2000/king.pdf>, p. 7; 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; 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).

44. Using increasingly sophisticated forms of game theory, such as the multiparty stag hunt (as opposed to the two-party prisoner’s dilemma) and non-zero-sum games (i.e. games that allow for win-win situations, such as mutually beneficial trades, as opposed to zero-sum games in which one side’s gain is another’s loss, such as checkers), philosophers have begun to develop interesting explanations for why, over time, actors will tend to choose cooperative as opposed to conflict solutions to problems they face. While the author could find no

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formal institutions and regimes empowered to develop rules and enforce compliance (e.g. industry association and NGO-supported rule-making and disciplinary procedures, monitoring and enforcement techniques), as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest (e.g. peer pressure through quarterly meetings, information disclosure, etc.). Private governance is thus an overarching conceptual framework within which voluntary codes, as non-legislatively required commitments made and applied by a variety of actors, are developed and operate. It should be emphasized that governments can do and are doing much to promote, guide and support private governance techniques that further public policy objectives, and to constrain those that are contrary to public policy. Throughout this volume, examples of such government promotion, guidance, support and constraining efforts are provided.

Voluntary Codes and the Public Interest

As David Cohen makes clear in his chapter, there are a vast number of self-imposed voluntary instruments used by business that, while very important to the development, production, pricing, marketing and distribution of goods and services, have little significance from a public interest standpoint.⁴⁵ Many corporate structures, bylaws, policies, operational manuals, standards and contracts fit in this category. The focus of attention in this volume is on those voluntary codes that have a significant public interest component — even though in many cases the motivations of the proponent may very well be largely self-oriented in nature (e.g. increasing or maintaining customers, decreasing risk, increasing productivity and profit, responding to shareholder and investor demands, decreasing insurance premiums, improving worker and community relations, or forestalling development of a new regulation or decreasing the likelihood of a legal violation and liability).⁴⁶ It is in recognition of the public policy effects of private voluntary codes that, in a wide number of cases, governments have participated in and supported the development of such codes and indeed have drawn on them for their own purposes.⁴⁷

In a world in which industry, governments and NGOs are increasingly employing market-oriented voluntary codes that address important public policy

discussions on point, voluntary codes would appear to be good examples of cooperative multiparty solutions in keeping with stag-hunt and non-zero-sum game theories. The leading proponent of stag hunt theory is Professor Brian Skyrms at the University of California (Irvine). His paper, *The Stag Hunt*, is available at <<http://hypatia.ss.uci.edu/lps/home/fac-staff/faculty/skyrms/Hunt.PDF>>. The leading proponent of non-zero-sum game theory is Robert Wright, author of *Nonzero: The Logic of Human Destiny* (New York: Pantheon, 2000).

45. David Cohen, "The Role of the State in a Privatized Regulatory Environment," Chapter 2, below.

46. These motivations are variously explored in the chapters of this volume. Professor Wes Cragg of the Schulich School of Business (York University) has suggested that investor-owned corporations, by virtue of their status as legal creations, have a fiduciary obligation to shareholders to advance both public and private interests, which encompasses an obligation to enhance share value but also an obligation to work within the framework of law and prevailing moral standards to advance public as well as private interests. In so doing, Cragg provides the foundation for corporate social responsibility activities (in the form of codes of conduct) that extend beyond mere compliance with laws and simple profit maximization. See W. Cragg, *Business Ethics and Stakeholder Theory*, unpublished manuscript available from the author (November 2001).

47. As discussed in many of the chapters.

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problems, it seems evident that the lines separating the public and private spheres are blurring, representing, as one commentator called it, a “hybridization of law and market, state and non-state.”⁴⁸ This has led some commentators to suggest that a new conception of “government” is needed, capable of encompassing “the entire complex of ideals, goals, rationales, techniques, procedures and programs by which a diversity of state and non-state authorities seek to shape human conduct to desired ends.”⁴⁹ In this broader conception of government, it is possible for non-State actors such as industry associations and NGOs to use “governmental technologies”⁵⁰ such as codes and standards to achieve their aims, alongside government use of such instruments.

Some might argue that voluntary codes and standards depoliticize important environmental, health and economic issues, replacing them with technical and managerial devices and instruments driven by industry.⁵¹ With their emphasis on procedure, formality and technical expertise, the argument goes, voluntary codes mute the struggles over risks, harms, jobs and profits inherent in decision making concerning environmental, human rights, consumer protection and worker safety issues. Debates about “justice, poverty, racism, ecological integrity, animal rights, the intrinsic value of nature” are transformed through the use of codes and standards into “matters of managerial expertise and market preference,” thus enabling inequality and repression to be perpetuated, and disguising their own role in that perpetuation.⁵²

While this muting of significant political issues and perpetuating of inequalities is a distinct possibility — particularly when civil society and governments have no opportunity to meaningfully participate in code development and implementation⁵³ — an equally plausible scenario is that voluntary codes can act to operationalize vague and

48. 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). Note that Professor Wood was speaking specifically about the use of the ISO 14001 standard environmental management system standard.

49. Wood, *ibid.*, drawing on, among others, M. Foucault, “Governmentality,” in G. Burchell, C. Gordon and P. Miller, eds., *The Foucault Effect* (Chicago: Chicago University Press, 1991), pp. 87–104; N. Rose and P. Miller, “Political Power Beyond the State: Problematics of Government,” *British Journal of Sociology* 43 (1992), p. 173.

50. Wood, *ibid.*

51. The following is a paraphrase of discussion found in Wood, *ibid.*, which was specifically addressing the ISO 14000 environmental management system standard. It may be that the arguments concerning the effects of management-oriented standards would not apply with equal force to NGO-led or -supported codes that may or may not have the same degree of technical, management orientation.

52. Wood, *ibid.*

53. A key issue is how the public interest is factored into non-governmental voluntary code activity. One technique is to ensure that a full range of stakeholders has a meaningful opportunity to participate in code development and implementation. Discussion in several chapters in this volume suggests that, for reasons of enhanced credibility, as well as to improve the quality of decisions, this is increasingly considered essential (see, e.g., discussions on this issue in the chapters on Responsible Care, Gap Inc.’s code of conduct, sustainable forestry practices, and Canada’s eco-labelling program and helmet standards and regulations, below). In Canada, formal standards bodies must have a balanced matrix of representation on their standards development committees (on this point, see particularly discussions in the sustainable forestry practices and helmet standards and regulations chapters, below). A second technique is to structure voluntary code activity within a greater framework of law. The multiple ways in which the law structures voluntary codes are discussed in greater detail in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, below.

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general policy objectives, thus providing all parties with practical guidance on how to structure potentially harmful activities and behaviours, in the process moving discussions from high-level policy rhetoric and slogans to more mundane, nitty-gritty action. The fact that leading, high-profile NGOs with conventional advocacy and political orientations are now championing use of such instruments is evidence that, even in the eyes of these consummate political players, there is no perceived incompatibility between, on the one hand, engaging in political discussions about issues of societal concern and, on the other, attempting to devise instruments to address these issues. Indeed, one can argue that the ability of NGOs to be effective in their political activities will be enhanced through the knowledge gained developing and implementing codes.

Voluntary Codes and Innovation

The final concept in the title of this volume, innovation, is as vast in scope as private governance and the public interest. In its most basic form, innovation is any process through which new means and/or ends are developed.⁵⁴ Innovation can be focussed on the private sector (with new products or services, new ways of making those products, new ways of marketing and distributing them, etc.), the public sector (new policies, new ways of delivering policy, new ways of funding) or the not-for-profit sector (in the delivery of an organization's mission, in funding and in administration).⁵⁵

The focus of attention here is on voluntary codes as a form of *rule innovation*, with significant market and social (including public policy) implications. The concept of rule innovation draws for inspiration on the recent work of Harvard Business School Professor Clayton Christensen concerning breakthrough innovations in the "connected economy."⁵⁶ A key characteristic of breakthrough innovations is that they typically *enable a larger population of less skilled people to do things previously performed by specialists in less convenient, centralized settings*, and usually facilitate *empowered participation*. He gives as an example the computer, which in its early forms was a very large, expensive mainframe device used only by experts for sophisticated problem solving, but then with the advent of the personal computer, became something that, while not as powerful as mainframes, was suddenly accessible to many, and hence capable of application to a much wider variety of situations than ever before. Innovations such as

54. For good discussions of the nature of innovation, see P. Kelly and M. Kranzburg, eds., *Technological Innovation: A Critical Review of Current Knowledge* (San Francisco: San Francisco Press, 1979). See also Editorial Board of the *Innovation Journal*, "Some Thoughts on Definitions of Innovation," *The Innovation Journal* 4:3 (September–December 1999), available at <www.innovation.cc/discussion-papers/thoughts-innovation.htm>.

55. See, generally, *ibid.*, and P. Griffith, "Innovation in Not for Profits and Government," *The Innovation Journal* 4:2 (May–August 1999), available at <www.innovation.cc/discussion-papers/not-for-profits.htm>; and Public Policy Forum, "Innovation in the Federal Government: The Risk Not Taken," *The Innovation Journal* 4:2 (May–August 1999), available at <www.innovation.cc/discussion-papers/risk2.htm>.

56. 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). Note that Christensen's conception focussed exclusively on *commercial* applications.

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the introduction of the personal computer tend to distribute expertise and access, and to decentralize power.⁵⁷

The position taken here is that voluntary codes are a form of breakthrough *rule* innovation with significant public policy implications: clearly, public organs of rule making, administration and adjudication are and will remain the “mainframe computers” of society, controlled and used by experts (elected members of legislatures, government regulators, judges, etc.) for sophisticated problems. Voluntary code rule systems, on the other hand, are the comparatively inexpensive personal computers of societal rule development and implementation — they are perhaps not as powerful as “mainframe” rule approaches, but they are accessible to a much wider group of players and may be nimbler and more portable. While laws are imposed in a top-down fashion, have a coercive base and are the product of centralized rule systems, voluntary codes are inherently bottom-up, cooperative and consent-based, working only when agreed to by the appropriate attentive publics. Through use of voluntary codes, NGOs, firms, industry associations, multistakeholder groups, and others are in an empowered position⁵⁸ to create and operate their own rule systems, to engage in “norm conversations” directly with various publics, as opposed to exclusively through the intermediary of the State, and in so doing societal opportunities for norm development and implementation are enriched and vitalized.

Just as the introduction of personal computers did not obviate the need for mainframes, so too voluntary code rule systems will not replace the conventional rule systems of the State — indeed, voluntary codes function within an overarching framework of law. Voluntary codes are an additional instrument for rule development and implementation, operating alongside legislative techniques and processes, and as such increase and enrich the possibilities for effective norm development and implementation. In addition to acting as innovative voicing mechanisms for NGOs, industry associations and hybrid multistakeholder groups, codes can act as incubators for new legal approaches by testing out what does and does not work, refining and enhancing legal approaches, addressing activities not easily controlled through legislative techniques, helping define what constitutes legally acceptable conduct, assisting in addressing some of the weaknesses of laws, being incorporated into the terms of legal instruments, extending the reach of legislative techniques, stimulating “beyond legislative compliance” behaviour, and enhancing the enforcement capabilities of governments.⁵⁹

Some might be concerned that the proliferation of codes can be confusing — for consumers and citizens, as well as for governments and industries — as each code competes for attention. There is, of course, this possibility. But this potential confusion

57. Christensen and Petzinger, *ibid*.

58. Of course, whether voluntary codes are tools for empowering disadvantaged groups depends to a large degree on the code and context under consideration. A trade association may purposely shield its code development and implementation from input by affected parties, and in so doing fail to be empowering. However, failure to meaningfully involve these affected parties could negatively affect a code’s credibility and legitimacy. See, particularly, discussion of the sustainable forestry standards and apparel worker code standards in this volume for examples of this.

59. These points are all discussed in Webb and Morrison, “The Law and Voluntary Codes,” Chapter 5, below.

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may be overstated. At the level of individual behaviour, consumers seem to have a highly developed ability to sort through diverse products and services in order to select those that meet their needs — whether it be fair trade coffee, organic food, merchants that are members of the Better Business Bureau, products that meet Canadian Standards Association or British Standards Institute standards, garages that are approved by the Canadian Automobile Association or American Automobile Association, and so on. As long as codes and claims made about them are not misleading or otherwise anti-competitive (in which case they are open to legal action), it is difficult to see how diversity of codes is, in the final analysis, a troubling development for consumers, worthy of government constraint. From a market standpoint, there is the potential that code diversity will lead to improvements (see, for example, discussion of the seemingly positive impacts flowing from competition between the Canadian Standards Association and Forest Stewardship Council sustainable forestry initiatives, later in this volume). Moreover, it is not unreasonable to anticipate that, from time to time, early code diversity in a particular area (e.g. code initiatives pertaining to consumer protection in the area of electronic commerce) will lead to “market shakedowns,” with only a small number of such initiatives emerging as the most prominent. Thus, sudden, riotous and confusing proliferations of codes pertaining to a particular topic are likely to be only temporary conditions. Fourth, when governments are concerned about code confusion and proliferation, they can introduce their own code initiatives (see discussion of the Environmental Choice Program in Chapter 10 of this volume), support and endorse those they feel are worthy (as is the case with the Apparel Industry Partnership/Fair Labor Association and scanner accuracy code initiatives discussed in chapters 7 and 13 of this volume), draw on voluntary initiatives to create legislative approaches (as was the case with the development of the Canadian federal personal information protection law, which is based on a Canadian Standards Association code, as discussed in Chapter 8 of this volume), and constrain those who act in a manner considered contrary to public policy (e.g. contrary to anti-trust/competition or misleading advertising provisions and guidelines, as discussed in Chapter 5 of this volume). In short, code diversity would appear to be a positive development in most circumstances, and when it is not, governments have the tools at their disposal to address problematic aspects (and have so used these tools).

Voluntary Codes as Voicing Mechanisms

When NGOs take leadership roles in the development of voluntary codes (as in the case of the Forest Stewardship Council, Fair Labor Association and Web Trader initiatives discussed in this volume), the codes can act as aggregate voicing mechanisms for demand-side interests of the economy.⁶⁰ Before NGOs began regularly using voluntary codes in this manner, publications and consumer boycotts were virtually the

60. See Bendell (footnote 22) for discussion of the increasingly important role that organizations of civil society will have in setting the standards for business behaviour in the 21st century.

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only way for voicing to be undertaken by the demand side of the economy,⁶¹ and industry — through use of techniques such as surveys, focus testing, and advertising campaigns — had a virtual monopoly over the organized definition of consumer needs.⁶² In contrast with boycotts (the main techniques for demand-side voicing used in previous eras), voluntary codes are information-rich, targeted, proactive and practical. While boycotts essentially tell the marketplace that some aspect of private sector behaviour is unacceptable (and do so in a rather blunt, approximate manner), voluntary codes can be more constructive, providing detailed prescriptive information on what commercial behaviour is considered proper and improper, and how firms can operate in an acceptable manner. When a code is operated in conjunction with a labelling scheme, a practical system is in place for businesses to demonstrate good behaviour and for consumers to identify and reward that good behaviour.

In many circumstances, the ability of NGOs to act as demand-side voice aggregators has been enhanced considerably through use of the Internet. The opportunity for NGOs to gather information concerning a particular activity or firm, to share that information with their partners in code development, and to communicate and promote code initiatives to the broader community is improved through the use of Web sites, e-mails and search engines. Members of the public also have an enhanced ability to conduct their own Internet-based research on code issues as they see fit, and not rely solely on what supply-side advertising or mainstream media might choose to say about an issue. While in the past it has been governments and industry sectors that have had significant strategic informational advantages in terms of networking and communications, the Internet is now offering the possibility of a more “level playing field” for demand-side interests. In short, as access to the Internet becomes more pervasive, the information asymmetries between supply-side and demand-side interests may lessen, and information-related transaction costs associated with demand-side voice aggregation and organization may diminish. This would appear to be a significant contributing factor in the rise to prominence of NGO-led voluntary code initiatives. (In the next section, another possible contributing factor in the rise to prominence of NGO-led voluntary code initiatives is discussed — the high public credibility of NGOs, and the associated, considerably lower levels of public confidence in government and industry representatives.)

NGOs that take on the role of championing demand-side needs and wants through use of voluntary codes may be able to work with others to transform an ambiguous consumer attitude toward a particular behaviour⁶³ (which due to its generality

61. For a good discussion of the history and evolution of boycotts, see N. C. Smith, *Morality and the Market: Consumer Pressure for Corporate Accountability* (London: Routledge, 1990). Cooperatives have long been used for aggregate demand-side purchasing, but not primarily as a voicing mechanism.

62. Of course, the *threat* of consumer boycotts can still exist behind the comparatively benign face of an NGO-led voluntary code, and it is possible that the potential for exercise of that threat is increased once a voluntary code has been developed (since there is a peak organization to promote it that one can join, and presumably there is a constituency that can be called on to support the cause). Members of NGOs can also participate in protests of merchants that are not adhering to their (or an acceptable) voluntary code, and in this way “encourage” businesses to adhere to their code. See, generally, Gereffi, Garcia-Johnson, and Sasser (footnote 25).

63. See, e.g., Environics International (footnote 24).

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might not otherwise manifest itself at the cash register⁶⁴) into focussed, actionable changes in marketplace behaviour. Thus, for example, generalized public concern about clear-cut forest activities is operationalized through the World Wild Fund for Nature-supported Forest Stewardship Council that, as the result of the work of its affiliated certification partners, has now certified 24 million hectares of forests around the world as being sustainably harvested. Similarly, the Fair Labor Association's apparel-related code (whose founding members include consumer, faith-based and human rights NGOs, as well as businesses), transformed generalized consumer concerns with the working conditions of labourers in factories into commitments from major brand-name apparel retailers to comply with its workplace code of conduct. And the Web Trader program in the U.K. and other European countries responded to generalized consumer concerns with online merchants through a code of conduct and seal program that attracted more than 3,000 participating merchants. Note that with respect to both the Forest Stewardship Council and Fair Labor Association initiatives, a key to success was recognition and support by certain retailers of the value of the initiative, and agreement from them to work with NGOs to change behaviour. These retailers, as major buyers (on behalf of their consumers) were then in a position to push for change from producers. This sort of NGO-retailer-producer leveraged influence relationship is discussed in greater detail below.

A slight variation on the theme of voluntary codes as innovative voicing mechanisms in the marketplace occurs when businesses *lead* in the development of voluntary codes. Here, businesses are attempting to respond to, or anticipate, demand-side interests in some aspect of their products and services by articulating how their businesses address the perceived demand-side interest (or they are attempting to anticipate or respond to government demands). However, it is increasingly clear that industry voluntary initiatives developed without meaningful consultations with NGOs, affected communities and other civil society stakeholders may lack credibility. While NGO-led initiatives can be described as *push* mechanisms for "voicing," industry-led initiatives are more like *pull* mechanisms, attempting to "tell" consumers, communities, governments and other attentive publics what businesses think those attentive publics want to hear (and then responding on the basis of what they hear).

In either case, once an NGO or industry group makes public its intention to create a code, and thereafter as the code is developed, there are frequently replies from other interests, and so as the initiative evolves, and as several voices variously make themselves heard, a form of "norm conversation" — sometimes an argument — takes place. Not too surprisingly, the shape of initiatives may change as the conversations and arguments progress.⁶⁵

64. See, e.g., a recent U.K. study that has labelled the phenomenon the "30:3 syndrome," due to the fact that while more than 30 percent of consumers express support for corporate social responsibility, ethical products hold only 3 percent of the market. Per R. Crowe and S. Williams, *Who are the Ethical Consumers?* (London: The Cooperative Bank, 1999). For discussion of a similar phenomenon in Canada (the Environmental Choice Program), see K. Harrison, "Canada's Environmental Choice Program," Chapter 10, below.

65. Thus, for example, Gap Inc.'s original code for El Salvador supplier factories was not subject to third-party monitoring, but now is, following NGO criticism, as discussed in greater detail later in this volume.

Voluntary Codes and Leveraged Influence

Research in this volume suggests the importance of recognizing the potential for voluntary codes to be used to influence behaviour beyond the direct parties involved. NGOs have been able to develop alliances with retailers, who in turn are in a position (as proxy, aggregated consumers with buying power) to demand significant changes from supplier-producers (e.g. in the context of sustainable forestry and apparel worker codes).⁶⁶ In this way, NGOs may be able to exercise, on behalf of consumers, a degree of market influence beyond what would be expected based on their membership base. On the industry side of the ledger, chemical producers are also now beginning to extend their Responsible Care model to bring about change in conduct from downstream commercial chemical users, and thereby leverage their influence over these users. Research in this volume also suggests that the Responsible Care model has been widely emulated by other industry sectors, tacitly becoming a benchmark for a number of non-chemical-related industries wishing to put in place a voluntary program. Large automobile manufacturers are requiring their suppliers to comply with the voluntary International Organization for Standardization (ISO) environmental management standard, in a kind of supply-chain domino effect. Shareholders, investors and pension funds are using governance and social responsibility guidelines as measures of acceptable and unacceptable levels of risk management behaviour by corporations, and are thereby influencing firms to change their behaviour with a view to becoming more attractive to the investment community. Insurers are reducing premiums for companies that comply with recognized environmental programs.

Several years ago, the suggestion was made by Mancur Olson in *The Logic of Collective Action*⁶⁷ that, for reasons mainly pertaining to organizational dynamics, smaller, tightly knit groups might be more successful in getting changes made to public policy than would less tightly knit groups. Olson's attention was focussed on the behaviour of non-State actors vis-à-vis State rule-making institutions, but it would appear that a similar phenomenon and dynamic may be at work with respect to voluntary codes and market behaviour. In effect, a comparatively small but well-organized NGO, retailer, industry association or multistakeholder body may be able to stimulate widespread market behavioural change beyond its membership aided by the use of voluntary codes. Needless to say, those industry sectors, such as the mining sector, that do not have an identifiable retail exposure may be less vulnerable to consumer pressure than are others, but they may nevertheless be stimulated to respond as the result of pressure from other demand- or supply-side actors, such as retail-exposed shareholders, investors, pension fund managers and insurers, with which they have commercial and other relations.

To be successful, code proponents must target multiple potential supporters (ultimately, the consuming public), perhaps via proxy intermediaries such as retailers, while those wishing to influence the shape and content of laws may have their eye on the electorate, but tend to target their lobbying efforts on a small group of key ministers, the Cabinet and government officials. Unlike lobbying efforts concerning laws, an industry-

66. All of the examples in this paragraph are from research described in the volume.

67. M. Olson, *The Logic of Collective Action* (Cambridge, Mass.: Harvard University Press, 1965).

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initiated code can be countered by an NGO-initiated code (and vice-versa), so that an open, pluralist, market-based “rule competition” for the hearts and bank accounts of consumers is possible. Good examples of this are the competing NGO- and industry-led code and labelling initiatives pertaining to sustainable forestry and treatment of apparel workers, and similar competitions between NGO- and industry-led merchant reliability programs in the area of electronic commerce (as discussed in this volume). Concerns that codes can be wielded by powerful industrial interests (who have money, access to critical information, and influence) against those less powerful are being put to the test when NGOs develop their own initiatives, and are supported in their efforts by a range of consumer and other interests.

NGOs and industry interests that have developed voluntary codes may also attempt to use codes in efforts to influence public lawmaking. Thus, for example, an NGO or industry association could argue that the voluntary code that it developed, supported and/or implemented demonstrates the workability and indeed popularity of the initiative, so that it should be the basis for a law (as in the case of the support by the Canadian Marketing Association for the CSA privacy code becoming the basis for federal and provincial privacy laws). Or an industry association might argue that there is no need for a new law because a voluntary initiative is already addressing a particular problem (the spectre of this has been raised by NGO interests vis-à-vis the Responsible Care program). Or, an NGO could argue that a failure of a particular code initiative proves the need for a law.

In so acting, these interests would essentially be behaving in a manner entirely consistent with Olson’s original observation focussed on the potential enhanced capability of a comparatively small set of private actors to affect public policy, with the slight variation that the private organizations in question would be using market-oriented codes to bolster their public policy arguments. Some might argue that use of codes by industry associations and NGOs to influence public policy demonstrates the dangers of codes to public policy and thereby undermines democratic processes. There is always this possibility. But at least the basis for their lobbying efforts would be an operating rule regime, voluntarily agreed to by a range of supply- and demand-side interests (as the case might be), and not simply a more or less persuasive argument for why there should or should not be a law (the more conventional basis for lobbying). There would also be the possible existence of other, rival code initiatives for legislators and government officials to consider in their public policy decision making. Codes-based public policy lobbying is lobbying based on some degree of experience with rules in action, and in that regard at least offers the opportunity for all parties to reach their own conclusions about the merits of a public policy proposal based on operating code regimes.

Credibility, Commodification and Codes

Scholars such as Professor Benjamin Cashore of Yale University's School of Forestry and Environmental Studies have begun to turn their attention to the importance of credibility or legitimization in understanding the use and effectiveness of code initiatives.⁶⁸ Drawing on his research concerning forestry management initiatives, Cashore suggests that voluntary code systems have four distinctive governance characteristics: no use of State sovereignty to force compliance, authority granted through external audiences, authority granted through a supply chain, and verified compliance. According to Cashore, there are a variety of types of legitimacy that can be granted by a code's audience: *pragmatic legitimacy*, which rests on the self-interested calculations of an organization's most immediate audience (e.g. certification will give a particular forestry company a competitive advantage), *moral legitimacy*, which reflects a calculus based on what is "the right thing to do" (more likely to be granted by supportive NGOs), and *cognitive legitimacy*, which may flow from conforming to established modes or standards (e.g. building a Canadian Standards Association forestry standard on an existing ISO 14000 platform). The voluntary codes examined in this volume reveal the wide number of legitimacy-enhancing activities engaged in by business-, NGO- and government-supported voluntary code regimes.⁶⁹

Recently, Canadian provincial and American state governments announced that they were having their regulatory regimes for the management of forestry and fisheries resources certified by NGO-spearheaded voluntary code initiatives.⁷⁰ Such actions seem to show government recognition that their regulatory programs are lacking in public and market credibility, and that NGO-led certification might assist them in providing that needed credibility.⁷¹ In doing so, they join the line already formed by commercial

68. See, e.g., 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; S. Bernstein and B. Cashore, "Globalization, Four Paths of Internationalization and Domestic Policy Change: The Case of Eco-forestry Policy Change in British Columbia," *Canadian Journal of Political Science* 33 (2000) pp. 67–99.

69. See particularly discussions in Rhone, Stroud and Webb, "Gap Inc.'s Code of Conduct," Chapter 7, below; Rhone, Clarke and Webb, "Sustainable Forestry Practices," Chapter 9, below; Harrison, "Canada's Environmental Choice Program," Chapter 10, below; Webb and Clarke, "Other Jurisdictions," Chapter 13, below.

70. 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 (footnote 13), 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 intend to do so. In March 2001, the Ontario Minister of Natural Resources announced that the province was initiating a bilateral process with the Forest Stewardship Council (FSC) to obtain FSC certification of all Crown-owned forests managed in compliance with Ontario law and the products derived from those forests. Per Ontario Ministry of Natural Resources (footnote 13).

71. In *Group Politics and Public Policy*, 2nd ed. (Toronto: Oxford Press, 1992), Paul Pross articulates a nuanced and useful concept to describe the actors who have acquired a dominant voice in determining government decisions in a field of public activity, which he refers to as the *policy community* (see, e.g., p. 119).

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interests wishing to have their actions NGO-approved. The success of these NGO-supported initiatives, as well as those of standards such as ISO 14000, and the popularity of “ethical citizen” businesses such as Ben and Jerry’s and The Body Shop provide more evidence that social, ethical and environmental values have entered the marketplace, and are capable of commodification.

An argument can be made that values-based NGOs that spearhead the development of voluntary codes are attempting to parlay or transform their credibility as critics of government and private sector activities into arbiters of good government and good business behaviour through market-oriented voluntary code “rule commodities.” Prior to this point, NGOs were usually in the luxurious (if frustrating) position of never having the responsibility of regulating an activity.⁷² This allowed them to develop their skills in pointing out the weaknesses of others, but otherwise kept them above the fray. Now, it may be that the tables will be turned. They will likely face the same barrage of critical and skeptical questions that in the past they themselves have asked of government: for example, just how accountable and transparent are their decision-making processes? Are there meaningful opportunities for all affected parties to participate? What is the basis for their decisions? Indeed, the suggestion has been made that NGOs should themselves be the subject of a voluntary code of accountability.⁷³ At an operational level, it is reasonable to assume that NGO-spearheaded voluntary code administrations will be susceptible to the usual litany of problems faced by those that regulate (e.g. incompetence, corruption, conflict of interest, unfair treatment, etc.). In short, the real test of the credibility of NGOs as rule makers and implementors is just beginning. The advocacy activities of NGOs may be enriched through the knowledge gained in assuming rule-making and implementation responsibilities, but their reputation as observers above the fray is likely to be challenged.

In sum, in this volume, voluntary codes are considered to be innovative approaches to rule making and implementation, providing new competition to existing players and processes, both in the context of the market and concerning public policy. Codes offer a new and different model for framing, voicing and implementing market and public policy rules — a model potentially allowing more parties into the rule-making process. Codes compel a re-examination of how market and public interest rule making and implementation have to date been undertaken. But, on the other hand, codes that are not properly designed and implemented can cause problems for all parties concerned. These themes are variously illustrated and explored in the chapters that follow.

In a diagram on p. 123 that sets out the concentric rings of influence in a typical policy community, government agencies are at the centre. When non-State public policy-oriented voluntary codes are in use, and government regulatory credibility is threatened, it could be that a different conception of policy community is required, in which government agencies are circling NGO-led code institutions that occupy the central position.

72. It perhaps goes without saying that in light of the fact that NGOs are not government entities, the only opportunities they will have to regulate is through private regulatory mechanisms.

73. A. Adair, *A Code of Conduct for NGOs: A Necessary Reform* (London: Institute of Economic Affairs, 1999).

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The volume is organized into several parts. Part One consists of this chapter's introduction to the concepts and themes. Part Two is devoted to broad, cross-cutting examinations of basic issues that underlie the use of voluntary codes. The main objective is to provide readers with some idea of the intellectual and practical contextual background within which voluntary codes operate. In Part Two, the role of the State in a privatized regulatory environment is explored, as are the public administrative, political economy and legal aspects of voluntary codes. Part Three then consists of six case studies of existing voluntary code initiatives. The chemical producers' Responsible Care environmental program, Gap Inc.'s code of conduct for the treatment of overseas workers, a variety of privacy self-regulatory initiatives, two sustainable forestry initiatives, and the Canadian Environmental Choice Program are all reviewed. A comparison of voluntary bicycle helmet standards and hockey helmet regulations is also provided. Part Four is devoted to analysis of voluntary code experiences outside of Canada, with the Australian, American, European and developing country experiences all examined. Finally, in Part Five, a concluding chapter looks at the future of voluntary codes.

Part Two begins with David's Cohen's chapter, "The Role of the State in a Privatized Regulatory Environment." Cohen traces the movement towards regulation by private rather than public institutions. He describes voluntary codes as part of a transformation of our historical conceptions of government, to encompass activities of both State and non-State actors in the face of the growing economic, social and political importance of multinational and non-governmental organizations. In this new regulatory environment, the State and laws still have a place, but their roles are very different from (and of less central importance than) those considered appropriate for much of the 20th century.

In support of the idea that voluntary codes are a form of rule innovation, Cohen characterizes voluntary codes as decentralized contractual bargains between various stakeholders, replacing the centralized production of regulations by governments. When designed properly, voluntary codes can represent an effective regulatory instrument providing for a multiplicity of interests and values to be heard and reflected in the output of markets. Ideally, voluntary codes can provide a mechanism for industry to take an enlightened view of its self-interest, for NGOs to be more effective, for small business to be heard, and for labour to be represented, with government acting as a form of mediator. Moreover, voluntary codes can potentially avoid many of the constitutional limitations that constrain the legal authority of the State.

But there is no guarantee that voluntary codes will fulfil this promise. Cohen describes another, less positive vision of voluntary codes, one in which the instrument simply permits the most knowledgeable and powerful actors in the markets to dominate not only the production of private goods, but also the definition and creation of public goods. Codes may simply be a strategy to deflect the energy of interest groups away from the political process and permit firms to avoid more effective and rigorous public regulation.

Cohen concludes that perhaps both visions are true, and withholds judgment at this time on the utility of voluntary codes. Codes are neither inherently good or bad. What is certain is that underlying the use of voluntary codes is a complicated relationship of private and public regulation in shaping behaviour. And while the State is being

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transformed, it is still present, with laws and governmental action stimulating and shaping the form and content of voluntary codes. He speculates that the utility and impact of voluntary codes is likely to vary depending on the context, their design and implementation, and their relation to legal regimes.

In “Institutional and Public Administrative Aspects of Voluntary Codes,” G. Bruce Doern explores the application of the concept of accountability to the use of voluntary codes. He divides his analysis into five interrelated themes: accountability to the democratic State and Parliament, internal accountability within the groups that develop and administer codes, the characteristics of voluntary codes as public policy instruments, the impact of budgetary cutbacks on the ability of the State and others to carry out their tasks, and the nature of overlapping regimes of regulation and their relevance to voluntary codes. In contrast to conventional command-and-control regulation, which is subject to an upward and inward accountability to Parliament, voluntary codes have more of a downward and outward accountability to the broader collective.

Doern cautions against characterizing a world of greater reliance on voluntary codes as a world that is a full or sharp break from one with conventional regulation, noting that even with conventional regulation there is an important aspect of activity that is “relational,” involving ongoing persuasion, education and information between regulators and regulated. Much of voluntary codes activity has a strong relational component. With budget cuts, the ability of regulators to understand and properly respond to voluntary codes activity may be negatively affected.

Doern suggests that use of voluntary codes is likely to focus attention more on exactly what associational, corporate and intergroup democracy and accountability really involves. In a way, Doern observes, these organizations become “surrogate States,” leading to the legitimate question, what capacity do they have to carry out all of the rule functions that we currently associate with public institutions? Voluntary codes may mean fewer *public* bureaucrats, but not necessarily fewer bureaucrats. In this regard, the adequacy of accountability mechanisms within organizations that develop and implement voluntary codes will be of central importance — mechanisms such as reporting, compliance verification processes and public involvement.

In conclusion, Doern suggests that perhaps the largest institutional and public administrative picture to emerge from his analysis is that of a government presiding over two broad clusters of rule makers and compliance organizations: one that the government regulates itself and one in which it oversees, in some less clear and less direct fashion, a set of self-regulators and code administrators that has the direct relationship with the persons and interests affected by the code. In this regard, the growing number of voluntary codes regimes can be seen as a natural “bottom-up” construction of systems of rules and guidelines that complement the more formal State-centred regime. Concerns about accountability, especially democratic accountability and administrative capacity of organizations that develop and implement voluntary codes, are likely to be of increasing importance.

Bryne Purchase’s chapter, “The Political Economy of Voluntary Codes,” explores the competitive advantages of States and non-State actors as rule-making and implementation institutions. Democratic governments have a monopoly on the legitimate use of incarceration in support of laws, and have the ability through taxation to raise

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funds to support regulatory programs. As a result, the State has a key competitive advantage in terms of its ability to impose obligations on those who would otherwise not comply, and effectively ensure compliance with them. But States have difficulty addressing problems that extend beyond their boundaries, their financial capacities are not unlimited (and indeed are increasingly under pressure), their legitimacy as rule makers is increasingly being challenged, and their primary instrument of public policy (conventional command penalty regulations), because of its formality and comparative inflexibility, can stifle innovation.

Purchase notes that modern developments in the areas of voluntary standards, certification approaches, alternative dispute mechanisms and voluntary codes should be viewed as a continuation of non-governmental efforts to establish credibility in the marketplace. Non-State actors who develop voluntary codes cannot rely on the threat of coercion to support of their rule-making activity. Instead, their rule-making activity is inherently consent-based. In Purchase's analysis, this is both a strength and a weakness. On the one hand, non-State actors have considerable difficulties addressing the behaviour of free riders who choose not to comply with their rules. But on the other, non-State actors are not constrained by jurisdictional boundaries, and so are capable of developing consent-based voluntary codes that extend across the globe. Their rule-making activities can be sector-specific, flexible and outcome-oriented.

Although the consent basis of private regulatory activity can be viewed as a disadvantage when compared with conventional command-penalty regulation, Purchase points out that consent is the most effective form of governance, since it is most likely to lead to controlled behaviour, even when formal monitoring and enforcement mechanisms are weak. Participation and effective voice in the rule-making process is one way to increase the likelihood of consent being provided. While difficult to achieve, the wider the coverage of a code (e.g. within an industry), the more credible it is likely to be in the eyes of other stakeholders. A central challenge is to develop highly consensual processes that will attract parties to join. Credibility and legitimacy will also be enhanced if external stakeholders are meaningfully involved, although this is clearly not an easy task. Purchase points to the possible value of principled negotiation as a way of developing consensus, a process that separates people from problems, focusses on interests not positions, searches for commonly agreed benchmarks, and has a problem-solving orientation.

Purchase explores the interrelation between State and non-State actors, and the ability of State actors to influence the shape or content of voluntary initiatives. In particular, the question of the role of the threats of State action as a stimulus for voluntary activity is discussed. While the certainty of State action may be beneficial in producing voluntary agreements, the more predictable the State's actions, the more likely it will have to act. Purchase suggests that the State adopt a poker player's stance, and keep non-State actors guessing as to whether they will resort to regulation: the more uncertainty there is about how the State will act, the more likely there will be "voluntary" agreement. In addition to influencing the shape and content of voluntary codes through threats of new regulations, States can also "steer rather than row," by publishing guides, assisting non-governmental organizations in their participation, and giving positive publicity to good codes.

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Kernaghan Webb and Andrew Morrison's chapter, "The Law and Voluntary Codes: Examining the 'Tangled Web'," suggests that, while voluntary codes are non-legislatively required commitments, they nevertheless are strongly influenced by legal factors, and often have significant legal implications. Voluntary codes and standards can be referentially incorporated in regulations, with or without the approval of the original authors, and such codes can elaborate and refine upon the generality of regulatory requirements. Courts can draw on the terms of voluntary codes as evidence of the appropriate legal standard of care for an industry. The contract basis of voluntary codes can allow industry associations to impose sanctions on member companies. Codes — particularly when they are agreements among firms — can conceivably have competition law and trade law implications.

Compared with laws, the main advantages of voluntary rule systems centre around their flexibility and lower costs, speed in developing and amending rules, avoidance of jurisdictional concerns, potential for positive use of market, peer pressure internalization of responsibility, and informality. Compared to laws, typical drawbacks of voluntary codes include generally lower visibility, credibility, difficulty in applying the rules to free riders, less likelihood of rigorous standards being developed, uncertain public accountability, and a more limited array of potential sanctions.

In practice, laws and voluntary codes frequently work in tandem, often with positive effects. For example, in spite of their consent-based origins, voluntary code arrangements can be used by courts to impose standards and liability on parties who did not necessarily agree to be bound by the original voluntary code arrangement. In this way, free riders, who avoided joining a voluntary code system, may nevertheless have it imposed on them. At the same time, voluntary codes can help to "flesh out" legal regimes, such as providing detail on what constitutes due diligence in a particular context. A vigilant and consistent regulatory enforcement presence can provide strong encouragement for industry to engage in voluntary initiatives. The chapter concludes by noting that, even though voluntary codes may be developed for reasons that do not relate directly to the law or government, the legal system can play an important role in stimulating the development of voluntary initiatives, reinforcing the effectiveness of such measures, or constraining unacceptable code behaviour. Law and voluntary codes are inextricably intertwined, engaged in an ongoing conversation. As a result, all stakeholders need to carefully consider the legal implications of voluntary codes before participating in or supporting such initiatives.

Part Three begins with "Responsible Care: A Case Study of a Voluntary Environmental Initiative" by John Moffet, François Bregha and Mary Jane Middelkoop. The authors trace the evolution of the Canadian Chemical Producers' Association's Responsible Care initiative from its earliest days to its present form as one of the most advanced and emulated industry self-regulatory environmental protection regimes in the world. In its original form, Responsible Care was largely a reaction to negative public image associated with chemical disasters, as well as an attempt to forestall the introduction of new environmental regulations. What began as a set of basic principles, soon grew to extensive codes, a formal multistakeholder advisory panel, community consultations, public reporting and a unique verification process that involves peers and community representatives. Statistics show reductions of many key substances, but it is difficult to ascertain with certainty how much is because of Responsible Care, and how

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much is stimulated by other factors. The authors note the importance of several factors in the program's success, including strong leadership shown by some of the players in the large chemical companies, the value of information-sharing sessions and peer pressure, and technology sharing. The authors note that both community relations and relations with government seem to have improved since the introduction of the program, but there are also criticisms that the Canadian Chemical Producers' Association has been able to soften certain legislative initiatives.

In "Gap Inc.'s Code of Conduct for Treatment of Overseas Workers," Gregory T. Rhone, John Stroud and Kernaghan Webb describe how one clothing retailer has used its contracting power to exert control over the working conditions in supplier factories located around the world. It is also the story of the power of negative publicity, and the susceptibility of large image-conscious firms to such negative publicity, as workers from one of its plants in El Salvador, flown to North America to expose their working conditions, effectively compelled Gap Inc. to rewrite its code and introduce third-party monitors into its El Salvador factories. The authors describe Gap Inc.'s experience and the evolution of its code as a possible example of the "roach motel" syndrome,⁷⁴ since the initial commitment to abide by a code is comparatively easy, but after that point, exit is very difficult: any public exposure of foot dragging or renegeing on commitments may compel the firm to shamefacedly agree to more aggressive terms. Clearly, continued NGO, consumer or other watchdog scrutiny is necessary to ensure the continued effectiveness of the code.

Colin J. Bennett's chapter, "Privacy Self-Regulation in a Globalized Economy: A Race to the Top, the Bottom or Somewhere Else?" describes a complex and ongoing dialogue among self-regulatory and regulatory policy instruments (and their various champions) designed to protect personal information in the global economy. Like personal information itself, the dialogue takes place across borders, and between both State and non-State actors. Bennett articulates a useful typology of interrelated self-regulatory instruments, from commitments to privacy codes, standards and privacy seals. Bennett describes the evolution from voluntary to legislated approaches in Canada, the influence of external factors to this evolution, and the distinctive mix of public and private instruments underlying the development of the "safe harbour" agreement in the United States. He concludes that there is an overall move toward integration at the global level, with the resultant level of protection being neither a race to the top nor the bottom. In Bennett's opinion, the proliferation of self-regulatory instruments, and their broadening scope, means that the overall trajectory and dynamics constitute, if not a race to the top, then at least a steady walk. Even though many self-regulatory tools are designed to stem this process and avoid regulation, overall the bar has been raised, and self-regulation, along with legislative and technological instruments, has contributed to that process.

74. Roach motels are devices used to rid dwellings of unwanted insects. They consist of small boxes with several holes and an attractive scent. The scent lures insects in, and they are subsequently killed by an insecticide. Hence, insects can check into a roach motel, but they can never leave.

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As described earlier, Gregory T. Rhone, David Clarke and Kernaghan Webb's chapter, "Two Voluntary Approaches to Sustainable Forestry Practices," provides a comparative exploration of the evolution and development of an industry-led and an environmental group-led sustainable forestry initiative. While the two programs are not identical in function or content, nor in their process of development, it is clear that they are vying for the same goal: credibility in the marketplace as legitimate and effective mechanisms for ensuring that forests are harvested in a sustainable manner. Particularly interesting are the efforts of the environmental organization-led initiative to cope with unexpected popularity, and that of the industry-led initiative to demonstrate its credibility in the face of criticisms. Both programs have undergone considerable evolution, and no doubt will continue to do so.

Kathryn Harrison's chapter, "Promoting Environmental Protection Through Eco-Labeling: An Evaluation of Canada's Environmental Choice Program," reveals a government program whose mode of operation has changed significantly over time. Government has essentially delegated program administration to a private firm. The orientation of the program has become considerably more business-oriented with the passage of time. As a result, many of the least popular product categories have fallen by the wayside, and the process for reviewing applications has been streamlined to be quicker and less expensive. A key point raised by Harrison is the selective nature of eco-labelling programs, whose objective is to raise the ceiling as opposed to setting a floor of minimum standards. Rather than encouraging participation by all members of an industry, eco-labelling programs quite intentionally restrict participation to a subset of leaders. Free riding is not an issue, but eco-labelling programs must confront the potential for intra-industry competition. As such, third-party leadership is essential and an objective of consensus in standard setting is quite inappropriate. However, the resistance to eco-labelling by firms who fear a loss of market share may offer a cautionary lesson concerning other voluntary codes as well. Differences in the ability and willingness of individual firms to pursue social goals is an issue that must be confronted by other types of voluntary codes. The evidence from this case study that firms within an industry will resist standards that they cannot meet provides cause for concern more generally about the leadership potential of voluntary codes based on industry-wide consensus.

In "Bicycle Helmet Standards and Hockey Helmet Regulations: Two Approaches to Safety Protection," Andrew Morrison and Kernaghan Webb explore why the standard for the safety of bicycle helmets is voluntary, while that for hockey helmets is mandated in regulation. The study suggests that it is wrong to view selection of regulatory and non-regulatory approaches as an either-or proposition. In practice, the two work in tandem. Thus, for example, there are federal regulatory product standards for the manufacture of hockey helmets, yet use requirements are (with the exception of in Quebec) implemented through non-regulatory means. In the case of bicycle helmets, performance standards for the manufacture of helmets are not set out in law, but several jurisdictions have use requirements enshrined in law. In both contexts, the mix of regulatory and voluntary techniques operates against a backdrop of tort liability. As to why a regulatory measure was used for hockey helmets and a voluntary approach for bicycles, a combination of factors seems to be at play, including the distinctive nature of

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the activity, varying government attitudes toward regulations over time, divergent market conditions, jurisdictional issues, and the increasing credibility of standards bodies.

Part Four begins with Neil Gunningham's chapter, "Codes of Practice: The Australian Experience." Gunningham describes the development and content of Australia's guide to fair trading codes of conduct, as well as several examples of voluntary codes operating in Australia. Gunningham provides the example of a code for supermarket scanners as an effective voluntary code. Notable features include the fact that customers get the product for free when the price at the cash register does not match that on the shelf. The effect of this commitment to a free product when errors are found is to create a strong incentive for consumers to be vigilant, and an even stronger incentive for businesses to train and closely monitor their employees so that errors do not occur. On the basis of his research, Gunningham concludes that there is no doubt that codes of practice, properly designed and administered, in appropriate circumstances, with appropriate government oversight, can provide important benefits to consumers and others. Central to their success are a clear statement of code objectives, a mechanism for administration involving outside representation, membership covering a large portion of the industry, independent complaints handling, commercially significant sanctions, good code publicity, adequate training, good data collection, monitoring and reporting, and a regular review to ensure the standard meets community expectations.

In "Voluntary Codes in the United States, the European Union and Developing Countries: A Preliminary Survey," Kernaghan Webb and David Clarke examine environmental, human rights/worker protection and consumer protection (conventional and e-commerce) initiatives in the United States, Europe and developing countries. The research reveals that voluntary initiatives are flourishing in each of these jurisdictions, but that the process, form and content of initiatives vary significantly from one jurisdiction to another. In Europe, there seems to be less resistance to the idea of government playing a lead role in the development and supervision of voluntary initiatives. In the United States, there appears to be a predisposition in favour of letting voluntary codes develop with little or no direct government assistance. In developing countries, voluntary approaches are used to supplement weak regulatory regimes, but also have flourished upon the introduction and implementation of new, aggressive legislation. In all three jurisdictions, there are examples of government, industry and non-governmental organizations leading in the development of voluntary initiatives. The European "hands-on" approach to voluntary approaches, particularly at the European Union level, shows considerable willingness to integrate, coordinate and rationalize voluntary instruments with regulatory instruments in a systematic and effective manner. As such, the approach provides an intriguing model for other jurisdictions on how voluntary code rule innovation can be fostered.

Part Five consists of Kernaghan Webb's concluding chapter, "Voluntary Codes: Where To From Here?" Webb suggests that all stakeholders need to embrace a new conception of governing, one that brings together the use of a wide range of instruments, and harnesses the energies and potential of a broad range of actors, including the private sector and civil society, in a global context. In this new conception of governing, called *sustainable governance*, the State neither retreats nor expands, but rather acknowledges

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and makes room for other players and instruments to play a role in protecting the public interest. This new concept is likely to be particularly useful in addressing cross-jurisdictional issues, and is capable of adjusting to different operating conditions (e.g. differences in regulatory, social and economic environments between developed and developing countries). The final issue discussed is the trend towards companies using corporate social responsibility codes to address the full range of effects that companies have on employees, their families, the local community, the environment and society at large. The corporate social responsibility code movement is seen to be an excellent example of the type of evolving voluntary initiative that can emerge from adopting the sustainable governance model.

