

A Critical Analysis of Proliferation, Dynamic Interaction, and Evolution of Self-regulation within the Private Security Industry

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Introduction:

Much of the recent discussion of corporate responsibility describes and/or normatively prescribes corporations' role in the provision of values and services often considered to be the responsibility of states, including the provision of rights, public goods, and regulation (e.g., Matten and Crane, 2005; Scherer, Palazzo and Baumann, 2006; Scherer and Palazzo, 2011). We pursue the discussion of the last of these through detailing the experience of corporate and other stakeholders' involvement in self-regulatory initiatives in the private military and security industry (PMSI). Our discussion responds to previous critiques of the corporate responsibility literature and contributes new ones—in particular highlighting questions largely not yet addressed by the literature about the proliferation of initiatives within an industry, their dynamic interaction and evolution, and their associated success and failure. We use this discussion to make positive contributions to the literature's research agenda, including identifying new areas of inquiry across other industries' experiences with self-regulation.

Within the corporate social responsibility (CSR) literature, recent writings have concentrated on theorizing the political role of firms, at times in contradistinction to and overlapping with earlier periods in CSR analysis referred to as classical and instrumental CSR (Maekinen and Kourula 2012). Dubbed the (new) Political Corporate Social Responsibility (PCSR) literature (e.g., Maekinen and Kourula 2012; Rasche, 2012; Whelan, 2012; Scherer and Palazzo, 2011), it examines, among other things, the multinational corporation's growing political role in the provision of human and citizenship rights, public goods, and regulation in light of recent trends in economic globalization that have challenged traditional understandings of the roles and capabilities of states. We understand this literature to include recent scholarship that addresses corporations' taking on the provision of rights, public goods, and regulation, even if not specially framed in the context of globalization. This literature sometimes makes specific reference to security¹ as one of the rights and public goods that corporations provide (e.g., Scherer, Palazzo and Matten, 2009; Elms and Phillips, 2009; Bishop, 2012; Neron, 2013), though none of this literature refers specifically to security as an area in which self-regulation is occurring or analyzes the forms self-regulation of security have taken.

That being said Elms and Phillips (2009) have rightfully noted that the use of paid security and military services is not a new phenomenon, but rather as old as warfare itself, although from the mid-nineteenth century onwards national militaries did dominate in security provision, and more recently in the twentieth and into the early twenty-first centuries the nature and quantity of security contracting has changed. These changes are linked to the rise of the private military and security corporation and the changed nature of contracting towards contracting between a corporate entity and a consumer, to include both states and non-state actors, and away from contracting between individuals and non-corporate entities and consumers, as typically associated with forms of mercenarism (Singer 2003).

¹ Although Scherer and Palazzo (2011:899) relatedly refer to “promote social peace and stability” and Scherer, Palazzo and Baumann (2006: 506) refer to “peacekeeping”.

This paper will begin with a critical discussion of four key propositions of the PCSR literature that seek to account for the rise of the political corporation and its relationship to the state, and utilizes empirical evidence from the PMSI to bolster and challenge critiques of PCSR and to identify new ones. We then turn to an examination of the broader corporate responsibility and self-regulation literature, only to find that it too is lacking in its ability to account for the emergence and proliferation of self-regulation within an industry, the interaction of self-regulatory initiatives, and their evolution as a result of that interaction. The proliferation and dynamic interaction of self-regulatory initiatives has implications for the forms of self-regulation that develop – to include specific institutional design elements, e.g. related to stakeholder participation, governance, and assurance and accountability mechanisms – and the likely success and impacts of self-regulation. A case study of two voluntary initiatives within the PMSI – the International Code of Conduct for Private Security Service Providers (herein the ICOC process) and a series of four management system standards for private security companies and auditors of security services developed by ASIS International and accepted as national standards by the American National Standards Institute (herein the ANSI/ASIS PSC series) – will begin to explore the processes and mechanisms that can account for the proliferation, dynamic interaction, and evolution of self-regulation within the PMSI. In the conclusion, we identify the implications of our discussion and case study for the literature and suggest areas for future research and analysis of self-regulation in other industries.

A critical analysis of the Political Corporate Social Responsibility literature:

The repeated mantra in much of the PCSR literature is that states have been “unable or unwilling” to fulfill their traditional regulatory role, ensure citizenship rights, and provide public goods, at the national and global levels (e.g., Matten and Crane 2005; Scherer and Palazzo 2010; Mena and Palazzo 2012). The relative decline in state power, and as a result the new political role for corporations, is viewed as a direct consequence of the challenges that globalization processes pose for states’ ability to control the global economy and its impacts within and beyond their borders. In contrast, Whelan (2012: 710) counters that the political activities of multinational corporations and their involvement in voluntary initiatives reflect various institutional forms of globalization, rather than simply being the consequence of globalization, that have the potential of becoming globalized. Furthermore, he calls into question notions of the demise of the state, noting that while globalization trends have been recognized as impacting state sovereignty, they have done so in an “uneven” fashion and have not yet resulted in “the power of each and every state being radically altered or diminished relative to various non-state actors, and MNCs in particular” (Whelan 2012: 713). Similarly, Maekinen and Kourala (2012: 650) adopt a “pluralistic view” towards different interpretations of globalization, and the political theories underpinning them, that allows them to examine the various roles of the state without necessitating a “strong globalization thesis” (or its “antithesis” or “dialectic” for that matter) that “states are losing their political and socio-economic steering capacities towards markets and global business actors like multinational corporations.”

When examining the two primary voluntary forms of regulation in the PMSI – the ICOC process and the ANSI/ASIS PSC series – the proposition of state decline and forfeit of regulatory responsibilities does not prove wholly accurate as states were heavily involved in establishing both efforts. If anything, they indicate that in some cases, usually those of powerful Western states that are contracting and home states to the industry, governments are playing an active role in encouraging the development of alternative forms of global governance and privatizing the provision of public goods, such as security. However, weaker states – states that have recently or continue to experience conflict and lack of rule of law – have shown themselves less willing to participate in voluntary regulation of the PMSI. These states are struggling to create adequate licensing and regulatory regimes, and in some instances place limits on the outsourcing of security away from state forces. This has implications for the extent to which new forms of voluntary regulation are likely to be globalized.

The ICOC process is a prime example of the active role that states play in fostering new forms of global governance. The ICOC process was the second stage of an initiative launched under the leadership of the Swiss government’s Federal Department of Foreign Affairs to address the challenges of regulating the global security industry and to identify the pertinent existing legal obligations of state and corporate actors under international human rights and humanitarian law. The first stage, launched in 2006 jointly by the Swiss government and the International Committee of the Red Cross (ICRC), resulted in the “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict,” which was endorsed by 17 states in September 2008. It is currently supported by 43 states and the European Union. The Montreux Document was formulated with the input from governments, industry, academics, and human rights and humanitarian law organizations and describes “international law as it applies to the activities of private military and security companies (PMSCs) whenever these are present in the context of an armed conflict [and]... contains a compilation of good practices designed to assist states in implementing their obligations under international law through a series of national measures.”² The Document is directed at states and can only be signed by states, but contains one section focused on PMSCs that describes their obligations to adhere to “international humanitarian law and human rights law imposed upon them by applicable national laws, as well as other applicable law”, and notes that their status under international humanitarian law varies on a case by case bases depending on the “nature and circumstances of the functions in which they are involved.”³ Foremost, the Document was meant to convey an important point and counter popular misperceptions with regards to the international legal landscape: namely that there is no “legal vacuum” in international law with regards to the activities of PMSCs. This runs counter to another repeated claim in the PCSR literature that new forms of self-regulation arise to address governance gaps linked to the challenge of regulating globalized business activities (e.g. Mena and Palazzo 2012). That being said, the Montreux Document is not a binding treaty, enforcement of international law, in particular on non-state actors, has always posed challenges, and

² See <http://www.eda.admin.ch/psc> for details, accessed March 24, 2012.

³ For a full text of the Montreux Document, see http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467, accessed on February 13, 2013.

the adequacy of many national regulatory regimes, especially with regards to their extraterritorial reach and in areas of weakened rule of law, remains questionable.

With this in mind, in March 2008, the Swiss government announced a second stage of its Swiss Initiative, which was to be directed at corporations rather than states to address their activities in areas beyond just kinetic armed conflict. The industry agreed in June 2009 at a convening of stakeholders at a Wilton Park Conference that it would complement the Montreux Document by creating its own set of standards detailing industry's responsibilities under international human rights and humanitarian law.⁴ The ICRC stepped down as partner with the Swiss government, indicating that voluntary corporate regulation was not its area of expertise, and the Swiss joined forces with DCAF (formerly the Geneva Centre for the Democratic Control of Armed Forces) and the Geneva Academy of International Humanitarian Law and Human Rights to draft an International Code of Conduct for Private Security Service Providers and finalize it through a series of multi-stakeholder meetings. A signing ceremony was held in November 2010 and 58 companies indicated their support of the ICOC. As of February 13, 2013, there were 592 signatory companies from 70 different countries, to include a large number of maritime security companies.

After the code was completed, a Temporary Steering Committee (TSC) was created with three representatives from industry, government, and civil society, as well as one non-voting representative in each pillar. The individuals participating in the TSC has changed overtime, but the U.S., UK, and Australia have been the three governments most involved, Triple Canopy has been the lead company, and Human Rights First has been the driving force on behalf of civil society.⁵ The TSC was tasked with developing a draft charter for a multi-stakeholder governance and oversight mechanism that would be responsible for overseeing the code content, certifying companies that comply with the code, and setting up mechanisms for monitoring, reporting, and filing complaints. A first draft charter was released in January 2012, but due to extensive negative feedback, the TSC decided to solicit more input on the proposed governance and oversight mechanism through a series of extended consultations.⁶ A multi-stakeholder conference was held in Montreux, Switzerland from February 19-22 to finalize the Articles of Association which were publicly released on March 8, 2013.⁷ Currently, stakeholders in the three pillars are being invited to endorse and become members of the Association in advance of a signing ceremony planned for June.

A handful of governments were present in Montreux – to include Ukraine and China – however, the governments that dominated the negotiations were Switzerland as the convening authority, and the U.S., U.K., Australia, and Canada. The latter are the biggest contracting and home states of the PMSI,

⁴ For background on the ICOC process, see the Fact Sheet available at [http://www.icoc-
psp.org/uploads/Fact_Sheet_ICoC_November_2011.pdf](http://www.icoc-
psp.org/uploads/Fact_Sheet_ICoC_November_2011.pdf), accessed on March 24, 2012.

⁵ The current TSC participants can be found here [http://www.icoc-
psp.org/ICoC_Steering_Committee.html](http://www.icoc-
psp.org/ICoC_Steering_Committee.html), accessed on February 15, 2013.

⁶ The first draft charter can be found at [http://www.icoc-
psp.org/uploads/Draft_Charter.pdf](http://www.icoc-
psp.org/uploads/Draft_Charter.pdf), accessed on February 15, 2013.

⁷ For purposes of full disclosure, Rebecca DeWinter-Schmitt participated in the drafting conference.

and will be likely the first states to endorse the Articles and become members of the Association.⁸ Recognizing that territorial states – the host states where companies operate – have been missing from the process, and that other states, such as France and Germany, expressed concerns about the impact of a multi-stakeholder association on their sovereignty, the governments present at the negotiation created an advisory body in the Articles of Association, the Advisory Forum of Montreux Document Participants, to offer a chance for other states to observe the Association’s activities before committing to membership. One could speculate as to why in particular territorial states have been reticent to participate in the ICOC process to date to the same degree that home and contracting states have; one reason may well be that these states are not prepared to utilize self-regulation at a time when they are trying to better gain control of the industry within their borders, such as is the case with Iraq, or effectively eliminate the use of private security in favor of public forces, as Afghanistan has been doing. Weaker states that have been subject to recent and ongoing conflicts may indeed be an example of states struggling with the regulation of a global industry operating within their borders, compared to their powerful Western counterparts that are actively pursuing privatized regulation of the PMSI. This could have significant repercussions for the likelihood that the ICOC process becomes a globalized initiative, as territorial states, as well as those expressing concerns about their sovereign powers to control the use of force within their borders, may only see limited value in voluntary regulation.

The ANSI/ASIS PSC series is an even starker example of a government created voluntary regulatory initiative. The series is a set of four US national standards: PSC1 – Management System for Quality of Private Security Company Operations Requirements with Guidance, PSC2 – Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operation, PSC3 – Maturity Model for the Phased Implementation of a Quality Assurance Management System for Private Security Service Providers, PSC 4 – Quality Assurance and Security Management for Private Security Company’s Operating in the Maritime Environment.⁹ All four were created by ASIS International through funding provided exclusively by the U.S. Department of Defense (DOD). ASIS International is a society of individual security professionals, which among other things, develops educational programs and materials for security professionals. Within ASIS, the Commission on Standards and Guidelines collaborates with national and international standards-setting organizations, industry representatives, and other stakeholders to develop voluntary standards and guidelines for security professionals and companies. ASIS is an ANSI (American National Standards Institute) accredited standards developing organization. All four standards are now ANSI published standards, and PSC1 was submitted by ANSI for International Organization of Standardization (ISO) certification and approval.

As we discuss below with regards to the proliferation of standards in the PMSI, there is a dispute among stakeholders over why the ANSI/ASIS PSC series was funded by the DOD when the U.S. government

⁸ The Central Command of the Department of Defense is already requiring its contractors to make a mandatory reference to the ICOC in their contracts and to provide training to its employees on the principles outlined in Section F (Specific Principles Regarding the Conduct of Personnel) and Section G (Specific Commitments Regarding Management and Governance).

⁹ All four standards can be found at http://psm.du.edu/industry_initiatives/asis_international.html, accessed on February 15, 2013.

(through both the Departments of Defense and State) was already participating in the ICOC process, and over the nature of the relationship between the PSC series and the ICOC process. What seems clear is that the DOD's commitment to the ANSI/ASIS PSC series is greater than to the ICOC process. The DOD has written into the DFARS (Defense Federal Acquisition Regulations) that all of its contracts with security providers must include the requirement to conform to PSC1, even though the possibility of certification to PSC1 does not yet exist. The Department of State (DOS), which is the lead in the ICOC process, has not made a similar commitment. The British Foreign and Commonwealth Office has also announced that PSC1 would be included in its future contracts with private security providers.¹⁰ These developments will have implications for the form that globalized voluntary initiatives take, since, as we discuss below, while both are best described as "certification standards"¹¹ – one type of "international accountability mechanism" (Gilbert, Rasche, and Waddock (2011: 24) – they are also very different from each other in terms of key design elements. The ICOC process is more multi-stakeholder in nature and seeks to provide for independent performance assessments and certification through the Association, which increases its legitimacy in the eyes of civil society, whereas the ANSI/ASIS PSC series are management system standards to which companies can opt to seek third party certification by hiring certification bodies to audit them.¹² That being said, the ANSI/ASIS PSC series is more likely to go global through the established pathway of becoming ISO standards. What this indicates is the need to examine various forms of voluntary regulation to identify which ones are more likely to become globalized and for what reasons. While there have been multi-stakeholder initiatives (MSIs) similar in design to the ICOC process, MSIs have not reached the level of standardization and marketization that national and international management system standards have.

A second common assumption in the PCSR literature is that globalization results in a 'race to the bottom' in regulatory standards, in particular in relation to human rights and the environment, as states are forced to compete with each other to bring in foreign direct investment (e.g. Matten and Crane 2005; Scherer, Palazzo and Baumann 2006). An additional assumption here is that corporations actively seek out weak regulatory environments. Whelan (2012: 714), in contrast, questions the empirical evidence for a 'race to the bottom' in standards and notes that MNCs prefer to operate in well-regulated environments and in some instances may push states to adopt and enforce stronger rules and regulations. Fransen (2012) also argues that a race to the bottom in the governance of voluntary programs is only one possible outcome of the competition between multi-stakeholder forms of governance and business-driven programs within an industry, and that, depending on the legitimation politics surrounding that competition, equally possible are "decoupling," where changes in governance

¹⁰ The ministerial statement is available at http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/uk_2012_fco-statement_adoption_of_asis-psc1.pdf.

¹¹ Gilbert, Rasche, and Waddock (2011: 24) define certification standards as "voluntary predefined rules, procedures, and methods to systematically assess, measure, audit and/or communicate the social and environmental behavior and/or performance of firms."

¹² ANSI and ASIS describe certification to a management system standard by accredited certification bodies as independent third party certification, whereas many civil society groups would view this as second party certification because the certification bodies are directly paid for by the company being audited.

are more so window dressing than a concerted movement of a program's design towards a multi-stakeholder norm of governance, and the "paradox of empty promises," whereby overtime more superficial concessions result in a program becoming "locked-into" a real commitment to multi-stakeholder participation. We address this more in the next section.

The PMSI raises interesting questions in terms of the existence of a global race to the bottom in standards for the security industry for a number of reasons. First, as noted, the industry has been around in various forms for centuries, although the more recent growth in the PMSI post September 11 and with the wars in Iraq and Afghanistan has been the time period that has received the most scrutiny. To speak of a singular global trend in regulation, even during this recent period, is challenging. As noted above, the Montreux Document served to reaffirm that there is no legal vacuum in terms of state obligations, and derivative corporate responsibilities, to respect humanitarian and human rights law during conflict. It was also during this time period that the U.N. Protect, Respect and Remedy Framework was completed under the guidance of Special Rapporteur John Ruggie, as well as accompanying guidance on the implementation of the framework (the Guiding Principles on Business and Human Rights), both of which reaffirm state obligations to ensure that non-state actors uphold human rights and provide victims of rights abuses access to remedy, as well as corporate actors' responsibilities to respect human rights even where states may not be fulfilling their obligations.¹³ Thus the international hard and soft law landscape appear to be relatively well articulated for this industry, with the recent developments in the ANSI/ASIS PSC series and ICOC process contributing to the further elaboration of soft law standards. Second, the code at the heart of the ICOC process has been endorsed by 592 companies from over 70 countries, which would suggest that the industry does not shun regulation per se. Third, considering the nature of security provision, i.e. that security is usually needed in conflict zones or unstable environments where rule of law is weak, the industry may indeed be seeking out weak national regulatory environments as this is where they can be expected to find clients. However, this does not imply that those operating environments are sought *because of* the weak regulations. Finally, the industry seems to recognize the risks inherent to poorly regulated legal environments both in terms of reputational dangers involved with the appearance of being unaccountable to laws and in terms of the business risks of operating without adequate rule of law. With regards to the former, industry's support of the Civilian Extraterritorial Jurisdiction Act (CEJA), which would extend US criminal law to contractors operating on behalf of the US government overseas, indicates that there was a desire to avoid the perception that security providers are unaccountable when they commit crimes.¹⁴ With regards to the latter, the industry's consternation with the uncertainty surrounding new regulations in Afghanistan that restrict licensing of foreign security providers and seek to in-source security through the Afghan Public Protection Force indicate that a clear regulatory environment is deemed more favorable to business.¹⁵

¹³ For the full text of the framework and Guiding Principles, see <http://www.business-humanrights.org/UNGuidingPrinciplesPortal/Home>, accessed on March 19, 2013.

¹⁴ See for example the Triple Canopy CEO Iggy Balderas's blog in support of CEJA, http://www.huffingtonpost.com/ignacio-/post_2051_b_865896.html, accessed on February 16, 2013.

¹⁵ See for example the industry commentary from the International Stability Operations Association http://www.stability-operations.org/weekly/2012_dw06.htm, accessed on March 19, 2013.

A third common critique of the PCSR literature captured by Whelan (2012: 710) is that it “has often lacked clarity as to the motivations and interest that inform MNC decision-making.” He argues that the writings of PCSR scholars such as Matten and Crane (2005) and Scherer, Palazzo and Matten (2009) contribute to the failure to account for the specialized role of MNCs as economic organs, an “oversight that has contributed to the belief that MNC motivations can, do, or might, oscillate between a rational profit seeking and pro-social logic.” Whelan (2012: 717-718) argues that MNCs should be presumed to engage in PCSR activities for instrumental reasons, primarily in so far as they further the goal of maximizing returns for shareholders and advancing core business interests. He bases his narrow view of corporate motivations on the need to recognize the dominance and widespread acceptance, practically and theoretically, of the shareholder model of governance, and the putative explanatory and predictive limitations of theoretical models seeking to capture post-strategic, ideational logics of corporate behavior.

Whelan (2012: 718) cites Realist theorists – who find causal explanations for state actions by attributing to states monolithic, rational behavioral motivations reflected in the pursuit of national wealth and power – in order to justify a similarly narrow explanation of the instrumental motivations of corporate actors. However, this argument has shortcomings at both a theoretical and descriptive level. Theoretically, more recent developments in international relations theory in the constructivist school of thought (e.g. March and Olson 1995) recognize that states’ actions are based not only on rational calculations in terms of how best to maximize their preferences, be it the pursuit of wealth, power or something else – referred to as the logic of consequences – but also on a reading of accepted norms and the pursuit of desired identities as deemed socially appropriate in a given context – referred to as the logic of appropriateness. In other words, actors, to include collective actors, behave in certain ways not only because it allows them to pursue their self-interest, but also because this is what is socially expected of them, and desired by them, if they are to be recognized by others as legitimate. The same can be said of corporate actors operating in a changing normative landscape, and indeed within the idealist-institutional self-regulation literature (Fransen 2011, 2012), the logic of appropriateness has been used to explain why companies participate in private governance and how convergence in understandings of appropriate and legitimate forms of private governance occurs overtime through learning and socialization processes. As indicated, with the development of both hard and soft law as applicable to the PMSI and concomitant shifts in what is expected of companies if they are to maintain their social license to operate, security providers have adapted and accepted their social responsibilities to respect human rights and humanitarian law. To try to parse out whether these adaptations are occurring based on instrumental reasoning or ideational logics creates a false dichotomy – irrespective of the impossibility of empirically assessing exactly what motivates a collective actor to do something.

At a descriptive level, applying the shareholder model of governance to the security industry is problematic. The majority of companies in the PMSI are not publicly traded. While this does not mean that they do not seek to maximize profits, they are not constrained by the same corporate governance and principal-agent problems associated with shareholder theory. Specific to this industry is the nature of senior corporate leadership which may indeed point to the importance of ideational and social

behavioral motivations. Most executives have some type of military or police background. They have received training in humanitarian law. They are familiar with the consequences, which can run counter to operational and strategic goals, if one disrespects local populations. And they are used to operating in institutional environments that have clear command and control structures and lines of authority. In fact, the Montreux Document indicates that directors and managers of PMSCs have “superior responsibility” and may be responsible for the actions of their personnel, a concept not unfamiliar to former military officers.

A fourth critique of the PCSR literature advanced by Whelan (2012: 719-721) is the failure to develop a political model of corporate governance that is sufficiently differentiated from the shareholder model of corporate governance at the heart of instrumental CSR and the normative model of stakeholder governance advanced by stakeholder theorists. In particular, Whelan posits that PCSR’s preference for ‘deliberative democracy’ necessitates the conceptualization of a governance model that provides civil society, however defined, a similar say in corporate activities as shareholders. However, he questions the likelihood of this succeeding at a practical level because of reasons of modern institutional functional differentiation and resistance from core stakeholders, such as investors, suppliers, and employees, and even elements of civil society that may be hesitant to allow MNCs to adopt positive duties normally associated with civil society actors. Neron (2012) cautions that the PCSR literature has also not adequately taken into account the possible distributive consequences of political corporate governance.

If one examines the empirical validity of these critiques, the political model of corporate governance appears to already have been realized, to some extent, in the ICOC process which is through and through multi-stakeholder. Civil society is one of three equal pillars that have an equal vote in the ICOC Association as the business and government pillars. In fact, the voting requirements have been set up so that no one pillar can force through or block a significant governance or process decision. As already noted, this has led two governments, France and Germany, to hesitate in joining the Association because they fear it may undermine their sovereign powers relative to private actors. Furthermore, there is no indication that any of the core stakeholders involved in the ICOC process are opposed to the political model of corporate governance laid out in the Articles of Association – other than perhaps extractives companies as clients of the PMSI who have been reluctant to commit to the process and have not embraced full-fledged MSIs, as evidenced by the ongoing disputes over the assurance framework of the Voluntary Principles on Security and Human Rights, the leading MSI that seeks to self-regulate the extractives industry’s use of public and private security forces.¹⁶

The unintended distributive consequences come into play in terms of how civil society is defined – and for that matter the other two pillars as well. Missing in all three pillars of the ICOC process is the Global South – in terms of territorial states; in terms of small and medium sized enterprises in operating environments, and potentially elsewhere, who may not be able to afford certification, which could lead

¹⁶ For the full text of the Voluntary Principles, see <http://www.voluntaryprinciples.org/>, accessed on March 19, 2013.

to greater concentration in the industry if only larger companies can meet certification requirements established by key clients like large contracting governments; and in terms of the lack of representation of civil society organizations from territorial states and affected communities. With regards to the civil society pillar, there is also an effort to block participation of implementing NGOs, which work closely with companies to assist them in meeting social and environmental commitments, and academics. The current membership requirements for the civil society pillar necessitate that applicants belong to an organization with a proven track record in human rights, humanitarian law, or rule of law, and have no significant working or funding relationships with the business and government pillars. This could have consequences for the successful implementation of the ICOC standard for companies. For example, the needed civil society expertise on affecting change in management systems may be lacking. Affected communities, who can be essential for a company's social license to operate, may not feel they are represented in the Association and may not view the standards as legitimate, and therefore might avoid using the foreseen complaints process once it is established.

Whether or not the ANSI/ASIS PSC series can be legitimately called multi-stakeholder in nature is an ongoing matter of dispute and will be discussed below. However, to foreshadow a bit, the efforts of the participants involved in the PSC series to paint the initiative as genuinely multi-stakeholder in nature does evidence that, as Fransen (2012) points out, there is an isomorphism in the institutional design of voluntary regulation towards multi-stakeholder governance as the more legitimate type of governance. This suggests that political models of corporate governance that approach standards of deliberative democracy are becoming the norm, even though inclusivity and distributional outcomes may need to be examined more closely.

Self-regulation literature:

While addressing larger trends in the changing nature of business, state, and civil society relationships in an era of globalization, the PCSR literature does not specifically explore the emergence, proliferation, and evolution of new forms of global self-regulatory initiatives. The broader literature on corporate responsibility, self-regulation, and standards would appear to offer insight on these matters; however, this turns out largely not to be the case. The emergence and proliferation of initiatives within an industry, the dynamic interactions between initiatives, and the outcomes of those interactions in terms of the evolution of key institutional design elements of voluntary regulation over time (e.g. content of standards, governance structures, assurance frameworks, such as monitoring and certification mechanisms, reporting requirements, and grievance mechanisms), and the likely success of an initiative in meeting its stated normative goals are only tangentially discussed. Scholarship that goes beyond in-depth case studies of singular initiatives and addresses multiple initiatives in an industry tends to be static and non-longitudinal in its comparison, i.e. comparing particular institutional design elements at a certain point in time; seeks to extrapolate from a static comparison the likelihood that an initiative will be adhered to, in part due to the costs of compliance; and examines whether initiatives will result in the achievement of the stated social and environmental standards and/or will lead to a convergence in standards, although the processes that drive convergence are not well articulated.

In terms of static comparisons of voluntary initiatives' design elements, a few examples give a sense of the shortcomings of the self-regulation literature in capturing dynamic interaction between initiatives. Rasche (2009) in his study of the UN Global Compact laments the lack of a rigorous model to compare and analyze international accountability standards, but his model focuses on a static comparison of standards' content, implementation, and the geographic and industry context. Goebbels and Jonker (2003) compare AA1000 and SA8000 along various dimensions (object and scope, normative perspective, basic principles, improvement perspective, and methodological perspective). However, the comparison is also a static contrast between two initiatives rather than an exploration of their dynamic interaction. They do speculate whether the growing areas of overlap may reflect a trend towards convergence, but do not indicate what processes might lead to convergence. Similarly, Reynolds et al (2007) compare five different third party certification standards for the coffee sector, but again the emphasis is on comparison of design elements of the initiatives (governance structures, environmental and social standards) as well as market positions. The authors conclude that there is a "growing tension between certifications that hold the bar on social and environmental conditions and those that raise the bar, with market forces favoring the former approach" (Reynolds et al 2007: 160), but ultimately the impacts of proliferation on design elements are attributed to market forces rather than the interactions between the certification standards.

With regards to understanding the costs of social compliance, and the likelihood that initiatives within an industry will be successful in ensuring that stated standards are attained, to include the likelihood that standards will become more harmonized, or what the PCSR literature might refer to as globalized, here again the analysis in the self-regulation literature fails to capture dynamic interaction and the evolution of initiatives. Chatterji and Levine (2006: 30) discuss the costs to managers, and to consumers and other stakeholders concerned about companies' social performance, of the "proliferation of non-financial performance metrics and associated surveys." However, their focus is on how to improve social performance metrics, in terms of reliability, comparability, and validity, as well as improving transparency of measurement processes and reducing compliance costs. In a case study of the apparel industry, the authors explore how disagreements between stakeholders over the Fair Labor Association's composition, standards, and monitoring protocols gave rise to the Worker Rights Consortium and World-wide Responsible Apparel Production (WRAP), however, the thrust of their argument is about how differences over social performance measures and processes resulted in the splintering of initiatives rather than the interactions between the initiatives once they existed. Also with regards to the apparel industry, O'Rourke (2006) compares six initiatives' codes of conduct and monitoring systems with the goal of identifying the factors that could increase their effectiveness defined as improved conditions in factories and accountability to local stakeholders. Like Chatterji and Levine (2006), he indicates that there might be the beginnings of convergence among initiatives, but he too does not explore what dynamic processes drive the trend. Rather, he make a prescriptive, normative case for launching efforts to "build complementarity and inter-operability between systems," as proliferation may result in "initiatives competing for the hearts and minds of consumers, serving to confuse the public and undermine the credibility of non-governmental initiatives" (O'Rourke 2006: 911). This plea is likely grounded in the widely held belief that "private governance competition has significant

negative consequences for the effective functioning of these arrangements,” an assumption Fransen (2011: 359) challenges, as discussed below. Van Tulder and Kolk (2001) bring in a dynamic element to their analysis of codes of conduct in the sporting goods industry to the extent that they examine how the compliance likelihood and stringency of a code depend on the interaction of stakeholders within an initiative during code formulation and implementation as shaped by domestic context, the nature of the industry, and the structure of global supply chains. What they do not consider is how interactions between stakeholders participating in competing initiatives shape code content and compliance, although they do find that international institutions, in this case FIFA (the International Federation of Football), which introduce their own codes may create incentives for greater rigor and specificity of compliance procedures.

There are three interesting exceptions in the literature. Sullivan’s (2005) article examines the outcomes of mining companies’ adherence to multiple codes addressing environmental issues. Based on an examination of the implementation of three voluntary approaches, he asks two primary questions: whether different voluntary initiatives can be applied to the same environmental problem, and how the outcomes from adopting multiple approaches differs from those expected from adopting one initiative. He concludes that companies adopting multiple initiatives may see advantages such as reduced transaction costs, improved data collection, and better implementation – all of which challenge the notion of corporate auditing fatigue. However, he finds no indications of improved environmental performance, economic efficiency, or competitive positioning. While an interesting study in terms of examining the effects of proliferation on companies adhering to multiple standards, it too does not address how interactions between standards affect either their design elements or relative effectiveness. More relevant to our analysis, Bartley (2005), as a sociologist, is also an outlier in that he offers a particularly interesting dynamic analysis of the organizational field which can shape the trajectories of private regulation. However, he does so with the goal in mind of testing the “displacement hypothesis” that private regulation displaces or “crowds out” public regulation. His analysis, while not directly examining the interaction between private initiatives, does offer insight into how actors in the organizational field of an initiative shape the meaning and implications of private regulation by strategically responding and adapting to each other’s moves. Furthermore, he analyses how path dependencies can arise to the extent that “a specific outcome of past events shapes the possibility for social change in the future, by shifting action down certain roads, “locking in” some sets of options, and discouraging others” (Bartley 2005: 235). As we will discuss below, these types of path dependencies occurred within the PMSI when the creation of the ANSI/ASIS PSC series forced stakeholders in the ICOC process to contend during the development of the oversight and governance mechanism with the ANSI/ASIS PSC series’ management system model of certification, and similarly the development of the PSC series after the launch of the ICOC necessitated that its supporters contend with disputes over the independence and multi-stakeholder nature of management system standards.

Finally, most relevant for our own dynamic analysis of interaction between initiatives is the work by Fransen (2011, 2012) on convergence and competition in private governance. With regards to the former, Fransen (2011) examines the proliferation of private governance in the apparel industry but does so with an eye towards explaining how competition between forms of private governance may or

may not lead to convergence in governance, thereby problematizing the notion that competition in governance results in negative impacts in terms of policy implementation by companies, confusion among external audiences that utilize standards for various purposes (consumers, governments, and activists), and spurring a race to the bottom in standards. Fransen (2011: 360-363) argues that existing economic-institutional and idealist-institutional approaches, which take optimistic and pessimistic positions on the likelihood of convergence, all fall short in terms of explaining actual outcomes in governance in the apparel industry. Instead, Fransen (2011: 363-4) offers a pessimistic political-institutional approach to explain the absence of convergence in the apparel industry and grounds it in an examination of the political negotiations among rival groups, the balance of power between participants as affected by the institutional forms that governance takes, and the political consequences of competition between governance initiatives. His approach looks at both “static attributes and process dynamics in the making of a field of political interaction between competitive and possible adversary actors and governance institutions” (Fransen 2011: 364). In particular, four factors shape the likelihood of convergence: characteristics of the industry itself; characteristics of participating civil society organizations; political dimensions of private governance’s institutional setup (what we call here design elements), in particular the scope of standards and the control of implementation and enforcement mechanisms; and finally, deriving from this, political process dynamics in terms of fragmentation or consolidation in the organizational field of private governance. Since the PMSI, at least in terms of those companies participating in the ICOC process and ANSI/ASIS PSC series, is relatively homogenous,¹⁷ and since non-profit civil society organizations have almost completely shunned participation in developing the PSC series, his latter two factors are more relevant to our analysis. However, unlike Fransen, we seek to understand not only political disputes over an initiatives’ design elements and how these can shape participants’ understanding of the legitimacy of an initiative, but also to examine how competition between initiatives influences institutional design during the creation of initiatives and over the course of their evolution. Similarly, we recognize that differences in the characteristics of participants and disputes about institutional design can foster rivalries that lead to a fragmentation of the private governance field, but we seek to understand the dynamic mechanisms that lead to break away efforts.

Of even greater relevance is Fransen’s (2012) examination of competition between multi-stakeholder initiatives and business-driven programs in the retail industry in the U.S. and Europe. He focuses on how this competition leads to a diverse range of outcomes as shaped by the politics of legitimation surrounding private forms of governance. He operates on the assumption that there has been a convergence around the norm of multi-stakeholder governance as the more legitimate form of private governance, although he recognizes that contentious encounters between initiatives, their participants, and external audiences can challenge that norm, to include how multi-stakeholder governance manifests itself in actual institutional design elements. Somewhat problematic is his adherence to the ‘standard story’ typical of the PCSR literature that private governance arises to fill a void left by governments, which does not capture the dynamics relevant at least to the PMSI. Furthermore, his focus on one institutional design element – governance – leaves untouched another area of major contention

¹⁷ As noted above, this is in part because of the exclusion of companies headquartered in territorial states in the Global South.

in private regulation, namely assurance frameworks, which also has implications for the perception of an initiative's legitimacy. In addition, while the perceived legitimacy of governance processes is important for the success of an initiative, it is not clear what multi-stakeholder governance implies for success defined as meeting stated social and environmental commitments. However, he does recognize that the outcomes of contentious interactions over the legitimacy of private regulation may indeed, over the long run challenge the wide-spread acceptance of multi-stakeholder governance as the preferred norm, especially if business-driven programs begin to be seen as effective in terms of social and environmental outcomes. Nevertheless, he makes a significant contribution at two levels. First, he captures not only the importance of institutional design elements for perceptions of legitimacy, but also of the interactions between programs and audiences that can either lend or withhold legitimacy. Second, he recognizes the open and contingent nature of competitive interactions between programs and stakeholders and their implications for particular design elements of programs and the larger normative landscape around private governance. He, thereby, is able to integrate structural considerations related to normative landscapes and institutional fields with agent centered processes typical for contentious negotiations among programs, participants, and their larger external audiences. The outcomes of these interactions can be as diverse as an isomorphic trend towards multi-stakeholder governance, a race to the bottom as industry shuns civil society participation, to the paradox of hybrid governance, which may initially superficially incorporate elements of multi-stakeholder governance only to see a deepening of actual commitments to multi-stakeholder participation over time. The latter process has also been referred to as "rhetorical entrapment" whereby companies begin to walk the walk after only talking the talk, due in part to the need to evidence genuine adherence to commitments that were more verbal than real when initially made because of civil society pressure and changing normative and institutional landscapes (DeWinter-Schmitt 2007, 2010).

The proliferation, dynamic interaction, and evolution of self-regulation in the PMSI:

In this section, we will seek to identify causal mechanisms that can account for the proliferation of voluntary regulation in the security industry and differences in the emergent institutional design of competing initiatives. Borrowing from social movement theory, we define causal mechanisms as "a delimited class of events that alter relations among specified sets of elements in identical or closely similar ways over a variety of situations" (McAdam, Tarrow, and Tilly 2001: 24). By identifying causal mechanisms, we hope to set the stage for future research to examine whether similar processes occur in other industries that experience a multiplication of voluntary regulatory initiatives.

Proliferation of standards:

Based on a case study of the retail industry, Fransen (2012) notes that many business-driven programs emerge after the creation of multi-stakeholder programs because of businesses' hesitation to bring elements of civil society into private governance processes, such as concerns about the politicization of negotiations within an initiative and the slowing down of decision-making, hesitancy to subject themselves to external scrutiny, and perceptions that collaborating with civil society may not reduce

external pressure resulting from civil society campaigning. In contrast, with regards to two U.S.-based voluntary standards in the apparel industry, the Fair Labor Association (FLA) and the Worker Rights Consortium (WRC), DeWinter-Schmitt (2012) found that the founding of the WRC three years after the official launch of the multi-stakeholder FLA in 1998 occurred because of a reverse process. Some civil society groups that had been initially involved in the FLA were dissatisfied with certain clauses of the FLA code of conduct and the proposed procedures for auditing and certification of member companies, and felt more generally that the FLA was too heavily dominated by industry interests. They broke away and joined with the growing student movement, led by United Students Against Sweatshops, to found an alternative initiative, the WRC, which excluded business from participation. In this case, it was the more 'radical groups' that caused the proliferation of standards, rather than more 'conservative groups' as was the case with retail industry (Fransen 2012). We pick up on this theme in the next section.

In the PMSI, a similar sequencing occurred as in the retail industry, with the ANSI/ASIS PSC series being developed after the ICOC process was well underway. Although how to characterize the PSC series is a matter of dispute, as a management system standard it is clearly oriented towards businesses and assisting them with integrating standards into their organizational structures and day to day policies and procedures. In addition, the entire process around the development and implementation of management system standards is highly professionalized and marketized, and does not foresee any significant ongoing role for civil society organizations relative to multi-stakeholder forms of governance, as discussed below.

Conversations with stakeholders in the ICOC process reveal that there is little agreement about how the ANSI/ASIS process came into being. Civil society groups tend to portray the ANSI/ASIS process as resulting from dissatisfaction on the part of elements of the U.S. government with the ICOC process, and as an effort to redirect the institutional design of the ICOC in a way that would unduly favor industry by pushing the ICOC Association to accept certification to PSC1 rather than creating its own independent monitoring and certification procedures. In contrast, elements of the U.S. government within the DOD argue that the beginning of the ANSI/ASIS process can be traced all the way back to 2004 when the DOD drafted Policy Guidelines for Contractor Security which eventually evolved into DOD Instruction 3020.41 Contractor Personnel Authorized to Accompany the US Armed Forces.¹⁸ They note that the 2010 National Defense Authorization Act (NDAA) required the creation of a report examining the feasibility of an independent third party certification requirement of PSCs as a means to ensure "appropriate operational and business practice standards" as well as the costs to taxpayers of certification for provision of such services. The 2011 NDAA also required a report reviewing existing third party standards and certification processes. Furthermore, they note that the ICOC at the time was a non-binding code of conduct,¹⁹ whereas the DOD had recommended in its 2010 report that a binding "higher quality management standard" modeled on ISO standards and certification processes be the route the

¹⁸ See the April 19, 2010 Report to the Congressional Defense Committees, Third Party Certification of Private Security Contractors, prepared by the Office of the Assistant Deputy Under Secretary of Defense.

¹⁹ Already at this point in time it was clear that the ICOC process would entail a next step of creating a governance and oversight mechanism to ensure implementation and enforcement of the ICOC.

DOD pursue because such a standard can be written into contracts, measured, and legally enforced. Finally, they point out that the ICOC itself stipulates the development of complementary, operationalized national standards grounded in the ICOC principles.²⁰

While the origins of the ANSI/ASIS process are not agreed upon, what is clear is that in March 2011, according to a press release, ASIS International was awarded a contract by the DOD to develop “an ANSI [National Standards Institute] standard that provides principles and requirements for a quality assurance management system for private sector security organizations to abide by and demonstrate accountability to internationally recognized norms of civil and human rights while providing quality assurance in the provision of their products and services. The standard will enable private sector security service providers to demonstrate their operations and services are consistent with the principles of the "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict" and the "International Code of Conduct for Private Security Service Providers" (ICoC).”²¹ According to the press release, the DOD reached out to ASIS in summer 2010 when it became clear that the 2011 NDAA would contain requirements for standards and third party certification for private security service providers.²² However, as noted in the April 2010 DOD report to the Congressional Defense Committees, both the DOD and DOS were already “actively supporting an effort to produce an industry generated standard and the necessary support mechanisms, including third party certification and oversight.”²³ With the DOD and DOS already heavily involved in the ICOC process, it is unclear what was going on within the process – in advance of the pending November 2010 code release – which apparently had already led the DOD to conclude that what was being developed would not meet the stipulations for standards and certification set out by the DOD in its April 2010 report.

Despite differences in perspectives on the creation of a competing initiative to the ICOC process (or complimentary initiative, depending on who one asks), this sequence of events raises a number of interesting issues. First, while it is unclear how closely the DOD was working with industry, the U.S. government, and not primarily the industry, contributed to the proliferation of standards efforts, although neither the U.S. government nor businesses shunned the ICOC process as a result of the emergence of a parallel effort. This may have to do in part with the fact that the ANSI/ASIS process was

²⁰ Clause 5 states: “The purpose of this Code is to set forth a commonly-agreed set of principles for PSCs and to establish a foundation to translate those principles into related standards...” Clause 7 speaks of establishing “objective and measurable standards” and Clause 10 states that “... Signatory Companies and other stakeholders will undertake to work with national standards bodies as appropriate to develop standards, with the intent that any national standards would eventually be harmonized in an international set of standards based on the Code.”

²¹ See the press release at <http://www.marketwire.com/press-release/ASIS-Awarded-Department-Defense-Contract-Develop-Standard-Improve-Performance-Accountability-1412927.htm>, March 24, 2012.

²² The exact language in the NDAA does not actually state this and reads as follows: "(1) establish criteria for defining standard practices for the performance of private security functions, which shall reflect input from industry representatives as well as the Inspector General of the Department of Defense; and (2) establish criteria for weapons training programs for contractors performing private security functions, including minimum requirements for weapons training programs of instruction and minimum qualifications for instructors for such programs."

²³ See footnote 18, pp. 4-5.

framed as an initiative to create auditable standards based on the general principles already laid out in the Montreux Document and the ICOC. Of course, ironically once the PSC series was created both the government and business participants in the ICOC process lamented that if they were to be audited and certified to two different standards this might result in prohibitive costs to the industry and “auditing fatigue.”²⁴ Thus the existence of one initiative was *strategically leveraged* to influence the institutional design of another initiative, something we address more in the next section.

Second, it seems that a causal mechanism can be found in the intra- and inter-organizational *constitution of the stakeholder pillars and the relationships within and among them*. Within the U.S. government, the DOD and DOS were operating somewhat at odds from each other, with the DOD more supportive of a business-driven initiative over a multi-stakeholder model of governance, while different departments of the DOS seemed to take different positions on both initiatives, with, not surprisingly, the Bureau of Democracy, Human Rights, and Labor most supportive of the multi-stakeholder ICOC process. For civil society organizations, there were differences among those who considered it pragmatically advisable to participate in the creation of the PSC series to shape its human rights content versus those who felt that a management system standard was too comprised in terms of governance structures and certification processes to be considered a legitimate example of multi-stakeholder governance with independent third party oversight. While initially human rights organizations joined in the development of PSC1, none participated in the creation of PSC2-4, so divisions within civil society may have less relevance for proliferation or convergence of private governance in the PMSI than in other industries (Fransen 2011: 367-8).²⁵

Third, at an agent level, *personal–political relationships* are also a factor. While personal and political differences always come into play in negotiations over private governance, they are much harder to capture in any abstract sense, although different organizational, cultural socialization may be one way of conceptualizing the origins of disagreements. Suffice it to note that the hierarchical and results-oriented operating culture of the DOD did not match well with the open, inclusive, and democratic negotiation styles of civil society organizations, which are also typical for MSIs that are as much focused on deliberative decision-making process as outcomes.

Fourth, the *uptake and propagation of norms associated with the CSR institutional field* is also an important causal mechanism to the extent that actors gravitate towards that which they are familiar with and consider to be accepted norms and best practices in self-regulation. For the DOD, this was a management system standard, since it had past experiences with requiring government contractors to attain certification to management standards. For the participating companies, many of whom are ISO

²⁴ This issue was raised by both a Department of State representative and a security industry representative at a civil society briefing about the draft charter of the International Code of Conduct held at the Open Society Foundations offices in Washington, DC on March 13, 2012.

²⁵ For purposes of full disclosure, Rebecca DeWinter-Schmitt represented Amnesty International USA in the Technical Committee and Working Group that drafted PSC1. Human Rights First was also initially part of that process but dropped out before completion. The remaining civil society participants thereafter were largely academics or consultants.

9001 certified, there was also a certain comfort with the language, often framed in terms of the business case for respecting human rights, and the requirements of a management system standard, although their support of the ANSI/ASIS process did not lead simultaneously to a rejection of the ICOC process. As noted, if anything companies seemed most concerned about cost considerations related to the possible need to adhere to two different standards; thus, they wanted clarification on the relationship between the ANSI/ASIS and ICOC processes rather than actively lobbying for one over the other. As noted, civil society organizations came to the table viewing multi-stakeholder governance as the only legitimate form of governance, and, as will be detailed next, with an array of experiences, in particular with regards to best practices for assurance frameworks and complaints processes, gleaned from other MSIs in which they participate. These past experiences shaped their skepticism towards business-dominated forms of governance and their negotiating positions during the process of creating the charter for an ICOC governance and oversight mechanism. However, the general strength of the norm of multi-stakeholder governance (Fransen 2012), strengthened their hand.

Institutional design elements:

The question of who gets to participate and govern in voluntary regulation is one of the main points of contention among stakeholders and central for determining the legitimacy of an initiative. With regards to the PMSI, the framing of the dispute over the adequacy of the multi-stakeholder nature of both the ICOC and the ANSI/ASIS processes indicate that the norm of multi-stakeholder governance is widely accepted – the greater an initiative’s composition is representative of key stakeholders, the greater is its perceived legitimacy as the superior form of governance (Bernstein and Cashore 2007; Gilbert, Rasche, and Waddock 2011; Fransen 2012). What this looks like in actual practice is where *legitimation politics* (Fransen 2012) come to the fore and shape institutional design elements. For example, within the ICOC process the membership in the civil society pillar has created the greatest degree of dispute, particularly within the pillar. As already pointed out, the lead civil society representatives felt that participating civil society organizations should be from one end of the civil society spectrum that might be termed watchdogs (rather than the other end of implementing partners). There was also disagreement as to what role academics should play. For business and government, there was a greater interest in bringing in implementing partners for their particular expertise in assisting companies with standards implementation. However, likely due to experiences with other voluntary regulation initiatives – again the larger *CSR institutional field* – such as with the Voluntary Principles for Security and Human Rights, the watchdog NGOs felt implementing NGOs were too close to companies to exercise effective oversight. Another split within civil society was with organizations generally leery of private regulation, who felt that the ICOC process lacked legitimacy because of, among other reasons, the weight given to corporate perspectives and its failure to include civil society organizations from the Global South. Civil society participants, recognizing the significance of this last criticism for their own reputations within the NGO community, have been willing to make overtures to local NGOs. Finally, perhaps significantly for the overall robustness of the ICOC process and its ability to truly shape the industry on a global scale, one key stakeholder group is missing – namely clients of the industry. By design as a certification standard, it would have made more sense to have the third pillar be clients, rather than just states, and only contracting and home states to boot. The fact that the ICOC process arose out of the Montreux

process may account for why governments, and not other non-state clients, are included. That being said, there have been efforts to reach out to extractives companies, who have expressed limited interest in becoming more involved, in part because the certification, monitoring, performance assessment, and complaints mechanisms are far more onerous than the requirements of the Voluntary Principles on Security and Human Rights. Many have stated that they are not prepared to open up their facilities and operations to auditing, even if only by way of auditing of their security providers.

As already noted, the ANSI/ASIS PSC series has been roundly critiqued by most of the civil society participants in the ICOC process for failing to meet a legitimate standard of multi-stakeholder governance, since the composition of the stakeholders in the ANSI/ASIS process does not represent an equal balance between government, civil society, and business. ASIS selects participants for standards development from three categories: users/managers, producers/service providers, and general interest. Civil society representation falls into the last category, while the first two represent for profit interests. Government would likely fall in to the first category. What is clear is that the process is heavily skewed in favor of business input.²⁶ With the PSC series completed, there are limited roles for civil society organizations to play, especially when compared to the central role of civil society as one of three equal pillars in the ICOC Association. At most civil society can participate in regularly scheduled reviews of standards, at the company level PSCs certified to the PSC1 standard are supposed to involve civil society in risk analysis and communication, vetting and training of security providers, and promoting effective use of grievance mechanisms. At the certification body level, certification bodies are supposed to consult civil society during the auditing process and utilize civil society organizations to train auditors on international law. Finally, accreditation bodies rely on civil society to evaluate the work of certification bodies and report any shortcomings. For civil society participants in the ICOC process, this is simply not comparable to civil society's full integration into all aspects of the ICOC Association, including in governance bodies like the board and general assembly, which have decision-making authorities over budgetary and membership issues; the creation of certification, performance assessment, and complaints procedures; and determinations over non-compliance and sanctions. That being said, the strength of the norm of multi-stakeholder participation was evidenced by the DOD's efforts, as the main backer of the ANSI/ASIS PSC series, to go to great lengths in purporting the multi-stakeholder nature of the process by referencing the number of organizations and governments on the Technical Committee, their level of expertise, and geographical representativeness.

Closely related to the legitimation politics around governance are the contentious disputes around assurance frameworks, such as procedures for auditing, certification, and complaints. We focus here in particular on auditing and certification. Experience in the apparel industry indicates that one particular mechanism led to a convergence of the auditing and certification practices of the FLA and WRC over time (DeWinter-Schmitt 2007, 2012), namely the "radical flank effect mechanism" (McAdam et al 1996: 14). The term, borrowed from social movement theory, suggests that the pressure from "radical"

²⁶ ASIS provides a quick reference guide for its standards development process in which it is clear that it primarily seeks industry representation. See the heading "participation" on page 3, available at <http://www.asisonline.org/guidelines/committees/docs/SGquickReferenceGuide.pdf>, accessed on March 24, 2012.

groups, making more onerous demands on a social movement target, allows more “moderate” groups engaging with a target to wring concessions. In this case, the demands of NGOs participating in the WRC with regards to the independence of auditing procedures and the limitation of the scope of certification of brands allowed those NGOs participating in the FLA to arrive at auditing and certification procedures that companies would not have agreed to had they not been confronted with the radical alternative.

However, in the PMSI there seems to be a different type of *flank effect mechanism* at work, which could be dubbed a conservative flank effect because the U.S. government, in particular the DOD, was the driver behind the creation of an alternative self-regulation initiative that exerted pressure on the negotiations over the institutional design of the existing initiative. One of the reasons the U.S. government felt there was a need for an alternative to the ICOC process was the perceptions that field audits by ICOC Association staff was untenable for a number of reasons, ranging from the practicality of field audits to concern about the disclosure of competitive information. The PSC series also requires field audits under PSC2, but by accredited certification bodies paid for by the companies and overseen by national accreditation organizations – in other words, a market based model of auditing and certification, rather than a non-profit, multi-stakeholder model. The fact that the PSC series was completed before the ICOC Association’s charter, which outlines broadly the frameworks for certification, monitoring, and performance assessment, and shaped the negotiations over the charter indicate two other causal mechanism that may shape the design of self-regulatory initiatives: *first mover advantage* and *path dependence*. In other words, once the PSC series was completed and backed by two of the biggest contracting states, the U.S. and U.K., and included in their contracting requirements, and governments and industry leveraged the strategic rhetoric of auditing fatigue, the negotiations over the ICOC process had to take the existence of the alternative into account. The result was that the Articles of Association give the Board the ability to determine whether other existing certifications, to include to national standards like PSC1, meet the ICOC standards. However, this may lead to an ironic and unintended outcome for civil society. Civil society was so opposed to the PSC series that they operated from the assumption that as a management system standard certification would only be based on desk audits of organizational structures, policies, and procedures, rather than audits of field operations. That is incorrect as PSC2 requires field audits, at least of a sample of operations based on a geographical and human rights risk analysis. In order to maintain the desired civil society oversight of actual business practices on the ground, the Articles create an artificial separation between desk based certification of management systems and performance assessments in the field. Unless the procedures for both certification and performance assessments, which still need to be developed once the Association is officially launched, integrate these two instances of oversight better, the Association could potentially create the problem of decoupling, which has been one of the main grounds for criticism of management system standards. De-coupling captures the idea that weak assurance frameworks accompanying a standard can resulting in compliance as mere “window dressing” by assessing adherence to a process rather than accountability for substantive outcomes as a result of standards implementation (Benham and MacLean 2011).

This fitting-process between the two standards could be interpreted as a convergence of standards; although it must be noted that from the outset ASIS relied heavily on the ICOC standard and saw itself as

operationalizing it into something that could be audited, and the Board of the ICOC Association is yet to be formed and make a determination about the acceptability of certification to PSC1. However, the areas of convergence between the two initiatives are likely to increase as both the ICOC Association and the American National Accreditation Board tackle the task of creating the infrastructure necessary for auditing and certification in unstable, high risk environments. Currently, there are no existing social audit firms that conduct such audits. When auditing firms emerge to fill that gap, they will likely be auditing for both initiatives.

Conclusion:

We have tentatively identified a number of causal mechanisms that may explain why proliferation of voluntary regulation occurs within an industry and how the interaction between initiatives can shape emerging institutional design elements. The strategic leveraging of norms and practices embedded in the CSR institutional field can be used to rhetorically justify particular forms of governance and oversight. These contentious debates play out in the legitimation politics among initiatives and stakeholders, but also within stakeholder pillars. It is within these contentious encounters that the agent level of analysis comes into play, as political and personal disputes between individuals, in part grounded in organizational cultural differences, matter in negotiations. Once multiple initiatives exist, other mechanisms become significant as well to include the flank effect, first mover advantages, and path dependencies, all three of which shape the kind of concessions stakeholders can wring from each other when negotiating institutional design elements. What is less clear, especially for the nascent self-regulation initiatives of the PMSI, is how different design elements impact on the realization of environmental and human rights standards on the ground.

Future research would need to see if similar mechanisms can be found at play in the proliferation and competition among voluntary regulation in other industries. Examinations of other industries would allow more conclusions to be drawn about the longer term effects of these mechanisms on the evolution of design elements over time and their impacts on adherence to and attainment of social and environmental standards. There are many potential cases to choose from since standards proliferation is occurring in most industries. Recent research by Mena (2011) indicates that there may be a radical flank effect at play in the changes made to the business-dominated Sustainable Forestry Initiative as a result of pressure from the Forest Stewardship Council's stakeholders to make the Initiative more stringent. While Mena does not use the terminology of the flank effect, the interaction between the two initiatives mirrors the interactions between the FLA and WRC mentioned above.

Future research on the PMSI would need to expand the scope of the examination to look at the interactions between all voluntary initiatives in the industry beyond just certification standards to include potentially "principle-based standards," "reporting standards," and "process standards" (Gilbert, Rasche, and Waddock 2011: 26), and even other international accountability standards where these might impact on PMSI specific initiatives because of norm propagation, such as the Ruggie Framework and Guiding Principles on Business and Human Rights, and where actors' participation in other MSIs

shape their negotiation positions, both of which may contribute to cross-fertilization in institutional design. In addition to the ICOC process and the ANSI/ASIS PSC series, the security industry has at least five other standards that are directly relevant to it, not including company codes, regional standards, standards underdevelopment for the maritime security industry, and global business and human rights standards: the Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies being developed by the UN Working Group on Mercenaries (directed at states but with implications for firms), the Sarajevo Code of Conduct for Private Security Companies, the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (elements of which are directed specifically at firms), the Voluntary Principles for Security and Human Rights (created for the extractives industries but applicable to their security providers), and the Code of Conduct of the International Stability Operations Association (ISOA). For example, recently the trade association of security providers, ISOA, released its 13th version of its code of conduct, to which all members agree to adhere. Not only does it reference the ICOC, but during the multi-stakeholder review of the code its provisions were cross-checked for consistency with the ICOC's content.²⁷ The dynamic interactions between these also need to be examined to determine the overall direction of self-regulation in the industry, and whether standards are converging upward or downward (Fransen 2011).

Bibliography:

- Bartley, T. 2005. Corporate accountability and the privatization of labor standards: Struggles over codes of conduct in the apparel industry. *Research in Political Sociology*. 14: 211-244.
- Behnam, M. and T. 2011. Where is the accountability in international accountability standards? A decoupling perspective. *Business Ethics Quarterly*. 21(1): 45-72.
- Bishop, J. D., 2012. The Limits of Corporate Human Rights Obligations and the Rights of For-Profit Corporations. *Business Ethics Quarterly* 22 (1): 119-144.
- Chatterji, A. and D. Levine. 2006. Breaking down the wall of codes: Evaluating non-financial performance measurement. *California Management Review*. 48 (2): 29-51.
- DeWinter-Schmitt, R. 2007. Business as usual? The mobilization of the anti-sweatshop movement and the social construction of corporate identity. Dissertation thesis. Washington, DC: American University.
- DeWinter-Schmitt, R. 2010. Human rights and self-regulation in the apparel industry. In: *Private Security, Public Order: The outsourcing of public services and its limits*, eds. Simon Chesterman and Angelina Fisher. Oxford: Oxford University Press.

²⁷ See <http://www.stability-operations.org/index.php> for a description of the process and version 13.1 of the code. For purposes of full disclosure, the authors participated in the review meetings.

DeWinter-Schmitt, R. 2012. Voluntary standards in the private security industry: The impacts of standards proliferation on self-regulation. Unpublished paper presented at the International Studies Association, San Diego, CA.

Elms, H. and Phillips, R. A., 2009. Private Security Companies and Institutional Legitimacy: Corporate and Stakeholder Responsibility. *Business Ethics Quarterly* 19 (3): 403-432.

Fransen, L. 2011. Why do private governance organizations not converge? A political-institutional analysis of transnational labor standards regulation. *Governance*. 24 (2): 359-387.

Fransen, L. 2012. Multi-stakeholder governance and voluntary programme interactions: legitimation politics in the institutional design of Corporate Social Responsibility. *Socio-Economic Review*. 10(1): 163-192.

Gilbert, D., A. Rasche, and S. Waddock. 2011. Accountability in a global economy: The emergence of international accountability standards. *Business Ethics Quarterly*. 21 (1): 23-44.

Goebbels, M. and J. Jonker. 2003. AA1000 and SA8000 compared: a systematic comparison of contemporary accountability standards. *Managerial Auditing Journal*. 18 (1/2): 54-58.

Makinen, J. and Kourula, A. 2012. Pluralism in Political Corporate Social Responsibility. *Business Ethics Quarterly* 22:4: 649-678.

March, J.G. and J.P. Olsen 1995. *Democratic Governance*. New York: Free Press

Matten, D., and Crane, A. 2005. Corporate citizenship: Toward an extended theoretical conceptualization. *Academy of Management Review*, 30(1): 166-79.

McAdam, D., S. Tarrow and C. Tilly. 2001. *The Dynamics of Contention*. Cambridge: Cambridge University Press.

Mena, S. 2011. Corporate responsibility and soft law: Institutional, democratic, and social movement perspectives. Dissertation Thesis. University of Lausanne.

Mena, S. and G. Palazzo. 2012. Input and Output Legitimacy of Multi-Stakeholder Initiatives. *Business Ethics Quarterly*. 22 (3): 527-556.

Neron, P-Y. 2013. Toward a Political Theory of the Business Firm? A Comment on 'Political CSR'. *Business Ethics Journal Review* 1 (3): 14-21.

O'Rourke, D. 2006. Multi-stakeholder regulation: Privatizing or socializing global labor standards? *World Development*. 34 (5):899-918.

Rasche, A. 2009. Towards a model to compare and analyze accountability standards: The case of the UN Global Compact. *Corporate Social Responsibility and Environmental Management*. 17: 192-205.

Rasche, A. 2012. Global Policies and Local Practice: Loose and Tight Couplings in Multi Stakeholder Initiatives. *Business Ethics Quarterly* 22 (4): 679-708.

Raynolds, L., D. Murray, and A. Heller. 2007. Regulating sustainability in the coffee sector: A comparative analysis of third-party environmental and social certification initiatives. *Agriculture and Human Values*. 24: 147-163.

Scherer, A. G., and Palazzo, G. 2011. The new political role of business in a globalized world: A review of a new perspective on CSR and its implications for the firm, governance, and democracy. *Journal of Management Studies*, 48: 899-931.

Scherer, A. G., G. Palazzo, and D. Baumann. 2006. Global Rules and Private Actors: Toward a New Role of the Transnational Corporation in Global Governance," *Business Ethics Quarterly* 16(4): 505-32.

Scherer, A. G., G. Palazzo, and D. Matten. 2009. Introduction to the Special Issue: Globalization as a Challenge for Business Responsibilities. *Business Ethics Quarterly* 19(3): 327-47.

Singer, P. 2003. *Corporate Warriors: The Rise of the Privatized Military Industry*. Ithaca, NY: Cornell University Press.

Sullivan, R. 2005. Code integration: Alignment or conflict? *Journal of Business Ethics*. 59: 9-25.

Van Tulder, R., and A. Kolk. 2001. Multinationality and corporate ethics: Code of conduct in the Sporting Goods Industry. *Journal of International Business Studies*. 32 (2): 267-283.

Whelan, G. 2012. The Political Perspective of Corporate Social Responsibility: A Critical Research Agenda. *Business Ethics Quarterly*. 22 (4): 709-737.