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Soft Law and the Elusive Quest for Sustainable Global Governance

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John J. Kirton and Michael J. Trebilcock (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, Aldershot: Ashgate Publishing, 2004, ISBN 0754609669, 372 pp.

1. Introduction

Since 1987, when the World Commission on Environment and Development issued its famous report, *Our Common Future*, and coined the term 'sustainable development',[1] the latter has been one of the main goals of the international community. In the early 1990s there seemed to be the necessary momentum for the consolidation both of the concept of sustainable development and of the instruments and institutions able to deliver the promises therein. However, after the euphoria at the UN Conference on Environment and Development in Rio de Janeiro in 1992,[2] results have not been satisfying. Ten years after Rio the international community focused once again on sustainable development at the World Summit on Sustainable Development held in Johannesburg.[3] It can be said that the event was a disappointment compared with Rio. Currently there is a certain degree of consensus on the content of sustainable development, which includes social, environmental, and economic (development) goals that must be fulfilled together. What is still not clear is how to achieve sustainable development, what (legal) instruments are needed to balance the three pillars of sustainable development, and which institutions should be involved in promoting and delivering sustainable development?

Hard Choices, Soft Law[4] focuses precisely on this crucial issue: 'the twenty-first century challenge for sustainable global governance' (p. 6). Hard choices must be

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1. See the definition of sustainable development in Report of the World Commission on Environment and Development, UN Doc. A/42/427 (1997), Ch. 2.1, at 54: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'
2. Rio Declaration on Environment and Development, UN Doc. A/CONF.151/6/Rev.1 (1992), (1992) 31 ILM 874.
3. Report of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002).
4. The book builds on a project of the University of Toronto on 'Strengthening Canada's Environmental Community through International Regime Reform' and on papers and presentations presented at its second annual conference, with the same title as this book, held on 8–9 Nov. 2001 at the Munk Centre for International Studies.

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taken by the international community in order to meet this challenge and in order to give answers to the crucial questions about sustainable development. Against this background, the objective of this book is to clarify the role of soft law in the political and legal struggle towards sustainable global governance and, in particular, the role that voluntary standards and informal institutions may be able to play.

1.1. The structure of the book

Soft law is the overarching topic of the book. Kirton and Trebilcock underline six crucial questions about soft law: what it is; where it has flourished; what its benefits and disadvantages are; how soft and hard law can coexist and converge; why soft law has developed; and what its consequences are (pp. 8–13, 22–7). However, the book does not deal separately with each of these related issues. On the contrary they are present to a greater or lesser extent throughout the entire book, which is structured in order to study and analyse soft law as it is contained in each one of the three pillars that constitute sustainable development. The book begins by dealing with the environmental pillar of sustainable development, focusing in particular on forestry ('Setting Standards for Sustainable Forestry'). It then deals with the social pillar ('Setting Standards for Labour') and the economic pillar ('Creating Codes of Corporate Responsibility') of sustainable development. The book ends by analysing the role of intergovernmental organizations in achieving sustainable development in the environmental, labour, and economic fields ('International Institutions and Soft Law').

The added value of this book is that in all the contributions the authors stress both the instruments that are needed in order to meet the sustainable global governance challenge and the institutional architecture that is equally needed.[5] In other words, the book highlights the role that soft law has played, is playing, and might (or might not) play in the future, within the normative and institutional challenge in the quest for improved global trade, environment, and social global governance.

1.2. The structure of the essay

My goal in this book review is to underline three cross-cutting themes of Kirton and Trebilcock's book that deserve special attention. I shall first see how the book has dealt with voluntary standards, soft law, and the normative challenge of sustainable governance (section 2). I shall then move on to analyse how it highlights informal institutions, soft organizations, and the institutional challenge of sustainable global governance (section 3). Finally, I shall examine the contributions of several authors who have focused on the 'trade and . . . 'debate (section 4). The ultimate goal of the essay is to assess whether soft law is a beneficial instrument in the hands of the

5. The various authors come from a wide range of geographical, professional and disciplinary backgrounds such as international law, political science, international relations, and sociology. On the one hand, the majority of the authors are Canadian; however, there are several authors from developing countries who enrich the discussion with their view from a Southern perspective on how to achieve sustainable development. On the other hand, the simultaneous presence in the book of practitioners, members of academia and civil society, and corporate representatives makes the book a truly useful and multidisciplinary contribution on sustainable global governance.

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international community when there are hard choices to make in order to enhance sustainable global governance (section 5).

2. Voluntary standards, soft law, and the normative challenge of sustainable global governance

In this section I shall examine how the authors have defined soft law and voluntary standards, and try to determine the rationale behind their appearance. Second, I shall highlight those regimes in which soft law and voluntary standards have flourished. Third, I shall deal with the main limits to the application of voluntary standards. Finally, I shall complete the section by dealing with the issue of the coexistence of soft law and hard law.

2.1. Soft law defined

What is soft law and what are voluntary standards? On the one hand, throughout the book many authors, in order to define soft law, have first referred to the characteristics of hard law underlined by Abbott and Snidal:[6] precision, obligation, and delegation (pp. 8, 93). Whenever one of these three elements is weakened, soft law is likely to appear. Common elements of soft law regimes are their voluntary participation and their consensus-based mechanisms. Enforcement is not delegated to an independent judicial body, but is instead usually left to a non-intrusive system based on co-operation. Soft law provides for multi-stakeholder and non-confrontational legal regimes (pp. 22–3). On the other hand, voluntary standards are 'the principles and norms that depend on consent, consensus, and resources other than governmental authority for their work' (p. 10). Guidelines, codes of conduct, certification schemes, and labelling programmes are all examples of voluntary standards. In many cases, the state does not participate in the establishment of these programmes or in their enforcement, which is undertaken either by non-governmental organizations (NGOs) or by multinational corporations (MNCs).

In the first case, NGOs, in order to protect the environment or human rights, or to improve labour conditions, will establish voluntary guidelines for MNCs. If an external auditor certifies that the MNC has met the standards provided for in the guidelines, it will be granted a label or a certification.[7] In the second case, MNCs set their own rules in order to protect the environment, human rights, and labour standards. This is what has been called corporate social responsibility (CSR).

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6. K. W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organization* 421, at 422.
7. If consumers worldwide start getting acquainted with voluntary standards and agree with the objective behind them (environmental protection, human rights protection, etc.), then consumers will reward those MNCs that have followed the voluntary standard. Therefore it can be said that one of the reasons why soft law and voluntary standards have increased in the last decades is because market-driven forces are thought to be a better solution to specific problems (environment, labour standards) than strict governmental regulation. On this issue see, in relation to the climate change regime, K. Campbell, 'From Rio to Kyoto: The Use of Voluntary Agreements to Implement the Climate Change Convention', (1998) 7 (2) *Review of European Community and International Environmental Law* 159.

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2.2. Soft law regimes and voluntary standards programmes

Soft law is seen as a very useful instrument in those cases in which hard law is still not feasible because states are not yet willing to commit to binding international legal norms, or in those cases in which hard law has proved to be ineffective. In both cases soft law, and in particular voluntary standards, is a way for states to avoid delicate sovereignty-related problems. In this context the book explores the presence of soft law in the three pillars that constitute sustainable development: the environmental, social, and economic pillars. In all three soft law and voluntary standards are particularly important.

Forestry is probably the field in which soft law has most to offer. In fact, currently there is no hard law instrument that deals with global forestry-related problems.[8] One of the outcomes of the UN Conference on Environment and Development in 1992 was the non-legally binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests.[9] Simultaneously with the unproductive efforts towards a Global Forest Convention[10] a group of influential NGOs established at the beginning of the 1990s the Forest Stewardship Council (FSC),[11] which developed criteria and standards that companies in the forestry sector must follow in order to be certified.

A second field in which soft law and voluntary standards have increased their presence and which is dealt with in Kirton and Trebilcock's book is labour rights. While forestry lacks hard law and a single intergovernmental organization that can effectively co-ordinate action to protect forests worldwide, this is not the case in the labour field. The International Labour Organization (ILO) is one of the oldest international organizations, dating back to 1919, and the conventions that it promotes are binding on those states that ratify them. However, even if the ILO's conventions are apparently 'hard', its regime is getting weaker. On the one hand, the tripartite division (government, workers, and business) is causing a standstill that does not allow the organization to function properly and, on the other hand, the enforcement and compliance mechanisms have proved to be too mild and ineffective. Against this background, soft-law measures within the ILO, such as the adoption of recommendations, guidelines, and codes of conduct, have been favoured over formal conventions.

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8. An exception could be provided by the UN Forum on Forests, which has the sole purpose of examining global forest issues. However, it is a temporary forum and does not have a long-term mandate. Furthermore, forest-related issues are present in many multilateral environmental agreements, such as the Convention on Biological Diversity or the UN Framework Convention on Climate Change, and the problem is that in many cases there is a low level of co-ordination between the different regimes. Despite the absence of a global forest convention, there are some international treaties that deal with specific forestry issues, such as, for example, the 1994 International Tropical Timber Agreement, (1994) 33 ILM 1014. According to Art. 1(a), one of the main objectives of the agreement is 'to provide an effective framework for consultation, international co-operation and policy development among all members with regard to all relevant aspects of the world timber economy that trade in tropical timber.' In relation to this specific forestry regime see a recent article by L. Flejzor, 'Reforming the International Tropical Timber Agreement', (2005) 14 (1) *Review of European Community and International Environmental Law* 19.
9. Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (Vol. III) (1992), Annex III.
10. See D. Humphreys, 'The Elusive Quest for a Global Forest Convention', (2005) 14 (1) *Review of European Community and International Environmental Law* 1.
11. See http://www.fsc.org/en/.

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Furthermore, a number of voluntary standards have originated outside the ILO as a reaction to the organization's immobility.[12] A similar trend, moving from hard to soft law, is present in many multilateral environmental agreements (MEAs) because of the softness of their enforcement and compliance mechanisms.[13] Furthermore, in some cases major players stay out of the MEAs and foster soft law instruments, including voluntary standards, in order to deal with the environmental problem without having to be bound by strict international rules.[14]

Finally, the book focuses on soft law and voluntary standards in the economic pillar of sustainable development and, in particular, in relation to MNC activities. In the 1990s NGOs started very strong campaigns in which they targeted MNCs for their violation of human rights and their disregard for the environment, and for low labour standards.[15] MNCs realized that a negative reputation had negative economic effects[16] and acknowledged the societal function of companies that entails that MNCs respond not only to their shareholders but also to the public. In response to these pressures MNCs began to develop CSR initiatives, 'the obligations that companies must respect as basic principles in their operations toward human rights, labour standards, and the environment' (p. 191). Finally, the activities of MNCs have attracted the attention of intergovernmental organizations, and interesting developments in this direction, such as Kofi Annan's Global Compact and the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,[17] are analysed in this book.

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12. Social labelling exists in many industries, such as garments, leather products, coffee, tea, and carpets. The main labelling programmes in the carpet field are Rugmark (http://www.rugmark.org/), Kaleen (http://www.kaleenint.com/), and Care & Fair (http://www.care-fair.org/).
13. However, in most cases reaction to non-compliance in MEAs is meant to be soft because very often countries do not comply because they do not have the capacity or the technology to enforce environmental measures. This is especially true for developing countries. Therefore, response to non-compliance is not hard (i.e. sanctions) but implies capacity-building and technology transfer programmes. A co-operative and non-confrontational approach is, therefore, present in most international environmental regimes.
14. The biosafety and climate change regimes constitute good examples of this trend from hard to soft law. In fact, the United States, absent from both the Cartagena Biosafety Protocol and the Kyoto Protocol to the UN Framework Convention on Climate Change, fosters a number of voluntary standards in the area of both food safety and energy efficiency.
15. Nike and Nestlé have been among the two MNCs that have been most targeted in the last years by consumer boycotts. Their effects have been studied by B. D. Gelb, 'More Boycotts Ahead? Some Implications – Consumer Boycotts', (1996) 38 (2) *Business Horizons* 70.
16. Consumers were getting more critical and stopped buying products from companies that were proven to have a negative environmental record. This has led oil companies such as British Petroleum and Shell to get involved, for example, in efforts to curb negative climate change effects. For an overview of the BP climate change programme see http://www.bp.com/subsection.do?categoryId=4451&contentId=3072030, while Shell's action on climate change can be found at http://www.shell.com/home/Framework?siteId=royal-en. The importance of oil companies in the climate change regime has been underlined by J. Birger Skjaerseth, 'Major Oil Companies in Climate Policy: Strategies and Compliance', in O. Schram Stokke, J. Hovi, and G. Ulfstein (eds.), *Implementing the Climate Regime. International Compliance* (2005), 187.
17. On the one hand the UN Global Compact laid down 10 principles in the areas of human rights, labour, environment, and anti-corruption. Its main goal is to develop a network of MNCs and NGOs that will foster these principles in business activities around the world. For more detailed information see the UN Global Compact webpage at http://www.unglobalcompact.org/Portal/Default.asp?. On the other hand, the OECD Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. The guidelines are available at www.oecd.org/dataoecd/56/36/1922428.pdf.

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2.3. The limits of soft law and voluntary standards

Soft law and voluntary standards have some very important limits. The main ones are high costs, limited impact, and non-compliance.

Rezende de Azevedo's contribution, on the impact of the FSC on logging activities in Brazil, demonstrates that only big companies can afford the high costs of certifying and that community forest management activities cannot (p. 88). Tollefson's work on the impact of the FSC on indigenous rights in British Columbia points out that one of the drawbacks of the certification scheme was its high cost for First Nations[18] (pp. 113–14).

The second limitation of voluntary standards is their limited impact. Do voluntary standards really make a difference? Are the environment or labourers better off because tropical timber or carpets have an environmental or social label attached to them? Tropical timber and carpets which are environmentally friendly and socially sustainable are export-oriented products. Consumers in the North have started to demand these kinds of products. They feel better if they know that they are not taking part in the destruction of global biodiversity or in the exploitation of child labour, for example. However, what significance does this attitude really have for the Amazonian tropical forest, for example? Rezende de Azevedo reminds us that 'the state of São Paulo [Brazil] alone uses more tropical wood than all the countries that make up the European Community' (p. 72). Furthermore, how many workers in the South have seen their working conditions improved as a result of social labelling programmes? How many children in developing countries have gone back to school instead of stitching footballs for people in the North? Venkata Ratman and Verma in their work on the ILO standards in India stress strongly that 'concern for improving labour standards should be more holistic and encompass the entire working class, rather than the *microscopic* minority engaged in production for exports' (p. 166, emphasis added). Trebilcock, in his contribution on the relationship between trade policy and labour standards, gives some more data on child labour and export-oriented products. He reminds us that 'it is widely agreed that most child labour is not employed in export sectors (between 5 and 10 percent) but in domestic agriculture, services, retail, and the informal sector generally' (p. 177).

Finally, compliance is the third important limitation of voluntary standards. Soft law is intrinsically non-intrusive and non-confrontational. Therefore a voluntary standards programme, such as labelling or certification, will not have a strong enforcement mechanism. The rationale behind voluntary standards is that market forces will constitute the necessary compliance pull for MNCs. Thus if a company is not granted a label or is not certified, consumers will deem its products to be not environmentally friendly or not socially sustainable. This will result in economic loss, which is the ultimate reason why a MNC will protect the environment or introduce better labour standards for its workers. Therefore monitoring MNCs' conduct becomes crucial for the proper functioning of voluntary standards. The debate that follows is about who should be in charge of the monitoring. Should

18. First Nations is the name given to the indigenous groups living in British Columbia.

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it be only the private sector? Or should there be an active involvement of the state? This is particularly relevant for codes of conduct established by MNCs for their own activities, namely CSR. In this case, the voluntary standard is created by the same entity that must comply with it. Who controls whether a company is actually following its own CSR guidelines? Matthews's work on the investments of the Canadian oil company Talisman in Sudan highlights this problem. The author wonders whether the state should intervene when a company does not comply with its own code of conduct, leading to serious environmental degradation or, as in the case of Sudan, to serious breaches of human rights and international humanitarian law (p. 228). Dashwood's work on CSR and the evolution of international norms deals thoroughly with this issue and goes directly to the heart of the problem. She concludes that voluntary standards need 'co-operative code building and code implementation involving the private sector, government, and civil society working co-operatively in cross-sectoral networks' (p. 224). Interestingly, she highlights that in some cases MNCs have accepted the presence of major NGOs in the monitoring of their codes of conduct.[19] Finally, Wilkie, in his contribution on CSR, trade, and investment, argues that a possible solution for improving compliance with CSR could be linking the soft regime of CSR with the rules governing trade and investment (p. 288).

In conclusion, even if soft law and voluntary standards present several benefits in the sustainable global governance normative challenge, several major obstacles, such as the high costs of the application of voluntary standards, the limited coverage vis-à-vis the people affected and environmental problems dealt with, and the difficulties in the implementation and enforcement of voluntary standards, lead me to agree with Kirton and Trebilcock when they maintain that 'soft law has its place, but is by no means a silver bullet solution in all spheres' (p. 28).

2.4. The coexistence of soft and hard law

Given the weaknesses discussed above, what is the role that soft law could play in the normative challenge for sustainable global governance? Soft law, and voluntary standards in particular, must be considered to be a step in the progressive development of international norms. However, in some cases soft law may in fact be a step backwards rather than forwards. This occurs when the international community acknowledges that it cannot solve a global problem through binding international norms (hard law) whose violation leads to a penalty imposed by an independent judicial body, and it therefore steps back to soft law. This is the negative trend in which the ILO currently finds itself. However, stepping back may be useful in those cases in which the international community finds itself uneasy with the strict limitations of sovereignty and needs time (flexibility) to deal with sensitive problems.[20] If soft law is able to reunite the international community around shared values, then voluntary standards can become an extremely useful instrument for

19. This has been the case, for example, in the collaboration between Amnesty International and Transparency International with Shell; see Kirton and Trebilcock, p. 224.
20. See the debate on flexibility in section 3.2, *infra*.

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sustainable global governance.[21] This is the hope for current soft labour standards within the ILO. However, market forces are the rationale behind voluntary standards. In this regard Venkata Ratman and Verna underline a very important point: 'beyond a point, if things are left only to market forces, practices can become *amoral*' (p. 168, emphasis added). Therefore sustainable global governance pursued solely through voluntary standards (market forces) will inevitably lead to an inequitable conclusion.

In order to prevent this from happening, soft law and voluntary standards must fulfil a further function. They must be a phase in the normative creation of international rules. I therefore agree completely with the various authors in this book who consider soft law to be a pioneer of hard law (p. 12). Voluntary standards may from this perspective constitute the first step towards the creation of hard law in the future. In the case of forestry, for example, the FSC and other voluntary standards may well build up the momentum for a future global convention on forests. The same is desirable in the investment field. Even though negotiations on a multilateral agreement on investment failed, soft law instruments, such as MNC codes of conduct and recent developments in this field such as the UN Global Compact or the OECD Guidelines for Multinational Enterprises, may also constitute the beginning of a step towards comprehensive hard law in this field.

In conclusion, while market forces are the reason for compliance with voluntary standards, the nature of measures such as social or eco-labelling and certification is a genuine concern for environmental or human rights protection. The latter is the seed that must grow from soft law instruments; it must develop into good, hard law able to promote better sustainable global governance. Therefore the normative challenge of soft law is to 'build the kind of hard law that the world needs, as opposed to a static, stand-alone superior substitute for hard law' (p. 27).[22]

3. Informal institutions, soft law and the institutional challenge of sustainable global governance

Informal institutions are the second cross-cutting theme in Kirton and Trebilcock's book. But what exactly is an informal institution? According to Kirton and Trebilcock, it shares most of the characteristics of voluntary standards. They define informal institutions as 'those transnational and intergovernmental bodies, including those exclusively among governments, that similarly rely on consent and consensus, rather than on codified and ratified charters, and intergovernmental bureaucracies with resources of their own' (p. 10). In this section I shall essentially deal with three issues. First, I shall outline the major informal institutions that have been dealt

21. See the importance of shared values in the debate on soft law and legitimacy in section 3.3, *infra*.
22. Zemanek maintained that soft law instruments are 'tools for shaping the future development of the law, either by building *opinio juris* for custom or by shaping a consensus for future multilateral conventions', and they 'will represent one element in the respective law-creating process'. In sum, 'they are evidence of a step in a norm-creating process'; see K. Zemanek, 'Is the Term "Soft Law" Convenient?', in G. Hafner et al. (eds.), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern* (1998), 843, at 858–9.

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with in the book, second, I shall focus on their rise within international society, and, finally, I shall deal with one of the most delicate issues regarding soft law: legitimacy, and its implication for informal institutions.

3.1. Informal institutions

The informal institutions that are dealt with in this book are very similar to what some authors have defined as 'soft organizations'. Organizations are soft when states get together and create them on the side of international law.[23] In this regard, Bayne's work on hard and soft law in international institutions examines the OECD (pp. 349–50) and the G7/8 Summit (p. 350). The OECD has, since its creation, enabled industrialized countries to discuss their economic development in an informal manner. OECD decisions are not binding and they constitute guidelines for member states. However, the mandate of OECD activities has broadened in the last two decades, and many decisions taken therein on sustainable-development-related issues affect countries that are not part of the organization.[24] The same can be said for the G7/8, where issues such as poverty reduction in Africa and climate change have been dealt with.[25]

Informal institutions must not be confused with treaty-based regimes providing non-binding obligations. This is the case for specific environmental regimes, such as the biodiversity and the climate change regimes, which are both based on framework treaties that oblige member states to pursue the objectives present therein but give them freedom in their choice of instruments of implementation.[26]

I prefer to call these international regimes *weak* regimes, be it with regard to their nature or to how they work, or do not work. Soft law appears in this context when states acknowledge that the regime is paralysed. The United Nations, instead of promoting an international treaty covering MNC obligations in developing countries, fosters the UN Global Compact. The ILO, instead of promoting binding conventions on precarious employment, favours informal labour standard-setting through non-binding recommendations.[27] However, there are cases where a weak regime is strengthened. States involved in the negotiation of the Convention on Biological Diversity and the UN Framework Convention on Climate Change realized that further strong international legal norms had to be developed in order to fulfil the objectives of the treaties. This is what led to the strengthening of the biodiversity regime

23. See J. Klabbers, 'Institutional Ambivalence by Design: Soft Organizations in International Law', (2001) 70 (3) *Nordic Journal of International Law* 403, at 405: 'Over the last few decades, international co-operation has increasingly been organized through mechanisms that were deliberately kept at the fringes of international law, or even outside of it altogether.'
24. The OECD Guidelines for Multinational Enterprises are an example. See note 17, *supra*.
25. In the 2005 G8 Summit in Gleneagles, Scotland the focus was on Africa and climate change. See *Gleneagles Plan of Action – Climate Change, Clean Energy and Sustainable Development* (2005), available at http://www.g8.gc.ca/menu-en.asp.
26. If framework treaties are meant to be soft, other regimes can be considered soft because they are not able to work as efficiently as they should. Within the book Foster underlines the weakness of the UN (p. 206) and Vosko does the same in relation to the ILO (pp. 148–9).
27. See the work on the ILO and precarious employment by L. Vosko, pp. 134–52.

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through the Cartagena Biosafety Protocol[28] in 2000 and of the climate change regime through the Kyoto Protocol[29] in 1997.[30]

3.2. The rise of informal institutions

Why have informal institutions developed so extraordinarily in the last two decades? The reasons are in part the same as those explaining the appearance of voluntary standards. There has been a strong call for flexibility in international politics, but what is the underlying reason for this call for more flexibility? Klabbers explains it very well in the following terms: 'Soft international organizations [informal institutions] . . . are created . . . in response to a call for *flexibility*, and that call itself is related to anxieties and uncertainties about the role of *governance* in public affairs'.[31]

Therefore, informal institutions develop parallel to the growing lack of confidence in the role of the government in public affairs. In other words, the lack of confidence in the state's regulatory capacity has led major players, both domestically and internationally, to prefer institutions where the state is either completely absent (for example the FSC or CSR policies) or present in a less formal way (for example G8 and the OECD). However, the growing lack of confidence in state regulation implies a very worrisome crisis of politics. This has been one of the most important elements of the globalization process. On the one hand NGOs do not believe in politics because they feel that, especially in developing countries, it is overwhelmed by corruption. On the other hand businesses and MNCs prefer market forces, rather than expensive and time-consuming state bureaucracy, to regulate their activities.

However, it is clear that the power of MNCs is stronger than that of NGOs, and that if regulation is left only to market forces an inequitable result will be the final conclusion.[32] Therefore, if the rise of informal institutions is a sign that people do not believe in politics, is the correct solution to abandon politics? Is the solution to bad politics no politics? Is the solution to bad state regulation no state regulation? Klabbers responds that 'what is needed . . . is some form of politics'.[33] The solution to *bad* politics is *good* politics, where corruption is banned and market forces are accepted as one of the drivers of the economic world, but not the only one.

In conclusion, in order to pursue sustainable global governance, a premise must be established: it is necessary for the people to start to believe in politics again. Informal institutions, as long as they are considered to be a step towards more formal institutions, are welcome in the institutional challenge for sustainable global governance. If the latter is to be achieved primarily through informal institutions

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28. 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, (2000) 39 ILM 1027 .
29. 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, (1998) 37 ILM 22.
30. Many authors agree that both the biodiversity regime and the climate change regime need to strengthen themselves further through the improvement of their compliance system and dispute settlement system; see among others J. Brunnée, 'The Kyoto Protocol: Testing Ground for Compliance Theories?', (2003) 63 (2) *Heidelberg Journal of International Law* 255, and J. Werksman, 'Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime', (1998) 9 *Yearbook of International Environmental Law* 9.
31. Klabbers, *supra* note 23, at 421 (emphasis added).
32. See section 2.4., *supra*.
33. Klabbers, *supra* note 23, at 421.

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this would be difficult to accept for many reasons, in particular for reasons of legitimacy.[34]

3.3. Soft law, informal institutions and legitimacy

How legitimate is soft law? How legitimate are informal institutions? The rise of informal institutions in the last two decades makes these questions particularly relevant in the quest for sustainable global governance. But what does legitimacy imply? According to Zemanek,

> Observance owes more to its general acceptance, to the recognition that the existing legal rules reflect the shared values and interests of the members of the international community and are, therefore, *legitimate*.[35]

To put it bluntly, states will bind themselves to laws where the latter are considered legitimate.[36] Once this condition is met, states will equally follow hard law provisions or soft law guidelines. Therefore legitimacy is central to both hard and soft law. This is why some authors do not attach too much importance to the characterization of hard law as binding and soft law as non-binding; some have asked themselves whether the distinction between hard and soft law is at all relevant.[37]

Kirton and Trebilcock acknowledge the importance of legitimacy when discussing soft law and informal institutions. In fact, Bernstein and Cashore in their contribution on non-state global governance and forests stress strongly that 'a rule or institution is legitimate if relevant audiences accept it as appropriate' (p. 41). Further on in the book it is underlined that 'hard law . . . can be difficult to enforce if it does not reflect a general societal consensus about its legitimacy' (p. 190).

Therefore in order to obtain legitimacy the international community, or at least relevant audiences, must agree on shared values and interests. Once this agreement is reached, a norm that protects the shared value will be deemed legitimate. But who decides whether a value is truly shared? Even the most uncontroversial values of the international community, such as the protection of basic human rights, are sometimes questioned. Is the international protection of the environment really a shared value of the international community?[38]

However, if a norm can be legitimate because it protects a common value, what about the actor who creates that norm? When is it legitimate for an international actor to deal with a global problem? Kirton and Trebilcock's book highlights the difficult relationship between legitimacy and NGOs, MNCs, informal institutions, and intergovernmental organizations.

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34. Ibid., at 421: 'This [i.e. formal institutions' activities would be more effective], however, is partly illusory, and may be difficult to accept for other reasons, relating to such things as legitimacy.'
35. See Zemanek, *supra* note 22, at 843–62.
36. Ibid., at 856 (emphasis added).
37. Ibid.
38. Following the International Court of Justice in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the protection of the environment is a common value of the international community and, therefore, we can conclude that a norm whose objective is the protection of the environment is legitimate. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 679, para. 29.

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3.3.1. Legitimacy and non-governmental organizations

Since the end of the Cold War NGOs have increased their presence and their influence in international fora. Especially in the environmental and human rights field NGOs have assumed greater importance, and there is no important international law event in which NGOs do not participate actively.[39] However, are NGOs legitimate international actors? They form an expression of civil society and defend values that are to a great extent shared by most actors in the international community. Therefore NGOs have an important role to play in the institutional challenge for sustainable global governance. They foster debate and lobby internationally for more sustainable policy-making. In a chapter on the future of the world trading system Ostry explains that NGO coalitions must take a step forward and discuss an alternative to the international system that they are criticizing (p. 279). Can NGOs go a step further? Can NGOs start to legislate? Can they develop standards, guidelines that must be legally followed? Voluntary standards show that this is already occurring. Is this legitimate? Some authors have further dwelt on the concept of legitimacy and they have linked it strictly with accountability, but this relationship has not been explored thoroughly in Kirton and Trebilcock's book. To whom are NGOs accountable? The apparent lack of accountability causes NGO legitimacy to be questioned in the institutional challenge for sustainable global governance.[40]

3.3.2. Legitimacy and multinational corporations

A second type of actor whose legitimacy can be questioned is the MNC. The ultimate goal of an MNC is making profit, which is not a shared value of the international community. While an MNC is free to decide its own investment policies, it also has obligations towards the environment, their workers, and the general public. This societal function has led most MNCs to start CSR policies through which they regulate themselves. However, can MNCs get involved in other fields not directly linked to their business? Dashwood underlines that 'serious doubts remain whether companies should be involved in the social realm' (p. 193). On the other hand, according to Cloghesy, in his corporate perspective on globalization and sustainable development, governments cannot 'regulate everything that may pose a risk. The onus for establishing the level of risk and for reducing or eliminating the risk is thus shifting to the private sector, because it alone has the resources to do the job' (p. 326).

Therefore, according to Cloghesy, the private sector must get involved in societal functions.[41] The question of legitimacy in this case is insurmountable. The value embraced by MNCs is that of economic profit. Furthermore, MNCs are finally accountable to consumers through market response. But if things are left only to the

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39. See S. Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', (1997) 18 *Michigan Journal of International Law* 183, and J. Gupta, 'The Role of Non-state Actors in International Environmental Affairs', (2003) 63 (2) *Heidelberg Journal of International Law* 459.
40. On the accountability of NGOs see E. B. Bluemel, 'Overcoming NGO Accountability Concerns in International Governance', (2005) 31 *Brooklyn Journal of International Law* 139.
41. This would imply that the private sector may well decide, for example, the level of risk under which the consumption of genetically modified organisms is to be considered safe for human health and not dangerous for the environment.

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market the result will be inequitable.[42] Cloghesy maintains that the private sector must replace the government in certain sectors because it alone has the resources to do so. Then the problem lies in the fact that the state and, at a global level, international organizations lack the necessary financial resources. To put it bluntly, MNCs have no legitimate right to get involved in social activities outside their business and their role in the institutional challenge for sustainable global governance is highly questionable.

3.3.3. Legitimacy and informal institutions

A third actor whose legitimacy may be questioned is the informal institution. For example, can the OECD legitimately take decisions that, even if applied in OECD member countries, may finally influence other countries' policies? Anti-globalization protesters at G7/8 summits contest the body's legitimacy, in particular with regard to global issues such as poverty. The OECD and especially the G7/8 represent a very small number of Western industrialized nations, even if they include the most powerful. The values that are shared by these countries may not be valid globally. Therefore the first element of legitimacy is not truly consolidated. Furthermore, and this is valid also for anti-globalization movements, informal institutions are not accountable. They occupy voluntarily a grey section of international law. Therefore the role that informal institutions can play in the institutional challenge for sustainable global governance is once again questioned by both legitimacy concerns and by lack of accountability.

3.3.4. Legitimacy and intergovernmental organizations

Finally, are formal intergovernmental organizations legitimate? A first answer would be 'yes', because, when there is wide participation, the values that are being pursued are shared by the vast majority of the international community.[43] This is the case for the United Nations and for most of the UN agencies. This is also the case for the ILO and for many MEAs. However, legitimacy becomes a problem when international organizations deal with issues outside their scope. This is particularly the case for the World Trade Organization (WTO). Is it legitimate for the international trade regime to deal with environmental or labour-related issues? According to MacLaren's brief contribution on environment and labour in the WTO,

> the effort to impose on the WTO the means to resolve problems with the environment, labour, and even human rights must be seen as impracticable, best left to be dealt with by other international organizations, however inadequate they currently are, through policy measures other than trade, and by the general evolution of soft law. (p. 269)

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42. See section 2.4, *supra*. This has led the anti-globalization movement to create its own forum, the World Social Forum (p. 210), in which it debates alternative strategies to improve global sustainable governance.

43. However, in some cases the Conference of the Parties (COPs) of international organizations adopts a quasi-legislative power. In those cases in which acts are adopted by the COPs by majority and not by consensus, legitimacy concerns may arise. On this point see J. Brunnée, 'COPing with Consent: Law Making under Multilateral Environmental Agreements', (2002) 15 LJIL 1; E. Hey, 'Sustainable Development, Normative Development and the Legitimacy of Decision Making', (2003) 34 *Netherlands Year Book of International Law* 3; and R. R. Churchill and G. Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law,' (2000) 94 AJIL 623.

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The value on which the WTO has been built is free trade rather than environmental protection or human rights. Therefore the main objective of the multilateral trading system is to promote freer global trade. It should not interfere, even indirectly, in other international law fields.[44]

Nevertheless, the WTO is perceived to be one of the strongest international organizations around. Its binding dispute settlement system is by far more elaborate and more efficient than its counterparts, for example, in international environmental treaties.[45] WTO panels and especially the Appellate Body have interpreted obscure norms of the international trade regime. Their role has been very useful in its clarification. However, 'the most high profile and contentious disputes have concerned social regulatory issues (food safety and environment)' (p. 273). In this regard Ostry argues that the strength of the WTO judicial system has led the judges to create law in non-trade fields. She continues by maintaining that lawmaking judges in fields shared by trade rules and by other international regimes, such as environmental or food safety-related treaties, have led public opinion to criticize the WTO strongly for its intrusiveness (p. 273).

And what about the accountability of intergovernmental organizations? For example, to whom is the WTO accountable? There is no way of appealing against a WTO Appellate Body decision, even if it deals with non-trade issues and states consider that it breachs rights that they may have under other international regimes. Thus when an intergovernmental organization deals with issues not specifically foreseen in its mandate, legitimacy problems arise. This is particularly true for the WTO, whose legitimacy in the institutional challenge for sustainable global governance is, to say the least, doubtful.

4. Soft law and the World Trade Organization

Despite the doubts about the role of the WTO in the quest for sustainable global governance, Kirton and Trebilcock acknowledge that currently the multilateral trade regime is particularly important in this context. This is why the third overarching theme in this book is the WTO. In particular, two issues have been raised: on the one hand, the question of whether soft law can be challenged under WTO law, and, on the other, the controversial 'trade and . . .' debate.

44. However, this does not imply that the WTO lives in clinical isolation from the rest of international law. On this point see WTO Appellate Report, United States – Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, AB-1996-1, WT/DS2/9, at 621. What I want to underline here is that the WTO should not be considered to be the perfect forum to deal with environmental and labour-related issues just because it has a stronger legal regime than MEAs or the ILO.

45. See J. Cameron, 'Dispute Settlement and Conflicting Trade and Environment Regimes', in A. Fijalkowski and J. Cameron, *Trade and the Environment: Bridging the Gap* (1998), 16; R. Pratap, 'Trade and Environment: Trends in International Dispute Settlement', (2002) 42 *Indian Journal of International Law* 451; A. González-Calatayud and G. Marceau, 'The Relationship between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO', (2002) 11 (3) *Review of European Community and International Environmental Law* 275; E. U. Petersmann, 'International Trade Law and International Environmental Law – Prevention and Settlement of International Disputes in GATT', (1993) 27 *Journal of World Trade* 43.

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4.1. Soft law and WTO scrutiny

The first question is whether a soft law instrument, for example a voluntary standard, can be challenged under the WTO legal system. A voluntary standard is usually not created and not implemented by the state. Therefore the issue here is whether a non-state standard can be scrutinized by the WTO. Bernstein and Cashore deal with this specific question. They recall that the WTO Agreement on Technical Barriers to Trade, which is the agreement with which most voluntary standards could clash, covers non-governmental schemes (p. 44).[46] However, the authors argue against the possibility of voluntary standards being challenged under the WTO because the latter only refers to national standards.[47] Finally, Bernstein and Cashore conclude that 'as private transnational voluntary schemes operating in the marketplace, they are largely immune from WTO disciplines, unless adopted by a government' (p. 46).

Therefore guidelines, principles, codes of conduct, or standards that companies follow voluntarily would generally not be challengeable under the WTO. This is not the case for state regulations whose objective is to protect the environment, to enhance labour conditions, or to improve the investment conditions when these provisions might have international trade effects.

4.2. The WTO, environmental protection, labour standards, and investment

Global environmental protection and improvement of labour standards and investment conditions are not among the core objectives of the WTO.[48] However, while environmental protection falls within the mandate of numerous MEAs and labour-related issues are dealt with by the ILO, investment is covered by an increasing number of bilateral investment treaties and by the WTO Agreement on Trade Related Investment Measures (TRIMS). Furthermore, even if environment and labour have their own international setting, we have already seen that these are weak regimes.[49] Therefore the combination of a weak global governance system for the environment and labour, and of the lack of international institutions solely dedicated to promoting sustainable investment, has led to environment-, labour-, and investment-related issues being dealt with in the WTO in many cases.

The first question that arises, then, is whether the strong nature of the WTO, based on a dispute settlement system that authorizes retaliatory measures (sanctions) against a state that has breached WTO rules, is an adequate forum for dealing with environment-, labour- and investment-related problems which usually occur in developing countries. An economic sanction will just worsen the living conditions of a country's population and it will not help a developing country to improve its environmental or labour conditions. Therefore the retaliatory machine that gives strength and credibility to the WTO does not seem to be the best framework in this context.

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46. WTO Agreement on Technical Barriers to Trade (1994), preamble and Art. 3.
47. See also H. Ward, 'Trade and Environment Issues in Voluntary Eco-labelling and Life Cycle Analysis', (1997) 6 (2) *Review of European Community and International Environmental Law* 139, at 143.
48. However, sustainable development is present as one of the goals of the multilateral trade regime in the preamble of the Marrakech Agreement Establishing the WTO (1994).
49. See section 3.1, *supra*.

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The second issue that must be analysed begins with a premise. Even if it is argued that the WTO is not the right institution to pursue global sustainable governance, it should be acknowledged that the strength of this organization has attracted many non-trade issues. The trade and environment debate is limited in this book to the forestry and biosafety regimes. Although voluntary standards are not subject to challenge under the WTO,[50] should a dispute finally arise over an instrument such as the FSC, the forestry certification scheme will most likely be considered to be compatible with trade rules because it is transparent and non-discriminatory and is not trade-restrictive (p. 46).[51] The debate in the book on the biosafety regime does not dwell too heavily on issues already extensively examined, such as the legal relationship between the Cartagena Biosafety Protocol and the WTO[52] or current developments such as the transatlantic dispute on the alleged European Union's moratoria on genetically modified products coming from the United States, Canada, and Argentina.[53] Mills's chapter on agricultural biotechnology underlines the difference between the strong WTO agreements and the newborn and still weak Cartagena Biosafety Protocol and the International Treaty on Plant Genetic Resources for Food and Agriculture.[54] Her conclusion is that, in this case, in order to protect the environment, more hard law is needed. In fact, she maintains that 'only additional hard law instruments can provide universal protection and can allow states to protect their jurisdictions without fear of WTO challenges' (p. 343).

The link between trade policy and labour standards is covered in Kirton and Trebilcock's book. Several points merit attention. One is the criticism of the North's rationale in linking trade sanctions to lower labour and environmental standards. According to Trebilcock, developing countries are right to remind the North that the elements that enabled it to develop in its early stages of industrialization were precisely low wages and poor environmental standards (p. 171). However, trade sanctions do have a role to play as well as the WTO. Trebilcock proposes to link the ILO and the WTO in the international response to the violation of core labour standards. The ILO, or the UN committees on human rights in those cases when breaches of labour standards amount to a violation of human rights, would be in charge of detecting non-compliance of a state with labour standards and deciding

50. See section 4.1, *supra*.
51. See T. Hock, 'The Role of Eco-Labels in International Trade: Can Timber Certification Be Implemented as a Means to Slowing Deforestation?', (2001) 12 (2) *Colorado Journal of International Environmental Law and Policy* 347, at 363–5.
52. On the relationship between the Cartagena Biosafety Protocol and the WTO see P. W. B. Phillips and W. A. Kerr, 'Alternative Paradigms: The WTO Versus the Biosafety Protocol for Trade in Genetically Modified Organisms', (2000) 34 *Journal of World Trade* 63; A. H. Qureshi, 'The Cartagena Protocol on Biosafety and the WTO: Co-existence or Incoherence?', (2000) 49 *International and Comparative Law Quarterly* 835; S. Safrin, 'Treaties in Collision?: The Biosafety Protocol and the World Trade Organization Agreements', (2002) 96 AJIL 606.
53. On the current dispute before the WTO see L. Boisson de Chazournes and M. Moïse Mbengue, 'GMOs and Trade: Issues at Stake in the EC Biotech Dispute', (2004) 13 (3) *Review of European Community and International Environmental Law* 289; D. Winickoff et al., 'Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law', (2005) 30 (1) *Yale Journal of International Law* 81; F. Sindico, 'The GMO Dispute before the WTO: Legal Implications for the Trade and Environment Debate', (2005) 11 *FEEM Nota di Lavoro*, available at http://ssrn.com/abstract=655061.
54. See http://www.fao.org/ag/cgrfa/itpgr.htm#text.

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whether to impose a sanction on that country. The WTO would be in charge of ensuring that the sanction does not constitute a disguised restriction on international trade. Therefore the sanction would only be imposed after a breach is detected and not before (pp. 181–2). According to this option the WTO would not be involved in the non-trade issue of whether labour standards have been breached. However, the author acknowledges that this is a very difficult option to implement, at least in the short term. This is why he makes a second proposal according to which WTO judges decide on labour issues. However, in order to counterbalance the trade interests in the dispute, some of the members of the panels or of the Appellate Body would be nominated by the ILO or the UN committees on human rights. This would be very important in the framework of the necessity test provided for in Article XX(b) of the General Agreement on Tariffs and Trade.[55]

Finally, as was mentioned above, the investment field is the only one in which there is no comprehensive international agreement dealing with the issue. The recent efforts to draft a Multilateral Investment Agreement failed, and now investment is dealt with in the multilateral trade regime through the TRIMS Agreement and through an increasing number of bilateral investment treaties and regional trade agreements. Kirton and Trebilcock's book makes two interesting points in the trade and investment context. On the one hand, Wilkie highlights that a possible way to enforce MNCs obligations embodied in codes of conduct and CSR policies could be through the mechanisms provided for in the WTO Trade Policy Review Mechanisms (pp. 308–9). On the other hand, Matthews underlines that investments in countries in which there is armed conflict must be heavily monitored. If the investment, instead of bringing profit to the MNCs and development to the receiving country, is directly or indirectly fuelling the conflict, as happened in Sudan with the Canadian oil company Talisman, then the home state of the MNC must target the company with strong sanctions. If these do not work the government must be ready to oblige the MNC to end its presence in that country. Unfortunately, in the case of Talisman investment interests were stronger than human rights concerns and the company was able to prevent the Canadian government from taking any action against its presence in Sudan.[56] This leads Matthews to a very bitter conclusion, in which he maintains that 'human security was sacrificed on the altar of private sector profit and the imperatives of global capitalist economy' (p. 245).

In conclusion, if the trade and environment, labour, and investment relationship is to be played out in the WTO, more hard law instruments are needed in non-trade fields in order to counterbalance the strength of the WTO. MacLaren envisions a better solution in his brief contribution: there should be a common understanding that the WTO is not the right framework for achieving sustainable global governance and that, therefore, environmental, labour, and investment concerns should be

55. General Agreement on Tariffs and Trade (1947), Art. XX (b): 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . necessary to protect human, animal or plant life or health.'

56. Thanks to the help of a public relations firm (p. 244).

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dealt with in their relative international institutions and through the law that is provided therein. A solution of this kind would allow soft law to develop into hard law (environment and labour) and informal institutions to consolidate into intergovernmental organizations (investment) focusing on their principal function and not just as a need to counterbalance another organization, the WTO, which would inevitably lead to the creation of trade-distorting provisions in the name of environmental or labour standards protection.

5. Conclusion

Kirton and Trebilcock provide international law scholars and practitioners with a very interesting book that explores the role of soft law in the quest for global trade, environmental, and social governance. This book review has underlined the three overarching topics with which most authors who contributed to the book deal thoroughly: the role of voluntary standards, that of informal institutions, and that of the WTO in the quest for sustainable global governance. I am led to draw three conclusions:

(1) Soft law, and voluntary standards in particular, are a stage in the creation of international legal norms. It is as a pioneer of hard law that soft law finds its *raison d'être* in the normative challenge for sustainable global governance.

(2) While the rise of informal institutions is a sign of people abandoning politics, which needs to be tackled by a return to good politics, the increasing role of informal institutions in the institutional challenge for sustainable global governance can be questioned on legitimacy grounds.

(3) The WTO is not the right framework in which to pursue sustainable global governance. However, due to the current strength of the organization, proposals like those put forward by Trebilcock to balance the interests between trade liberalization on the one hand, and environmental or human rights protection on the other, are welcome and useful in the quest for sustainable global governance.

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