The Good Governance of Transnational Private Relationships

Towards the Realisation of Social Sustainability

Jilles L. J. Hazenberg

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by

Jilles Lennard Johan Hazenberg

born on 9 May 1989
in Groningen

Supervisors
Prof. A.L.B. Colombi Ciacchi
Prof. A.J. Zwitter

Assessment Committee
Prof. J. Herman
Prof. R. Holzacker
Prof. L. Kähler

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1 INTRODUCTION

1. Transnational Private Relationships and Sustainability

Transnational private relationships shape the livelihoods of millions. Close to 500 million jobs are directly linked to global supply chains (ILO, 2015). A great number of these supply chains produce consumer goods for global markets and are the subject of controversies. In 1998 Nike Chairman Phil Knight stated that due to media pressure and public outrage the "Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse" (Cushman, 1998). Nike was one of the first transnational corporations (TNCs) to come under increased public scrutiny over child labour, low wages, working conditions, and 'modern slavery'. These controversies have not waned since then. In 2013 after the Rana Plaza factory collapse in Bangladesh left 1129 garment industry workers dead many of the same terms were used. Safety conditions, forced overtime, low wages, and bans on worker representation again featured in the public and institutional outrage over the myriad ways in which TNCs and their private relationships seemingly undermine the most basic interests of both their employees and the people indirectly affected by them.

Beyond employment relationships, transnational private relationships shape livelihoods in various other ways. The data of every individual with an internet connection, smartphone, or social media account are gathered, analysed, and monetised. These processes interfere with basic notions of privacy and rights to a private life through continuous monitoring and unprecedented levels of nudging by corporate actors without significant public oversight. The website Patientslikeme.com, an online forum where patients shared their experiences of illness, treatment, recovery, and loss in an apparent safe environment with each other, was scraped for personal identifying data and then sold to corporations, including insurers (Goodman, 2015). While carrying a smartphone, corporations track your location continuously, something of value not just for advertorial purposes but in the hands of the right, or wrong, people possibly a direct threat to individuals and groups. Facebook knows you better than your closest friends do after 'liking' 70 things on their platform and your supermarket might well know of your pregnancy before you or your relatives do (Goodman, 2015; Youyou, Kosinski, & Stillwell, 2015). Privacy and personal autonomy are threatened by the transnational private relationships shaping our digital landscape.

These examples offer only a small selection of the many ways in which transnational relationships private affect the lives of individuals and groups throughout the world. While the examples only cover two instances of transnational private relationships' negative effects they make clear the need to conceptualise, draft, and implement policies that steer the conduct of these transnational private relationships and the actors incorporated in them. The economic and political power of TNCs, global supply chains, and privately owned technological innovations often trumps that of individual

states and other public institutions.[1] Moreover, their transnational nature puts much of their conduct outside the reach of public actors confined to national jurisdictions. Therefore, good governance is required to minimise the negative effects these transnational private relationships have on the livelihoods of individuals and groups. This thesis seeks to conceptualise the good governance of transnational private relationships. This task contrasts with a more limited inquiry into public regulation of these relationships through, for instance, legal sanctions. Good governance is a prescriptive and evaluative concept that relates to all types of social coordination and is thus not limited to coordination or policy making by public actors or contractual relationship by private actors.[2] As such it has been conceptualised in relation to widely varying practices, e.g. good governance in development, public service provision, or corporate governance.

- *To what extent can the good governance of transnational private relationships be informed by concerns for social sustainability?*

Answering this research question requires additional questions to be formulated relating to the concepts, the practice, and policies encompassed by the central research question. Ultimately, answering this central research question entails formulating a conception of good governance that can be applied to transnational private relationships and guide action in the formulation and implementation of mechanisms towards the realisation of social sustainability.

Three additional types of additional questions are formulated that require assessment: conceptual questions concerning governance, good governance, and sustainability; practical questions concerning the effects of transnational private relationships; normative questions concerning the mechanisms constitutive of their good governance. In sum, these questions relate to (1) the concepts this thesis interacts with, (2) the practice that good governance is conceptualised for, and (3) the relation between these concepts and the practice in the formulation of good governance mechanisms. For the first type of questions two sub-questions can be formulated as follows:

- *1.1 What are the dominant meanings and usages attached to the concepts of governance, good governance, and (social) sustainability within those disciplines and discourses relevant for the good governance of transnational private relationships?*

[1] Research by the NGO Global Justice Now shows that 69 of the 100 top economic entities are corporations and not countries. Taken together the 10 biggest corporations have greater economic value than all countries in the world. See http://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined

[2] See Chapters 2 and 3 at p.29 and p. 49 respectively.

- *1.2 How should these concepts inform each other in specifying the content of good governance?*

Answering these questions clarifies what the concepts of good governance and social sustainability entail for academic research concerning policy-making. It requires studying the changes that have been witnessed in policy-making processes over the last three decades during which governance, good governance, and sustainability became dominant policy-making concepts. The meanings attached to these concepts and the processes through which they rose to prominence require assessment to properly understand them. Moreover, governance, good governance, and sustainability are not just academic terms but emerged from policy contexts and are both shaped by them and shape them. As such these concepts and their consequent academic conceptualisation have left their mark on practice and the manner in which we study it. Answering sub-question *1.1* requires a conceptual analysis that incorporates the emergence and meanings of governance, good governance, and sustainability. The normative sub-question *1.2* assesses how these concepts relate to and should inform each other. Answering this question necessarily requires engaging in moral argument as its subject concerns the 'good' of governance and social sustainability. These two concepts, good governance and social sustainability, both have strong normative components.

For the second type of questions knowledge of the practices that encompass transnational private relationships is crucial. Without a proper understanding of the effects that transnational private relationships have on the livelihoods of individuals and groups their good governance cannot be conceptualised. In studying transnational private relationships two questions should be answered:

- *2.1 How do transnational private relationships negatively affect and positively contribute to social sustainability in ways relevant to their governance?*

- *2.2 Which forms of governance presently apply to transnational private relationships in the transnational context?*

Answering sub-question *2.1* requires understanding transnational private relationships, their practices, and their negative and positive contributions to social sustainability. To this end two exemplifying cases are studied within the broad range of transnational private relationships. The first case concerns the production of Apple's iPhone in China. It exemplifies the manner in which transnational supply chains positively and negatively impact social sustainability. The second assesses the rise of big data and the transnational private relationships that dominate the collection, storage, and utilisation

of personal information. This case thereby exemplifies the positive and negative contributions made to social sustainability through privately owned technologies and innovations. Together the cases exemplify the many ways in which transnational private relationships affect individual and group livelihoods.

Sub-question *2.2* is crucial towards the end of conceptualising the good governance of transnational private relationships. It is contended that conceptualising good governance mechanisms cannot be isolated from practice, as explained below.[3] Therefore, understanding the forms of governance and the mechanisms that currently apply to transnational private relationships is a necessary step in conceptualising their good governance.

The third type of questions concern the normative issues relating to the mechanisms that constitute the good governance of transnational private relationships towards the realisation of social sustainability. Towards this end two sub-questions can be formulated:

- *3.1 How do the findings from the conceptual analysis relate to the practice of transnational private relationships as studied in the cases?*

- *3.2 Through which mechanisms can the good governance of transnational private relationships towards the realisation of social sustainability be achieved?*

Sub-question *3.1* assesses the relationship between transnational private relationships and the conceptual analysis formulated in response to questions *1.1* and *1.2.* This assessment brings together the conceptual analysis of good governance with the findings from the exemplifying case studies. Such an assessment is necessary in order to conceptualise good governance towards the realisation of social sustainability. Sub-question *3.2* is best viewed as overarching normative question bringing the different analyses together. It concerns the mechanisms that can constitute the good governance of transnational private relationships. Together the sub-questions enable answering the main research question *'To what extent can the good governance of transnational private relationships be informed by concerns for social sustainability?'.*

The next section outlines the approach and subsequent limitations of this thesis in answering the main question and its sub-questions. The final section introduces the structure and outline of this thesis.

[3] See section 2 below.

2. Approach and Limitations

The manner in which the research questions are approached should be explicated. In order to perform the analysis necessary to answer the research questions interdisciplinarity is required. Therefore, this thesis is first and foremost an interdisciplinary endeavour integrating insights from social sciences, most notably law, political science, and political philosophy combined with empirical observations and analysis from sociology and developmental economics. Interdisciplinarity implies understanding, interacting with, and integrating findings, arguments, and viewpoints from academic fields outside one's own specialisation (Klein & Newell, 1997). Therefore, often interdisciplinarity trades-off thoroughness for broadness as understanding and interacting with other disciplines requires extensive explanation. However, the benefit, and perhaps necessity, of interdisciplinary research rests with the increasing complexity of social issues and interconnectedness of the actors involved in them. Singular viewpoints are necessary but research that connects them is as essential in understanding and overcoming the issues facing us. This thesis seeks to approach its subject-matter from such interdisciplinarity.

Beyond interdisciplinarity explicating the approach of this thesis requires the clarification of the tradition in which this thesis operates and how it affects the content of this research. This explication illuminates not only the arguments presented but the manner in which the subject-matter is approached and thereby what readers from specific disciplines can expect from it. Moreover, it brings to the fore an important limitation. It does not directly engage with policy prescriptions but rather investigates the context within which such prescriptions are to be made and proposes a practical conception of good governance as guide for making them. Especially Part I's preoccupation with conceptual analysis and focus on moral considerations concerning policy-making place this research in the analytical philosophical tradition (Wolff, 2013). Such a focus is not without problems and especially with regard to the legal environment within which this work has been written two valid objections and reservations can be made to doing research this way. Firstly, it can be objected that the present approach addresses problems the wrong way around by starting with theory rather than practice and the rules that regulate this practice. Secondly, perceived from practice the objection can be made that such research stops before making practical prescriptions. To the first objection it is noted that given the subject-matter of this thesis and the inherent and intuitive moral content of concepts such as good governance and sustainability a theoretical approach that delves into the justification of the application of these concepts required. This research takes this to be its task, the justification and clarification of applying such conceptual constructs and their practical consequences. In response to the second consideration it

is noted it does indeed fall short of prescribing specific policies but rather it provides a diagnosis and course of action, not a cure.

In important aspects, however, this research deviates significantly from this analytical philosophical tradition by moving well beyond the intellectually but not necessarily practically satisfying endeavour of moral argument and conceptual clarity. This research is interdisciplinary in nature and even though its author has roots in philosophical theory the thesis incorporates debates and discourses from other social sciences, most notably law and political science, and observations from the more empirical fields of sociology and developmental economics. Implicit in this approach is the conviction that philosophy and political theory have for too long ignored practice and the proper workings of power relationships in policy-making and have instead been overly preoccupied with the construction of unified ideals without adequate appreciation of the practice to which they are meant to apply.[4] The conceptual analysis at the heart of this research engages with discourses from the practice of policy-making. It is practice and the analysis of the processes and concepts shaping practice that take centre stage here by constructing an overarching framework within which good governance can be conceptualised. Practice tends to get in the way of theoretical endeavours and is often treated accordingly: as a nuisance to moral and/or theoretical clarity. Indeed, conceptual analysis and the determination of the proper moral grounds for action-guiding concepts, such as good governance, requires appropriate distance from practice. Otherwise 'oughts' might be to easily derived from what empirically 'is' at a given time and place. Therefore, the conceptual analysis in response to sub-questions *1.1* and *1.2* takes appropriate distance from practice. The remaining questions are, however, answered by reaching for the practice that good governance is to be applied to and thus require practice-dependence (Sangiovanni, 2008).

Beyond the approach, one important limitation concerning the subject-matter of this research requires explication. Transnational private relationships operate in the wider institutional context of the global economy shaped by globalisation. The basic foundations that globalisation through free trade rests upon are not questioned in this thesis' analysis of transnational private relationships.[5] Instead this thesis works within these foundational limitations without the necessity to fundamentally alter global governance.[6] Thereby the

[4] A recent example is Aaron James' (2012, p. 230) treatise on fairness in the global economy that, though very thorough, invigorating and thought provoking concludes that his findings are "of course subject to potentially serious concerns about the limits of traditional top-down government regulation". This research therefore starts with the conceptual analysis of those concepts that at present guide practice, rose from it, or are from academia frequently applied to it in order to evade conclusions like James'.

[5] For this discussion see Rodrik (1997), Bhagwati (2004), Stiglitz (2002), Friedman (2005).

[6] See Finklestein (1995) and McGrew & Held (2002) for excellent introductions into the field of global governance.

arguments and prescriptions concerning good governance of transnational private relationships remain relevant to existing practices. The context within which the subject-matter of the good governance of transnational private relationships towards the realisation of social sustainability is analysed is thus taken as a given rather than fundamentally questioned. This context structures or even dictates the ability of private relationships to operate. Not offering a fundamental critique of globalisation through free trade, lower tariffs, and deregulation does not, however, imply an implicit endorsement of these processes of globalisation and the current structure of global governance. This research remains silent on these issues as it conceptualises the good governance of transnational private relationships and their conduct and not the good governance of public policies and structures that shape globalisation.[7] In approaching the main research question practical applicability and action-guidance is thereby favoured over a fundamental critique of global governance. Given the aim of this research to contribute to the good governance of transnational private relationships this trade-off has been made in favour of practical applicability. Thereby this thesis is not at its core about global governance, globalisation, or free trade.

Prior to discussing the overview of this thesis three concepts require clarification up front: on the one hand, transnational private relationships themselves, and on the other hand, soft and hard law and the distinction between them. These three concepts are touched upon throughout the thesis. Good governance and transnational private relationships constitute the primary subject-matter of this research. Transnational private relationships require some clarification as the examples made in this thesis can raise questions as to why this research focusses on transnational private *relationships* instead of transnational private *actors.* It is contended that the term 'transnational private relationships' better fits the way in which private actors shape the transnational context. These relationships are constituted by a variety of private actors. More specifically they are here defined as any relationships between two or more private actors across national borders. Private actors in turn are those actors without public authority, unlike states, international, and supranational public institutions. Transnational private relationships differ from international variants as the coordination of transnational private relationships is not determined by the nationality of either of the parties as at least one of them operates globally, i.e. its operations, investments, decision-making, and those of its subsidiaries and contractors cover multiple states and jurisdictions. These transnational private relationships shape globalisation, the transnational order, and the lives of many around the world. This relational account suits the task of conceptualising the good governance

[7] See Rodrick (2011) for an excellent example of what such an endeavour would look like.

of transnational private relationships. While economically transnational private relationships sometimes might be conceived as single entities, such as TNCs, for regulatory or legal purposes they are not. Profits of a TNC might flow to a single bank account but for regulatory purposes TNCs themselves should be conceived as a conglomerate of a multitude of independently governed private relationships usually referred to as global supply- or value-chains (Ruggie, 2017, p. 4). TNCs command vast transnational relationships but these relationships can exist outside of their command, e.g. the TNC is exchangeable instead of the relationships.

Beyond good governance and transnational private relationships, the distinction between soft and hard law is frequented throughout and requires clarification. Governance refers to a wide variety of mechanisms that coordinate action. From a legal and regulatory perspective an essential distinction is made between these types of mechanisms pertaining to the extent that they are 'binding'. Hard law refers to those legal instruments and legal mechanisms that are binding (Abbott & Snidal, 2000). Hard law relies on a regime of formal sanctions and thereby relies in many ways on the "coercive authority" of the state and/or the judiciary (Michaels, 2007, p. 456). Abbott and Snidal (2000, p. 421) define hard law as "legally binding obligations that are precise (…) and that delegate authority for interpreting and implementing the law". Hard law is thus binding, precise, and rests on delegated authority for interpretation and implementation to, primarily, courts. Soft law in turn refers to regulatory instruments and governance mechanisms that do not rely on "binding rules or on a regime of formal sanctions" even though they stipulate normative commitments (Cotterrell, 2012; Di Robilant, 2006, p. 499). Soft law thus refers to rules that are 'weakened' in reference to either their bindingness, precision, or delegation (Abbott & Snidal, 2000, p. 422). Rather than binding in a formal sense soft law coordinates the actions of actors through other means than legal sanctions. One can think of codes of conduct, standardisation, alternative dispute resolution, guiding principles, or even something as mundane as customs. Such soft law can be of both public and private nature and is thus not limited to specific actors, such as judiciaries or legislatives, in their establishment, interpretation, implementation, and application. It should be noted however that the distinction between soft and hard law is not a "binary one", especially in the transnational context (Abbott & Snidal, 2000, p. 422).

3. Structure and Overview of the Thesis

As stated above, answering the central research question requires three additional types of questions to be asked. These three types of sub-questions roughly correspond to the three parts of this book. Each part has a separate

introduction outlining their aims and a conclusion summarising the main findings. **Part I** engages in a conceptual analysis of governance, good governance, and sustainability. Each of these concepts' emergence and usage in both practice and academia are critically analysed. Consequently, in Part I sub-questions *1.1* and *1.2* are answered. The conceptual analysis of Part I culminates in a practice-independent conception of good governance that is normatively grounded in human rights and applicable to a wide range of practices. A practice-independent conception implies that the conception of good governance is not determined by the specific practice it is applied to. Rather such a conception offers components that can be interpreted in light of specific practices towards the formulation of practice-dependent good governance. Practice-independent does not, however, imply an ideal conception. Instead it is informed by the practices the concept rose from and its independence is thereby relative. Moreover, this practice-independent conception concerns the 'good' of the general practice of 'governance' and is therefore best thought of as a meta-conception. Practice-independent good governance integrates the main findings from the conceptual analysis. It incorporates both procedural aspects pertaining to processes and mechanisms through which governance takes place and normative ones relating to the moral content and aim of good governance. As this thesis concerns the good governance of transnational private relationships, this practice-independent conception is then applied to the exemplifying cases.

Chapter 2 analyses 'governance', a concept that has risen to prominence in the study of policy-making and the changes it underwent in the last three decades through transformations of the state, European integration, economic specialisation, and globalisation. Governance as a concept is introduced and its rise to prominence explicated prior to outlining its operationalisation in this study. Following Levi-Faur (2012) governance is operationalised as a descriptive concept signifying changes. As descriptive concept governance reflects the fuzzy world of multi-levelled policy-making where both public and private actors interact (Christiansen, Petito, & Tonra, 2000). It provides a crucial birds-eye view by integrating into its perspective policy-making outside of the vertical structures of public policy or horizontal structures of private contractual relationships. Thereby the spill-over effects resulting from social coordination across boundaries of the political, economic, and legal spheres come into view. The dominant change signified by this descriptive conception of governance is the increased horizontalisation of policy-making beyond the vertical structures of the state under pressure of functional differentiation, globalisations, and harmonisation. In this process three governance problems emerge concerning the legitimacy, enforceability, and accountability of governance mechanisms and actors. Absent vertical structures of representation governance actors encounter legitimacy problems. Increased horizontalisation undercuts the extent to which governance

mechanisms can rely on vertical structures of enforcement. Finally, this increased levelled playing field problematizes accountability mechanisms. These three problems relate directly to conceptualising good governance. It is argued that good governance mechanisms should adequately respond to these problems of legitimacy, enforceability, and accountability.

Chapter 3 shifts focus to the academic and institutional literatures on good governance. The usages of good governance in three different fields are analysed: international relations and developmental studies, administrative law and public administration, and corporate governance. From these literatures can be concluded that good governance is a prescriptive and evaluative concept with an inherent normative core in prescribing and evaluating policy-making towards a conception of 'good'. However, the dominant conceptions of good governance are indeterminate and contradictory precisely in their formulation of the 'good' that good governance strives for. Good governance thereby fails to guide action towards a good in its prescriptions and evaluations. In other words, it is unclear what good governance requires in practice. Two requirements for conceptualising a normative ground for good governance are formulated in order to retain its wide-applicability: liberal neutrality and inclusiveness. Following this conclusion **Chapter 4** sets out to provide a normative ground for good governance. Given the prescriptive and evaluative content of good governance its normative content should be direct at and embedded in practice. In international practice sustainability and sustainable development have risen to dominance as widely shared policy ideals. This chapter therefore analyses these concepts and critically assesses whether they can provide normative grounds for good governance. It is argued that interpreted through a conception of human rights social sustainability can provide a normative ground for good governance. The conception of human rights through which social sustainability is interpreted focusses on the unity between right and duty and is contrasted with other conceptions. It is argued that the proposed conception best suits the changes in policy-making governance signifies and meets the criteria necessary to formulate the normative ground of good governance. This normative grounding constitutes a normative component of good governance.

Together the three chapters comprising Part I stipulates the conditions for governance to be good independent of the practice it is applied to: practice-independent good governance. Moreover, Part I does so regarding both procedural and normative aspects. The procedural aspects of good governance are distilled from Chapter 2 concerning the governance problems. For governance to be 'good' it should be (i) legitimate, (ii) enforceable, and (iii) accountable. It is argued that these constitute good governance's procedural component. Developing good governance mechanisms for specific practices thus requires responses to the governance problems that depend on these practices. The normative aspects of good governance are located in its groun-

ding in basic human rights. This normative basis give aim to the practice of good governance. In other words, good governance strives for the ability of all individuals to enjoy the content of their human rights. Mechanisms and practices that undermine this goal cannot constitute good governance, even though they can be legitimate, enforceable, and accountable. Moreover, contradictory principles or conflicting policies can be assessed with reference to this normative ground.

Part II comprises two chapters studying and analysing the conducts of actors that constitute transnational private relationships. **Chapter 5** descriptively studies these practices through two case studies. These descriptive cases have a twofold aim. Firstly, to exemplify practices of transnational private relationships and, secondly, to excavate the aspects of these relationships relevant for good governance, i.e. their impact on social sustainability. The first case concerns the transformative nature of the rise of big data processes by private corporations through the collection of individual data. The second is a quintessential example of transnational supply chains, sweatshop labour, and corporate influence. It concerns the production of Apple's iPhone in China. Together the cases exemplify the breadth of transnational private relationships and their impact on society and the livelihoods and rights of individuals. Together they give an adequate understanding of transnational private relationships, their governance, and the ways they positively contribute to and negatively affect the livelihoods of groups and individuals thereby answering sub-question *2.1.* through exemplification. The case studies focus on the assessment of the actors involved in transnational private relationships, their powers, and the manner in which these relationships are governed. It is concluded that to a great extent TNCs are the most powerful actors that command the transnational private relationships studied in the cases. Moreover, these TNCs are dominant in the governance of these private relationships through self-regulation and other forms of governance. Thus, sub-question *2.2* is also answered through exemplification, by assessing the governance of these transnational private relationships. Simultaneously it is shown how these transnational private relationships also positively influence the well-being of individuals and groups by providing employment, contributing to economic growth in under-developed regions, and integrating people into global communication and innovation networks.

In **Chapter 6** the cases are analysed in light of the constructed practice-independent conception of good governance. The chapter thereby brings together the meta-perspective of Part I and the case studies of Chapter V. The cases are analysed on two levels relating to the components of practice-independent good governance. The first level concerns the procedural component of the governance problems where it is argued that within the transnational context the problems of legitimacy and enforceability lose salience. Consequently, it is argued that good governance is achieved

procedurally through mechanisms that increase the accountability of powerful actors. The second level analyses the cases in light of the normative component. It is argued that private actors, specifically TNCs, do not bear positive human rights responsibilities and that therefore legal mechanisms that enforce positive human rights duties that private actors do not bear do not constitute good governance. More generally, it is shown that the transnational context is a multi-layered and multi-polar constellation. This is exemplified by the legitimate claims to authority of different actors and unattainable direct enforcement mechanisms. Alongside the nature of private actors' human rights duties this transnational constellation necessitates trade-offs to be made towards the achievement of good governance. Good governance is located in the accountability of actors for trade-offs that affect social sustainability. The conclusions of this chapter correspond to sub-question *3.1* concerning the relationship between the conceptual analysis of good governance and transnational private relationships.

Part III comprises two chapters and brings together conclusions in order to construct a typology of practice-dependent good governance of transnational private relationships. Through this typology mechanisms constitutive of the good governance of transnational private relationships towards the realisation of social sustainability can be developed. This typology constructed in **Chapter 7** lays out the structure of practice-dependent good governance. It is contended that soft-law mechanisms that aim to increase the accountability of powerful private actors constitute good governance. Transparency is central to these mechanisms by providing information to a forum capable of holding actors accountable for conduct relating to social sustainability. Moreover, it will be shown that a close approximation of good governance is exemplified by multi-stakeholder initiatives. An argument is made that offers a normative justification of such initiatives and their favourability over other types of interventions in transnational private relationships. In conclusion, different ways in which public actors, most notably states, can contribute to the good governance of transnational private relationships are discussed. Thereby Chapter 7 answers the final sub-question *3.2* concerning mechanisms that can constitute the good governance of transnational private relationships.

In **Chapter 8** this thesis is concluded by reiterating its core argument, formulating the answers to the sub-questions, and ultimately by answering the central research question. Firstly, this chapter discusses the core argument and sub-questions and answer to the main research question. Secondly, recommendations to the actors central to the governance of transnational private relationships are made with regard to the achievement of good governance: international lawyers, corporations, public policy makers, and NGOs. Thirdly, avenues for future research are explored that would be necessary to further improve our understanding of good governance, transnational private relationships, and the mechanisms constitutive of good governance.

Given its structure, this thesis can be read in three ways. Firstly, in a linear fashion following the consecutive parts from the conceptual analysis and practice-independent conception of good governance through the case studies and their analysis leading up to the practice-dependent good governance of transnational private relationships. Secondly, readers concerned with good governance independently of the specific practice this thesis applies it to can focus on Part I for the arguments for practice-independent good governance and the case analysis for guidance for its application to different practices. Thirdly, readers concerned primarily with the good governance of transnational private relationships can opt to read back to front. This starts with the typology of practice-dependent good governance and its close approximation in the transnational practice followed by the analysis of practice and finally the normative foundations. Thereby this thesis aims to contribute insights to different discourses and debates concerning good governance and the governance of transnational private relationships. By no means does it claim to have the final word on each of the parts that comprise the argument for practice-dependent good governance. Rather it contends that each consecutive part has insights and arguments to contribute to different debates within disciplines studying governance, good governance, and transnational private relationships.

At the beginning and end of all chapters the aim of the chapter and its findings are visualised. To guide the reader through the argument these visuals clearly depict the relationship between the different parts, chapters, and arguments of this thesis. The overarching structure and three interrelated parts are visualised below and on the next page:

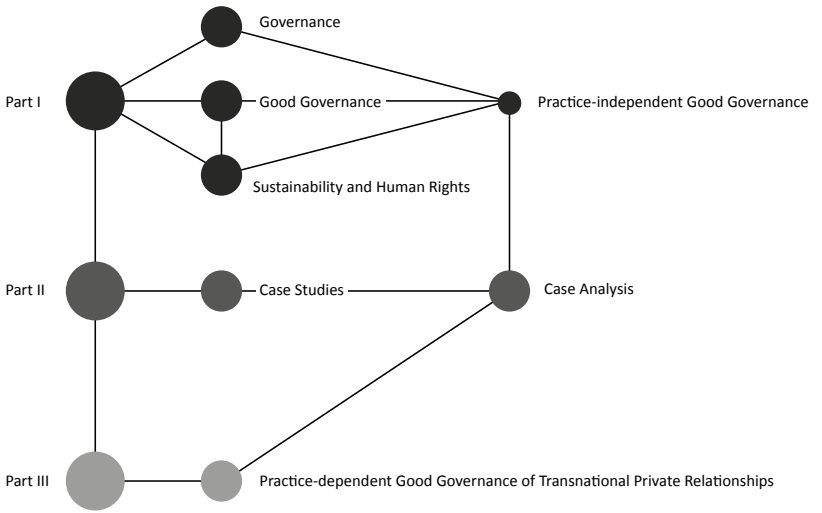

Figure 1 *Visual Representation Chapters*

Incorporating the different argumentative steps this visualisation can be expanded as below:

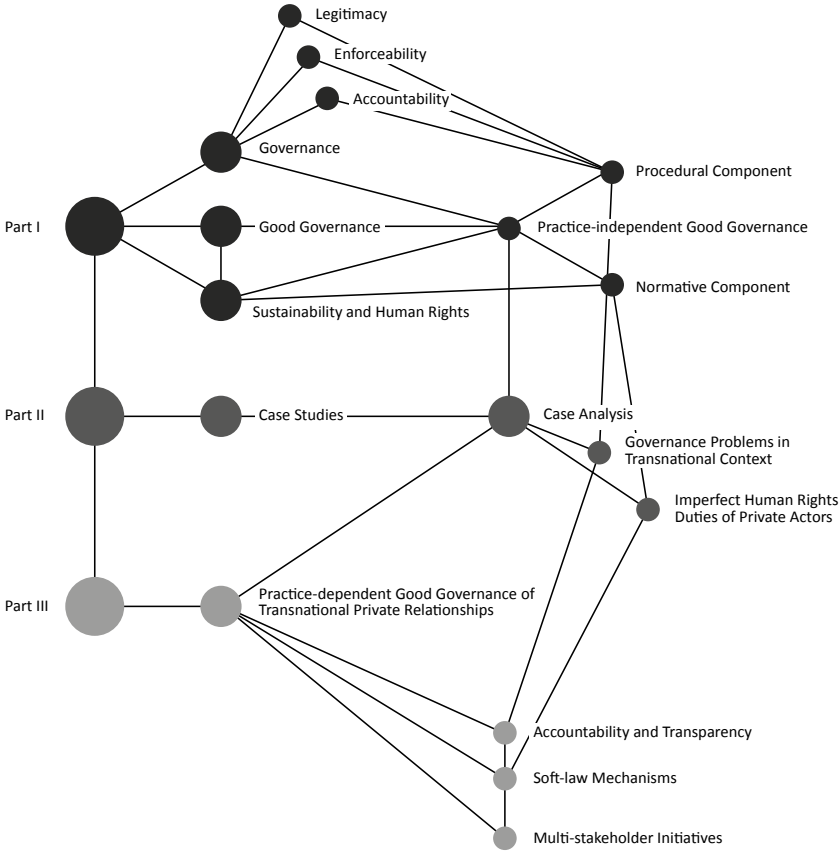

Figure 2 *Argumentive Structure*

Part I

CONCEPTUAL ANALYSIS

INTRODUCTION TO PART I

In light of this research governance, good governance, and sustainability are concepts in need of clarification. To this end Part I comprises three separate chapters that critically analyse and assess these concepts. The conceptual analyses are conducted through, primarily, literature reviews and critical engagement with their findings. The analysis of these concepts is interrelated. This means that each concept is analysed in light of both the previous analysis and the general aim of the research project. Ultimately, the task Part I sets out is to conceptualise good governance isolated from specific practices. What is good governance; Does it require good outcomes or legitimate inputs; In relation to what is the good conceptualised. These are questions Part I addresses and formulates answer to.

Chapter 2 concerns the concept of governance. In the last three decades 'governance' has risen to prominence in debates concerning policy-making, transformations of the state, European integration, and globalisation. A descriptive conception of governance is advocated that signifies changes in the policy-making process. It is this descriptive conception that the following conceptual analyses are applied to. Beyond this operationalisation of governance as descriptive signifier of change, problems associated with the changes governance signifies are explicated. It will be argued the conceptualisation of good governance in different practices requires adequate responses to be formulated to these problems.

Chapter 3 critically reviews different conceptions of good governance from the dominant disciplines: international relations and developmental studies, administrative law and public administration, and corporate governance. It is argued that, even though these disciplines all provide novel insights, their conceptions of good governance are contradictory and indeterminate in relation to what good governance is and requires. Consequently, it is argued that existing conception of good governance lack a conception of the good that it strives for. In other words, good governance requires a normative grounding of the good.

Chapter 4 sets out to formulate a normative ground for good governance. The concept of social sustainability is analysed in order to assess whether it can inform the normative ground of good governance. In order to gain an adequate understanding of social sustainability the broader sustainability discourse is analysed. Sustainability is a commonly accepted goal of policy-making by national, international, public, and private actors. A discourse analysis shows that within the sustainability and sustainable development discourses social sustainability is underdeveloped. A substantiation of social sustainability through a conception of human rights is argued for. This con-

ception can provide the normative ground of good governance. Together the chapters that comprise Part I offer a practice-independent conception of good governance through interrelated conceptual analyses. Below the structure of and the relationship between the chapters comprising Part I is visualised.

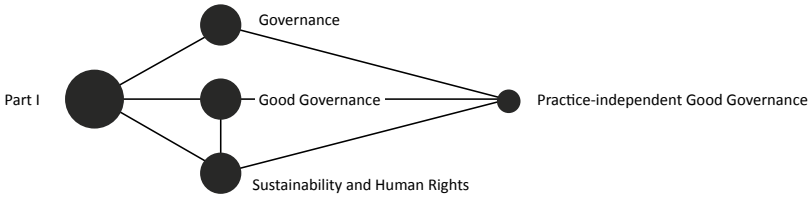

Figure 3 *Overview Part I*

2 GOVERNANCE

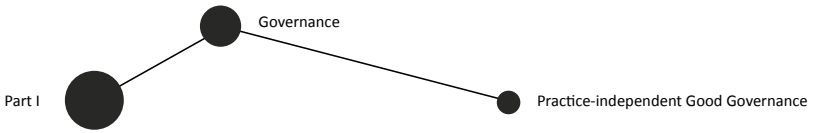

Figure 4 *Overview Chapter 2*

1. Introduction

In different academic literatures diverse uses of 'governance' have become widespread. This chapter introduces the concept of governance and explicates its operationalisation in this study. The next section provides a brief overview of different definitions of governance across academic disciplines exemplifying its widespread and diverging applications. An overarching definition of governance as a perspective signifying of changes in policy-making based on Levi-Faur's (2012) seminal work is proposed. The third section describes the changes governance signifies starting from the narrativist conceptions of governance from political science (Bevir, 2010, 2013; Rhodes, 1997). The description of these changes elucidates the perspective a governance approach offers to the study of policy-making. The fourth section introduces three generic 'governance problems'. In the literature on governance it is widely acknowledges that the changes the concept signifies challenge traditional notions of legitimacy, accountability, and enforceability. The problems and the dominant responses to them are discussed. Lastly, the fifth section takes a birds-eye-view to reflect on the use of governance throughout this study. It is argued that governance offers a convincing descriptive[8] perspective of policy-making on different levels and in functional spheres of society. This study applies its critical analysis to this descriptive background.

2. Governance

Over the last, at least, thirty years, governance has risen to prominence in policy-making and a wide range of academic disciplines (Colombi-Ciacchi, 2014; Kooiman, 1993, 2003; Levi-Faur, 2012; Van Kersbergen & Van Waarden, 2004). The concept has been heralded as transformative in the study of systems through which actors coordinate their action (Bevir, 2010; Kooiman, 2003) and as a unifier of academic literatures (Van Kersbergen & Van Waarden, 2004). Simultaneously, others have diminished it as empty signifier (Fukuyama, 2013) and even potentially dangerous concept (Bellamy & Castiglione, 2010; H. Hazenberg, 2015). Governance is an elusive concept. Its increased use in social sciences, and not unimportantly its use in this study, calls for substantiation and clarity. This chapter does, however, not seek to

[8] This study does not directly engage with the prescriptive application of 'governance' in contexts of national political authority. It is contended, however, that within these contexts a prescriptive governance approach is likely to suffer most prominently from legitimacy issues and could undermine representative democratic structures of policy-making within the nation-state (Bellamy & Castiglione, 2010; Bevir, 2010; H. Hazenberg, 2015).

provide an overarching analysis[9] of governance conceptions and definitions. Instead it provides an overview of the uses of the concept across academic disciplines. It is informed by the conviction that any concept in the social sciences should be judged on the difference it makes to either the description of social orderings or the prescription of changes to these orderings. This section introduces the dominant uses of governance in different disciplines before formulating an overarching definition of governance as descriptive perspective signifying change.

Within *institutional economics* the concept of governance refers to regulations and other forms of coordination of economic relationships (Plehwe, 2012; Williamson, 1979). Governance thus concerns the institutions and mechanisms that govern economic relationships. Within this discipline, the concept is primarily operationalized to analyse, firstly, different modes of governance, such as corporate hierarchies and markets. Secondly, to analyse different mechanisms of coordination and, thirdly, the different levels on which coordination takes place. These are all assessed through the lens of economic theory (Nielsen, 2010). In institutional economics governance contrasts with the classic idea of markets as spontaneous order best left not interfered with. Studies on economic governance contrast this classical idea with the many ways in which institutions, regulation, and other forms of coordination within and through economic relationships enhance both the efficiency and effectiveness of market mechanisms.

Scholars of *international relations* define governance along a continuum ranging from the international order constructed as anarchical to conceptualisations of full order in the international realm (Kacowicz, 2012, p. 687). Governance refers to the different "systems of rule, as the purposive activities of any collectivity, that sustain mechanisms designed to ensure its safety, prosperity, coherence, stability, and continuance" (Rosenau, 2000, p. 171; Zürn, 2012). Within international relations governance depicts the manners in which coordination and cooperation among states and between states and international institutions is possible in a context not necessarily conducive of such cooperation given the absence of sovereign authority. The terms international governance and global governance thereby incorporate the many ways in which such coordination and cooperation happens in a context previously defined as anarchical arena of competition (Bull, 1977).

The dominant governance literatures arguably have their roots in *political science* (Colombi-Ciacchi, 2014). As governance primarily revolves around modes and mechanisms of social coordination and policy-making this comes as no surprise. While several definitions of governance within political science exist, all refer to the increasing influence of non-state and private actors on

[9] For such analyses see for example Colombi-Ciacchi (2014), Kerbergen & van Waarden (2004) Sand (2004).

policy-making and weakened public hierarchical command-and-control structures.[10] In literatures predominantly concerned with the functioning of politics in western welfare-states the conceptions of governance resemble Rhodes' definition of governance as "hollowing out of the state" (Rhodes, 1997). Hollowing out refers to increased 'steering' by the state as opposed to command-and-control 'rowing' through hierarchies, commands, and state power. Such steering mechanisms rely on 'softer' forms of governance such as coordination, negotiation, compromise, and incentivising. Governance depicts the increasingly horizontal modes of policy-making through networks, coordination, and collaboration between public and private actors. In European Union (EU) studies governance is defined primarily as multi-level governance referring to the interactions and coordination of actions between different levels of policy-making (Marks, 1992, 1993). Multi-level governance is a more hierarchical conception as it relies on institutional hierarchies for its commands while simultaneously relying on increased horizontal relationships between public and private actors in the formulation of policies (Marks & Hooghe, 2004).

The variety of governance definitions and applications are in need of an overarching conceptualisation. David Levi-Faur (2012, p. 7) offers such a conceptualisation of governance as "signifier of change" in policy-making. Across disciplines the concept of governance signifies different changes in policy-making. As such governance opens up "new ways, new concepts, and new issues for research" (Levi-Faur, 2012, p. 7). These changes concern shifts of policy making upwards to regional, international, and transnational, downwards to the local, and horizontally to private spheres of society (including what is commonly referred to as civil society). Governance is here conceptualized as primarily descriptive concept observing these changes in governance and "controversies about their direction and implication" (Levi-Faur, 2012, p. 7). A large share of governance literature concerns such descriptive analysis and thereby falls within this conceptualization (Bevir, 2010). It should be noted, however, that not all governance literature is of a descriptive nature. Many studies include prescriptive arguments directed at different governance actors, structures, and mechanisms, especially in relation to the controversies about the direction of governance.[11] All, however, rely on the descriptive governance perspective to apply prescriptive arguments to. These prescriptive components will be briefly discussed in the third section.

As Levi-Faur (2012, p. 9) notes it is important to state what this conceptualization of governance as signifier of change does not offer. In his words governance "is not a unified, homogeneous, and hierarchical approach to the study of politics, economics, and society". Rather it offers a perspective on

[10] For overviews see Section 3 on p. 33, Rhodes (1997), and Bevir (2010, 2013).
[11] See n8 above.

different structures, processes, mechanisms, and strategies of policy-making. A compelling descriptive perspective on policy-making by integrating a variety of techniques, actors, interactions, and relations within complex and interdependent levels into its analysis. Its use as signifier of change moreover challenges the study of policy-making towards a more comprehensive descriptive, critical, and/or prescriptive analysis. Thus, as descriptive perspective governance aims to cast the net wide.

This definition of governance as a perspective signifying changes in policy making is well-suited to the subject-matter of this research. The concepts of good governance and social sustainability are themselves contested and in practice operationalised through a variety of, primarily, soft mechanisms by a multitude of both public and private actors. A focus on single actors, mechanisms, or institutions would be unwarranted in answering the research question. Such a singular focus would unduly limit the applicability of good governance to practices that confine themselves to a predetermined set of actors. The definition of governance as signifier of change offers a comprehensive descriptive perspective on coordination between "multiple players in a complex setting of mutual dependence" (Kohler-Koch, 1996, p. 188) towards policy making subject to "continuous change of patterns of interaction and relations among actors" (Sand, 2004, pp. 44–46).

3. Signifying Change

In order to gain a general understanding of the descriptive perspective of governance as signifier of change this section introduces the most prominent shifts that the concept signifies. It starts with the narrativist conceptions of governance developed by Mark Bevir (2010) and R.A.W. Rhodes (1997) and Bevir and Rhodes (2006) who, while focussing rather strictly on policy-making with the closed context of western nation-states, locate shifts in governance observed across policy-making contexts. After this narrative conception the governance shifts that directly relating to the subject-matter of this study will be discussed. These are changes signified within global governance, judicial governance, and economic and corporate governance.

As signifier of change, governance is often conceptualized in terms of what it is not emphasising shifts in policy-making. In this vein governance is often contrasted with 'government'. Government is taken to represent the clear vertical structures and hierarchical modes of policy making traditionally associated with the nation state. Historically this political science discourse on the governance of nation states depicts a narrative of state-overload, privatization, functional differentiation and specialization in a time where the centralised state apparatus was deemed increasingly incapable to efficiently and effectively provide public goods to citizens (Bevir, 2010, 2013;

Rhodes, 1997). R.A.W. Rhodes and Mark Bevir (2006) extensively studied this historical narrative of governance. From the 1970s onwards the authority of the state and its place in policy making and achievement of policy goals came under pressure. Deepened economic specialisation and over-burdened western welfare states required more efficient and effective governance. Two "waves of governance" signify the consequent changes in policy-making within the nation state (Bevir, 2010).[12] The first wave vested hope in markets and mechanisms of competition to provide public goods more efficiently and at lower costs. Through privatization and deregulation public sectors of society were brought to increasingly deregulated markets to foster efficiency and effectiveness (Bevir, 2010, 2013; Rhodes, 1997). The observation that these processes failed to establish competitive markets sparked a second wave of governance (Bevir, 2010, pp. 15–92).[13] Rather than competitive markets the process of privatisation and deregulation of policy-making constituted policy-networks in which public and private actors collaborated. To take advantage of these policy-networks privatisation was replaced by contracting-out and the delegation of policy-making tasks to actors outside of the traditional structures of government. The state's role became one primarily consisting of 'meta-governance', i.e. the governance of these horizontal governance networks (Rhodes, 1997; Sørensen & Torfing, 2007). These policy-networks exist neither within the competitive structures of the market, nor within the hierarchical command-and-control structure of the nation-state. These two consecutive waves constitute "the hollowing out of the state" by blurring the division between public and private and changing role of political authority in commanding policy making (Rhodes, 1997).

This opposition between government and governance is often conceptualized in terms of 'old' and 'new' governance.[14] 'Old' refers to the hierarchical structures of state institutions and 'new' to the emergence of more horizontal modes of governance (Bevir, 2010; Börzel, 2010; Levi-Faur, 2012; Lobel, 2012; Mayntz, 2003; Rhodes, 1997). Old governance signifies policy-making through authoritative public institutions. New governance challenges with these clear Westphalian political structures of policy-making. Instead it describes the processes through which policy-making takes place, the actors involved in these processes, and the relationships between those actors. New governance

[12] These waves rely on both empirical arguments of public inefficiency and ideological arguments in line with what has come to be known as neoliberalism.

[13] For a slightly diverging narrative see Rhodes (2012).

[14] For the sake of consistency, the terminology of old and new governance is used here even though its semantics can be questioned since neither type of governance are temporally limited nor are they mutually exclusive. In fact, 'new' governance resembles more closely the earliest forms of human corporation in contrast to the relatively recent phenomenon of the state. In general, it can be stated that both 'old' and 'new' modes of governance have existed throughout human history in varying degrees.

represents a "dispersion of political power (…) which has led to increased incongruence between societal actors" (Kjaer, 2015, p. 22; Stoker, 1998). New governance's increased horizontality describes policy-making performed on a more levelled playing field between different societal actors, both private and public. A relative autonomy from command-and-control structures characterizes the increased interdependency of actors in policy-making processes because within an increasingly functionally differentiated polity certain issues can be addressed only in collaboration (Rhodes, 1997, p. 15).

The narrativist conception of governance focusses on changes within political institutions and public policy making. While limited and not necessarily representative of the breadth of different modes of policy making and coordination the concept of governance covers, it highlights a process of horizontalization of policy making central to governance conceptions across disciplines. The political processes described were triggered by external factors whose effects are not confined to the realm of public policy. Firstly, increased economic and political globalisation has altered the influence that public and private actors can exercise in the contexts within which they operate. Deepened interdependencies pressured changes in policy-making (Sand, 2004, p. 45). Secondly, a trend of increased functional differentiation can be observed.[15] Continuous technological and economic advancements require new modes of policy making and the integration of actors with specific expertise (Schepel, 2005, pp. 15–19). Thirdly, the concept of governance plays a central role in studies of European integration. As mid-way between an economic free-trade zone and a federal state, the EU required new concepts to describe and explain policy making at this level (Levi-Faur, 2012; Mayntz, 1998).

For clarity the changes the descriptive perspective of governance signifies can be subsumed under four meta-forms of governance (Hazenberg & Zwitter, 2017). Firstly, public governance exemplified by 'old' governance and the vertical structures of command-and-control policy-making within the nation-state. Secondly, public-private governance, commonly through public-private partnership or governance networks in which private actors are integrated into public-policy making processes towards the achievement of policy goals. These policy goals are themselves often set within public private partnerships towards more effective, efficient, and expert-based policy-making.[16] Soft-law plays a central role in the coordination of public and private actors and interests. Thirdly, non-autonomous private governance can be distinguished as a form of private governance "under the shadow of [public] hierarchy", i.e. the threat of hierarchical commands (Börzel & Risse, 2010). Environmental

[15] See Schepel (2005, pp. 11–37) for an overview of these two processes. He argues, for instance, that the world we live in increasingly resembles Durkheim's differentiated polity.

[16] Non-majoritarian institutions are examples of such expert based public-private institutions (Majone, 2001).

standard-setting can be an example of this. Again, soft law plays an important role as indicator of what is expected of private actors or public institutions. Lastly, autonomous private governance resembles the non-autonomous variant without the shadow of hierarchy pressuring private governance initiatives. Thus, autonomous self-governance is exemplified by policy-making originating out of free, often market, interactions between private actors such as certain product standards, codes of conduct, and best practices.

On the international level and within literature on global governance, governance describes the increasingly dominant perspective that both transnational and international social coordination is not characterized by a form of anarchical competition. Rather the interactions between a multitude of actors and institutions such as international organisations, corporations, treaties, regimes, and networks characterise global governance (Rosenau, 2000; Rosenau & Czempiel, 1992). Moreover, international litigation has increased the transboundary harmonization of policies and rules. On the transnational[17] level both public and private actors operate on an increasingly levelled playing field where corporations own much of the world's resources, are regulated through both soft and hard law, and states bind themselves to international legal duties. In absence of authoritative public institutions, transnational policy making relies on markets, compromise, and negotiation between a multitude of different actors. The diversity of modes and mechanisms of governance is increasingly depicted as autopoietic, i.e. as self-referential and self-constitutional system instead of anarchical (Bevir, 2013; Teubner, 1993).

Concerning the governance of functional spheres of society this study will limit its introductory analysis to economic and corporate governance and judicial governance. Economic and corporate and judicial governance concern those fields of social interaction that most directly affect the ability govern societies. The changes governance signifies in these fields offers insight for the conceptualisation of good governance. Economic and corporate governance provide a perspective on economic policy making by both public and private actors that integrates actors beyond the 'old' shareholder perspective and the

[17] As discussed in Chapter 1 'international', 'global', and 'transnational' are often used interchangeably as adjectives referring to the same governance level. Here it should be clarified that they are understood as different concepts that elucidate important nuances. International governance refers to the process of coordination between states. Global governance refers to policy-making and coordination in and for the global realm and includes actors such as states and international institutions and non-governmental organisations and institutions such as international criminal law and human rights law. Transnational governance, the context this study ultimately applies its analysis on, differs from international governance and global governance because these start from the centrality of the state and public actors. Transnational governance concerns all processes in which actions are coordinated across the globe by public, private, and public-private actors.

legal framework of the market (Aguilera & Cuervo-Cazurra, 2009; Brammer, Jackson, & Matten, 2012). The descriptive perspective incorporates wider stakeholders, such as consumers, the general public, workers, and the natural environment. The range of actors involved and mechanisms employed in economic and corporate governance is, moreover, extended to integrate softer forms of coordination such as sectoral codes, voluntary standards, and the disclosure of information. The broader descriptive perspective of economic and corporate governance takes into account spill-over effects of economic relationships. For instance, voluntary sectorial codes of conduct can have spill-overs to public policy-making when the private economic governance prescribes policies on social corporate responsibility.

Judicial governance describes the changing role of courts and the law more general. The decline of state-centrality led to a shrinking role of command-and-control hard law in policy making. The law and courts thereby function differently. Since law is increasingly supranational and regulatory powers are delegated to a variety of state and non-state actors, the regulatory role of courts coordinating all the different interactions has become stronger. The increased employment of soft-law measures and coordination between public and private actors leaves greater discretion to courts in interpreting rules whereby they necessarily engage with rule-formation, though often reluctantly so. This is generally described as a shift of power away from the executive and legislative towards the judiciary (Bellamy, 2007; Guarnieri & Pederzolli, 2002; Hirschl, 2004; Sweet Stone, 2000; Tate & Vallinder, 1997; Van Kersbergen & Van Waarden, 2004, pp. 152–153). Examples of this changing role are the rise of judicial activism, doctrines of direct effect at, especially, the European level, and a more general juridification of social relationships.[18]

4. Three Governance 'Problems'

The shifts signified by the descriptive perspective of governance are not without consequences or controversies. Changes these new modes of policy-making encompass challenge traditional notions and conceptions of legitimacy, accountability, and enforceability.[19] Often these are, implicitly[20]

[18] These processes cannot be assessed in isolation from a retracting state (Van Kersbergen & Van Waarden, 2004). When hierarchical representative structures withdraw from policy-making, courts necessarily achieve more power to ensure the equal and impartial imposition of rules. For discussions concerning the democratic legitimacy of courts to do so see Bellamy and Parau (2013).

[19] The dissemination of governance problems is influenced by Kersbergen & Van Waarden's (2004) formulation of the governance problems of 'governability', 'accountability', and 'legitimacy'.

[20] Often acknowledgements of these problems are implicit or these problems are not dealt with as Piattoni (2009, p. 3) states "being able to show that a given development is in effect

or explicitly, acknowledged (Bevir, 2013; Levi-Faur, 2012; Van Kersbergen & Van Waarden, 2004). This section discusses these governance problems from a practical perspective. This means that rather than attempting solving the problems here, they are introduced and the dominant solutions proposed in the literature briefly discussed. While interesting, a more theoretical perspective is not elaborated upon here as the achievement of pure theoretical clarity is neither necessary nor sufficient in achieving the task this thesis has set out.[21] The problems are introduced because they require careful attention and need to be adequately addressed to conceptualise good governance. All three problems relate to the shifts of policy-making authority, including enforcement, upwards to supranational institutions, downwards to local entities, and horizontally to private and other non-state actors.[22] Introducing the crux of these three governance problems and the responses to them will prove necessary towards conceptualising good governance.

4.1 Legitimacy of Governance

The problem of legitimacy concerns the democratic credentials of new governance mechanisms. Shifts of policy-making authority upwards, downwards, and horizontally alter the standing policy-makers have in relation to the general public, electorate, and others to whom their policies apply. The problem is best understood through the concepts of input- and output-legitimacy. In his seminal work on input- and output-democracy, Scharpf (1999) argues that input "considerations relate to the democratic character of the decision procedure", i.e. who has a say in policy-making on what standing (Bellamy, 2010, p. 2). Contrasting with inputs, output considerations concern the substance of policy-making and its achievement of policy-goals (Scharpf, 1999, pp. 6–13). Output legitimacy thus rests on the extent to which institutions and policies "'work', 'perform', are able to 'deliver the goods'" or are perceived by its subjects to do so (Van Kersbergen & Van Waarden, 2004, p. 156). Output legitimacy puts emphasis on the effective and efficient delivery of goals while input legitimacy is achieved though "procedures that include

taking place makes it more desirable, as actors will be encouraged to find normative desirability in developments that they cannot counter".

[21] Though very interesting philosophical literature is growing on the normative justifications of different modes of governance and the increased horizontality of policy-making. For instance, from libertarian, republican, and Marxist perspectives this process of increased horizontality is heralded as the fulfilment of negative freedom (Hayek, 1944), republican freedom as non-domination (Braithwaite, 2008), or the true emancipation of the individual (Julius, 2018).

[22] Horizontal shifts of policy-making authority imply that within 'new' governance mechanisms public and private actors stand in non-hierarchical relationships primarily based on coordination. The metaphor thus describes an increasingly levelled playing field between different societal actors as opposed to the vertical, i.e. hierarchical Westphalian, structures of government.

some minimal forms of accountability such as the rule of law, democracy, or political or economic competition" (Van Kersbergen & Van Waarden, 2004, p. 156).

The described governance shifts gave rise to more horizontal and networked processes of policy-making focussed on outputs. The problem of legitimacy is intertwined with these governance mechanisms. Increasingly, instances of such new governance mechanisms highlight "troubling, unresolved questions of legitimacy from the viewpoint of political philosophy, democratic theory, and (…) law" (Zumbausen, 2012, p. 85). The lack of hierarchical representative structures based on the equality of individuals is argued to undermine the political legitimacy of policy-making (Bekkers, Dijkstra, Edwards, & Fenger, 2007; Bovens, 2005; Strøm, 2000, p. 190). Especially within democratic theory, hierarchies are essential to integrate the popular vote into policy-making processes through representation. Through the described governance shifts focus moved towards the output side of legitimacy increasingly depoliticizing policy-making into technocratic forms. Negotiations and compromises within governance networks generally take place outside of the public sphere of political contestation and increasingly rely on expert knowledge. The involvement of a wider range of actors in policy-making through horizontal coordination blurs distinctions between public and private spheres, public and private law, and between administrative and judicial policy-making (Ladeur, 2002; Möllers, 2004). Consequently, political debate is forced to the background and technical language and reliance on non-political discourses prevail in the formulation of policies. Bevir (2010, pp. 106–109) states that within governance literatures legitimacy relies more on theories of rationality and efficiency than on moral or political values.

The increased depoliticised, horizontal, and output-based governance mechanisms appear to undermine the ability of public policy to achieve input legitimacy (Bellamy, 2010; H. Hazenberg, 2015). The policy-making process shifted towards the effective and efficient achievement of policy-outcomes rather than the democratic procedural inputs. While effectiveness and efficiency are important pillars of legitimacy it has long been a consensus among political scientists and theorists that non-democratic conceptions of legitimacy can only be complementary to input legitimacy rather than replace it (Menédes, 2004). This consensus is built around the idea that legitimacy has a very strong normative component that cannot be justified satisfactory with reference to outcomes alone (Scharpf, 1999).

In response to these legitimacy concerns, different strategies of accommodating the lack of democratic credentials and input legitimacy of governance mechanisms have been set out. Some operationalise sociological conceptions of legitimacy as acceptance of authority by a specific, often highly decentralised or technical, community or to alternative approaches to legitimacy, such as Weberian bureaucracy or efficiency based conceptions

(Bernstein & Cashore, 2007; Steffek, 2004). For instance, Jens Steffek (2004, p. 82) argues that "international governance is likely to be regarded as legitimate when it is directed towards the agreed values of the international community". These responses in part deny the validity of the assumption that authority requires a justification with reference to input legitimacy. Rather they rely on notions of legitimacy that refer to shared values, practical acceptance of authority, and rationality (Bevir, 2010, p. 107). These conceptions are usually defined by equating the legitimacy of rules with subjects' perception of them or the extent to which subjects abide by them. To show that institutions, rules, and policy-making is rational or efficient is, however, not to establish its legitimacy (Bevir, 2010, p. 107).

The dominant response, however, comprises many versions of deliberative democracy, expert democracy, and participatory democracy. Though great varieties exist that each engage in careful and concise theoretical argumentation, a red lining is that governance opens up policy-making to be *more* democratic by actively involving societal actors in the formulation of policies rather than casting a single vote every four or five years (Bevir, 2010, pp. 251–274; Cohen & Sabel, 1997; Rhodes, 1997). Deliberative democrats argue that the horizontal integration of sector-specific agents and private parties in policy-making constitutes input legitimacy. The extent to which deliberative democracy can accommodate the concern for legitimacy is subject to growing debate (Gerstenberg, 1997; Nantz & Steffek, 2004; Westerman, 2007; Zürn, 2000). Deliberative democracy fits new governance structures as it requires smaller horizontal deliberations to take place between actors directly affected by the deliberated policies. Especially, in relation to European and global governance, i.e. policy-making outside and beyond the nation-state, deliberative democrats provide convincing arguments regarding the input legitimacy of increased horizontal governance mechanisms given the absence of the hierarchical representative structures of national democracies (Nantz & Steffek, 2004).

4.2 Accountability of Governance

Closely related to the problem of legitimacy is that of accountability (Peters, 2014, pp. 211–222). The shift towards more horizontal modes of policy-making, the inclusion of a variety of actors, and emphasis on performance and policy-output transformed accountability mechanisms (Klijn & Koppenjan, 2014, pp. 242–257). Accountability is a relationship between an actor and a forum (Bovens, 2007; Mulgan, 2003, p. 9; Scott, 2000, p. 40). Accountability is thereby perceived as mechanisms rather than value (Bovens, 2010). Two components constitute this relationship: explanation[23] and sanction (Weale, 2011). An actor must make transparent and justify its actions, and the forum must have

[23] See Roberts (2001, p. 1551) who discusses the explanation component isolated from sanction.

the ability to pass judgment and opportunities to change the conduct of the actor. Political accountability is traditionally conceptualized procedurally in relation to vertical structures of command and control whereas within the context of governance accountability is more closely tied to the delivery of objectives (Castiglione, 2006). It is therefore unsurprising that within governance literature accountability and legitimacy are at times equated because actors' legitimacy hinges on outputs, the very things through which they are also said to be accountable. Bevir (2010, pp. 35–36) refers to this as a shift towards "performance accountability (…) which identifies legitimacy with stakeholder satisfaction with outputs". This conceptualisation, however, does not undermine the importance of the question to whom governance actors are accountable.

Traditionally a separation of powers constitutes the proper forum for accountability. Both within politics, through a legislative and electorate holding politicians and executives accountable, and in the private sectors, where shareholders hold CEO's to account. Such a separation of power and clear demarcation separating the accountable actor from the forum holding her accountable might no longer be suited for horizontal and networked governance structures. These traditional forms of accountability require, either factual or artificial[24], lines of delegation and responsibility between actor and forum (Jarvis, 2014; Papadopoulos, 2014, pp. 273–288). These lines become more opaque as a result of two governance shifts (Peters, 2014). On the one hand, more actors are involved in policy-making on more equal terms. The resulting policies are achieved through negotiation and compromise and lack the formal structures of responsibility. Responsibility becomes a collective affair of the governance actors in a given field or sector rather than, factually or artificially, located in a single actor. Collective, or shared, responsibility of actors within a functional field complicates accountability as the traditional forum capable of holding actors accountable is integrated, wholly or partially, into the responsibility-bearing collective. On the other hand, the blurring of divides between public and private spheres of society further complicates the accountability of governance actors as the boundaries of the political forum become corrosive. For instance, public policy-making is to a greater extent executed by private actors but whether these actors can and should be held accountable through private mechanisms such as market competition is unclear. Moreover, the spill-over effects of governance mechanisms across functionally differentiated sectors of society complicate the allocation of responsibility to actors. It, firstly, becomes increasingly complicated to determine who is accountable for what through what regime

[24] Factual is for instance ministerial responsibility for policies enacted under his own ministerial responsibility. Artificial when that same minister is responsible for processes formulated and implemented under one of his predecessors.

as a consequence of horizontal policy-making. Secondly, the integration of multiple actors in policy-making and the provision of public goods leads to opacity as private actors are entitled to a greater degree of privacy than public officials (Mashaw, 2006, p. 138). Pierre (2009, p. 592) argues that this constitutes the divorce between power and accountability.

Beyond the increased horizontal structures of policy-making, vertical transfers of authority to different governance levels affect accountability in two ways. Firstly, increased internationalisation of public policy-making and the shift of authority to international and regional bodies increases the distance between those governing and the governed, i.e. between actor and forum. Accountability has become increasingly indirect and often mitigated through different institutions (Papadopoulos, 2014).[25] Secondly, economic globalisation has increased the power of multinational and transnational private actors such as TNCs. Typically controlled through competition, at the global level many TNCs can escape responsibility as consumers operate to a great extent on national markets. This global accountability deficit stems from the fact that "most collectivities in globalized space are not accountable for their actions" (Rosenau, 2000, p. 192).

The most prominent responses to the problem of accountability within governance literature revolve around transparency and increased competition. When formal structures of accountability are absent, transparency is said to increase both the ways in which actors can be held accountable and who can hold them accountable. Public availability of information relating to governance actors, institutions, and networks, allows individuals and other actors to establish new forums through which these actors can be held accountable. Citizens can petition and protest against non-majoritarian institutions or the media can through reputational accountability hold private actors accountable. Transparency thus aids the responsible consumer who through market choices holds private actors accountable for 'irresponsible' conduct, as much as it aids public officials to protect public interests within governance networks. However, the burden on, for instance, individuals to hold governance actors accountable is greater within horizontal structures than in vertical structures of policy-making in which individuals delegate their responsibility to hold actors accountable to representatives. The time, competence, and other resources necessary to process information and make conscious decisions can be greater than individuals are able or willing to invest. A responsible consumer, for instance, can make informed decisions but given that individuals engage in more and more daily transactions the

[25] For instance, at the European level accountability is to a great extent mitigated through national parliaments. Moreover, international institutions such as the WTO and the IMF are increasingly unaccountable to a large number of people affected by their policies. It has also been argued that these institutions do not internally abide by the accountability standards they prescribe to others (Woods & Narlikar, 2001).

burden to make all purchasing decision consciously increases. The forums that transparency can establish are thereby relatively indeterminate.

Increased competition constitutes the second response towards the problem of accountability in the context of governance. Soft-law and self-regulation are promoted and arguably competitively advantageous. On the one hand the shadow of hierarchy plays an important role. Many private actors engage in setting up new lines of both internal and external accountability through shareholder responsibility and codes of conduct under pressure of external regulation by (semi-)public actors. On the other hand, TNCs engage in constructing accountability regimes through sectorial agreements and private adjudication. Such initiatives are often triggered by the need to simultaneously create stable markets and increase the legitimacy of the actors operating on these markets. These mechanisms, however, remain largely unchecked and suffer from problems regarding their consistent implementation leading up to the more general governance problem of enforceability.

4.3 Enforceability of Governance

Shifts in governance affect the manner in which policies can be implemented and actors regulated. Enforcement can no longer rely on the clarity of command-and-control structures of institutions implementing hard-law.[26] The problem of enforceability can be described by asking the question who governs governance. When rules, standards, or codes are drafted in horizontal public-private partnerships or within purely private networks, the enforceability of these policies is at stake.[27] Governing these governance actors increasingly takes place through soft law and private codes of conduct and other voluntary standards. These standards and soft laws are not directly enforceable. Command-and-control hard law becomes a less prominent mode of regulating governance actors. Though soft law and private voluntary initiatives are not without effect, they can even achieve more due to the relative freedom of actors towards compliance, these governance mechanisms complicate the enforceability of policies and regulations. In relation to this, Levi-Faur (2012) has argued that public governance is increasingly reconstructed into a form of risk-regulation curtailing the threats of private sector rowing. At the international and transnational levels much regulation relies on private enforcement or on the willingness of other public actors, rendering enforceability indeterminate. To use an analogy by John Braithwaite

[26] It should be noted that hard-law itself is not an enforcement mechanism or guarantee for enforcement. For instance, symbolic legislation or the Dutch 'gedoogbeleid' concerns hard law that is purposefully unenforced. However, hard-law offers the institutions implementing it the tools to hierarchically enforce. Political choices are often the only thing standing between enforceability and symbolism.

[27] This does not imply that compliance is necessarily at stake concerning the enforceability of governance mechanisms (Zürn & Joerges, 2005).

(Braithwaite, 1993, pp. 19–53), at these levels there are no big sticks or "big guns". The issue of enforceability is most significant when the conduct of private actors interferes with the ability of other actors to provide and protect public goods. Combined with concerns for accountability and legitimacy it becomes a question whether policies are enforceable at these levels and if so by whom and, arguably more importantly, whose policies.

Within the literature on governance two responses can be identified. Firstly, solutions are found in the new status quo of 'new' governance policy making. One response is that policies should be drafted from within the sector it is applied to. Consequently, their enforcement should be left to the discretion of these governance actors themselves as external actors lack the expertise necessary to interpret and enforce these policies.[28] Secondly, some argue that the best manner to achieve enforceability of, at least, those policies relating to the provision of public goods lies in extending national public law norms to private spheres. This "expansion of statehood" can happen through treaties and international adjudication (Joerges, 2002). More generally, the growing literature on regulatory capitalism, and in the context of the EU on regulatory governance, can be seen as a reaction to the problem of enforceability (Levi-Faur, 2005, 2012).

5. Governance in this Study

In this study governance is operationalised as descriptive conception of policy making to which normative and prescriptive arguments are applied. This perspective, it is contended, better reflects the fuzzy world of policy-making (Christiansen et al., 2000). Governance adds to the study of policy-making a crucial birds-eye-view. When policy-making and other forms of social coordination cross boundaries of the political, economic, and legal spheres, spill-over effects between functional spheres take place (Lane, 2002). For instance, what corporate boards decide not only affects corporate governance of a single corporation but can also influence public policy-making, as corporate actors are often part of multiple policy-networks. In Kazacigil's (1998) words governance is policy-making with and without the state and with and without politics. The arguments comprising this study therefore do not seek to justify existing modes or mechanisms of governance but rather takes the changing nature of policy-making as its descriptive perspective to which arguments are applied.

A reflection on the governance problems forms an integral part of achieving good governance. These problems of legitimacy, enforceability, and

[28] See Schepel (2005, pp. 11–36) for an overview of such responses based on Durkhemian corporatism.

accountability relate directly to this endeavour. They do so in a procedural manner. This implies that for governance to be 'good' its mechanisms should be legitimate, enforceable, and accountable or, at least, adequately respond to these concerns. The governance problems thus relate to the procedure through which governance takes place. For mechanisms to constitute good governance adequate responses to these three governance problems must be formulated. Governance mechanisms and the actors developing and implementing them cannot constitute good governance absent their legitimacy, enforceability, and accountability. Across practices different responses to the governance problems are adequate. What constitutes an adequate response is thus dependent on the practice good governance is formulated for.

One might, justifiably, question the relevance of these procedural aspects in relation to conceptualizing good governance towards the realisation of social sustainability. Intuitively, achieving social sustainability requires, at minimum, the availability of basic goods such as food, water, shelter, and health care. It can be argued that their delivery requires little input-legitimacy as what matters is their availability, which is hopefully efficient and effective. The force of the governance problems hinges on the good that governance strives for. Moreover, the salience of the governance problems differs relative to different practices. Transnational governance arguably requires different responses to the problems of legitimacy and accountability than local structures do. However, they require careful consideration as to their relevance to specific practices. For instance, the delivery of drinking water might not depend on the legitimacy of the provider, as long at its effective and efficient. Accountability, however, might be a problem when water is polluted and individuals bear the costs of an unaccountable governance actor. The content of an adequate response to the governance problems is thus dependent on the practice good governance is conceptualised for.

This chapter provided a conceptual analysis of governance. It introduced the concept as descriptive signifier of change and explicated the changes that governance signifies. Generally, and across disciplines, governance describes processes of policy-making that move away from hierarchical command-and-control structures associated with the centralised state. Governance describes more horizontal modes of social coordination in which different both public and private actors are incorporated into the policy-making process. Coordination and compromise through networks and negotiations take increasing primacy over top-down commands. In this study governance is used in line with the above conceptualisation: as descriptive conception of policy-making. Three problems are associated with the changes governance signifies from 'old' towards 'new' modes of governance. Together they provide a first step towards the formulation of good governance. Good governance requires adequate responses to be given to the problems of legitimacy, enforceability, and accountability. This requirement relates relating to the

processes through which policies are made and thus constitute a procedural component of good governance. Translated into the visual structure the three governance problems are explicated and their relation to good governance shown:

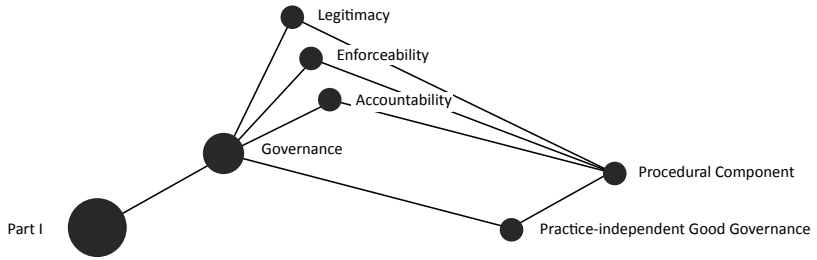

Figure 5 *Argumentative Structure Chapter 2*

3 GOOD GOVERNANCE

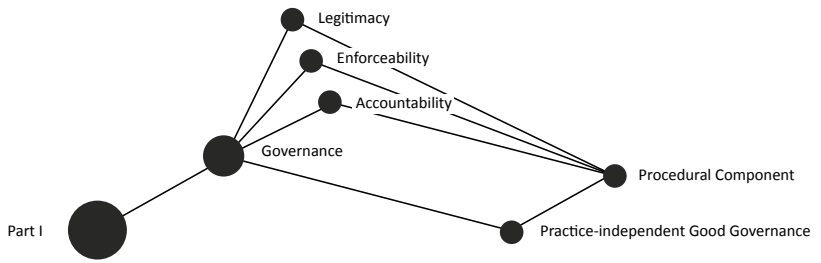

Figure 6 *Overview Chapter 3*

1. Introduction

As diverse as the literature on governance is the academic and institutional literature on good governance. Good governance is primarily operationalised in relation to specific concepts or institutions, for instance good governance as a function of public administration or as goal of development. Consequently, what the concept of good governance entails in isolation is diffuse and opaque. The concept does, however, have a clear conceptual history of its rise to prominence in policy debates. This chapter analyses the concept of good governance. It follows a diachronic structure analysing good governance from its historical emergence in both practice and academic discourses to current practices and debates. It starts with international relations followed by conceptions of good governance in the fields of business administration and corporate governance. Each of these bodies of literature is treated similarly. Firstly, the content and meaning of specific usages of good governance are introduced through a literature review. Secondly, each conception is critically assessed. The limitations of their substantive content, deviations from other meanings of good governance, and proposed principles of good governance are central in these critiques.

Within the good governance literature three separate strains of emergence are identified. The first and most prominent concerns the use of good governance in international relations and developmental studies from the 1990s onwards. The second comprises the concept as developed in the fields of administrative law and public administration. The third stems from the use of good governance in business administration focussing on governance structures within companies. Significant space and time is devoted to the first strain as it constitutes the most developed debate and is acknowledged as root of the modern use of good governance (Rothstein, 2012).

The conceptual analysis will show that a unified and exhaustive definition of good governance is impossible given the wide range of practice the concept is applied to. The first three sections analyse the treatment of good governance within separate academic fields and praxis. It argues that good governance is treated differently both substantively and procedurally. In some academic fields and practices good governance is conceptualised as prescriptive soft-law, for example within national administrative law through non-binding guidelines for public officials and administrations. In others it is conceptualised as self-regulation by private actors such as, binding or non-binding, corporate codes of good governance. In even other contexts, the concept of good governance is primarily employed as practical tool to assess and measure outcomes of developmental aid (Hazenberg, 2015). In still others, good governance is often understood as a marketing strategy that contributes to a societal beneficial perception of corporate conduct

and interest. In the analysing good governance two distinctions in uses of good governance are crucial. The first is a distinction between an internal perspective, i.e. good governance principles that are constructed within a closed context to govern the actors within that context[29] , and an external perspective, i.e. good governance principles that are constructed outside of the context it is applied to.[30] The second is a distinction between the different aims of good governance. The ends that good governance is meant to achieve can be arranged as either input- or output-based. These distinctions inform the application of good governance and ultimately its meaning within different contexts and disciplines.

Across disciplines good governance functions as evaluative and prescriptive tool to improve governance processes. These are predominantly cast in principles. The manner in which governance is defined across disciplines influences the practical application and normative justification of good governance principles. These principles are discussed in the two concluding sections. It is argued that different disciplines and practices list contradictory and indeterminate principles of good governance. Therefore, it is unclear what good governance requires in different practices. To overcome this indeterminacy, it is argued that good governance lacks a clear normative grounding of the 'good' it strives for undermining its evaluative and prescriptive properties. Finally, the first steps will be taken towards the normative grounding of good governance.

2. International Relations and the Development Discourse[31]

Good governance plays a pivotal role in the international discourse on the social, political, and economic development of states ('development discourse' hereafter). Within this discourse the term 'governance' primarily refers to governance arrangements by public institutions in developing countries and 'good governance' is primarily intended to be realised through reforms of government and the manner in which it governs societal actors. Consequently, the idea of governance as a move away from the state is subordinate in this context.[32] It will be shown that this diversion from the

[29] Corporate governance of the company is an example of such an internal perspective just as corporate codes of good governance that are constructed by the same group it is applied to.
[30] The World Bank good governance indicators, for instance, exemplify such an external perspective. See www.govindicators.org.
[31] This section bases itself on Hazenberg (2015).
[32] Though, as will be shown, the policies good governance prescribes in this context do exemplify the 'new' governance paradigm as they, to a certain extent, advocate the integration of private sector into the formulation of public policies.

dominant meaning of governance in political science[33] can be attributed to the historical emergence of good governance as term employed to increase the effectiveness of developmental loans by international financial institutions to developing countries.

Minimally two different uses of the concept can be identified; one primarily economic and one political. Both, however, share a history in the rapid political and socio-economic changes after the end of the Cold War. The institutional groundwork for the concept was laid in a developmental report of the World Bank that attributed the lack of development in Sub-Saharan Africa to a "crisis of governance" (World Bank, 1989). The notion of good governance as central to successful lending by the international financial institutions, e.g. IMF and the World Bank, stands at the root of this good governance discourse. The end of the Cold War brought with it the institutional realization that the preceding method of assigning developmental aid, the structural adjustment programmes (SAPs), were failing. From the mid-1970s onwards the Bretton Woods institutions conditioned development aid with economic reforms. These reforms primarily comprised of large-scale privatization of public services, a downscaling of government bureaucracies, internationalisation of the economy by promoting the influx of foreign capital through foreign direct investment, protecting property rights, and heavily deregulating markets (Rothstein, 2012; Serra & Stiglitz, 2008). More generally, the SAPs promoted "open and free competitive market economies, supervised by minimal states" (Leftwich, 1993, p. 607). Despite the economic assumption that these reforms would foster rapid economic growth, as was the experience in Western countries under similar reform policies in the 1980s, in the developing world they amounted to a race to the bottom. Structural adjustment caused a downward spiral starting with capital flight after privatizations of publicly held sectors of the economy, followed with increased borrowing by, often, authoritarian, governments, increasing indebtedness of societies ultimately leading to economic stagnation and recession (Pogge, 2008; Rodrik, 1990). The economic failure of the SAPs brought with it a re-appreciation of efficient and effective public administration in constructing the right conditions for economic development. In other words, the crisis of governance the World Bank referred to was caused by the absence of effective public institutions that can guarantee the necessary conditions for a functional market economy.

Tied to this re-appreciation of the role government plays in safeguarding economic prosperity is another, political, root of good governance. The fall of the Soviet Union and the West's subsequent victory over communism, fundamentally altered the role of the United States and its, primarily European, allies in distributing developmental aid. Firstly, no longer was justification needed for the financial support given to autocratic governments in the battle

[33] See Chapter 1, section 2 at p. 14.

against the eastern bloc. These governments were of lesser political concern after the Cold War. Secondly, the western victory reinforced the assumption of democracy's strong link with economic development, which was, again, reinforced by the argument that the failure of structural adjustment could be located in the absence of robust democratic public institutions that facilitate markets (Fukuyama, 1992). Whereas the SAPs had a strong focus on economic liberalization, the good governance paradigm sought to put greater emphasis on the steering role government plays in development. From the Bretton Woods institutions, a clear managerial and administrative conception of good governance emerged that focussed on the effectiveness and efficiency of public institutions and their instrumental contribution to economic development. Western governments more explicitly emphasised the necessity of democracy, the rule of law, and respect for human rights (Gisselquist, 2012).

Within this development discourse governance is understood as the manner in which power is exercised in the management of the public affairs and social and economic resources of a country (World Bank, 1992). The World Bank was pivotal in establishing what is known as the good governance agenda using the concept to assess the quality of government and public institutions and condition developmental aid accordingly (Doornbos, 2001; Grindle, 2007, 2010, 2004). Good governance, for the Bretton Woods institutions, was therefore instrumental towards the effectiveness of developmental aid whereas Western governments emphasised the ideological and normative worth of democracy and the rule of law as a more intrinsic justification of the good governance paradigm.

The diversion between these two 'meanings' can be traced to the institutional structure of the international financial institutions. The World Bank's and International Monetary Fund's (IMF) Articles of Agreement prohibit these institutions from mingling in the political affairs of countries (Santiso, 2001). Therefore, good governance from their perspective is presented in administrative, managerial, and economic terms rather than ideological or political ones. In assessing conceptions of good governance, one encounters a disparity of conceptions between institutions, NGOs, and states (Gisselquist, 2012). Upon a closer look, however, this disparity can be largely contributed to the limited paper authority of the international financial institutions to explicitly interfere with the field of politics. It can be concluded that the most prevailing conceptions are mutually reinforcing rather that in contradiction. In general the development discourse conceptually links economic liberalism and democracy through conceptions of good governance and good governance principles (Abrahamsen, 2000, p. 139). The remainder of this section zooms in on these 'separate' economic and political definitions of good governance within the development discourse.

2.1 Economic Definitions

Economic definitions of good governance effectively collapse the concept into development management. According to the World Bank good governance is "essentially the combination of transparent and accountable institutions, strong skills and competence, and a fundamental willingness to do the right thing" as these aspects "enable a government to deliver services to its people effectively" (Wolfowitz, 2006, p. 1). Similarly, the IMF views good governance from a macroeconomic perspective as encompassing transparent government accounts, effective public resource management, and stable and transparent regulatory environment for private sector activity (International Monetary Fund, 1997). Within international financial institutions governance is defined as the "process through which power is exercised to manage the collective affairs" and economic and social resources of a country (World Bank, 1992, 1994). Good governance in turn refers to the propriety of the manner in which this process is carried out.

The economic outlook of these broad and managerial good governance conceptions reflects the administrative, rather than explicitly political, role of the international financial institutions. In regional development banks, though less frequently employed, good governance is defined along similar lines. Good governance, from this perspective, is primarily intended to provide the framework and tools through which developmental aid can be conditioned and consequently be evaluated in order to foster economic growth in the developing world. Within the development discourse the conception of good governance stemming from the international financial institutions was and remains the most prominent on which other institutions rely. The most prominent substantiation of this conception are the widely-used governance indicators from the World Bank. Representing six areas to assess the 'goodness' of a country's governance, the indicators propose to be a practical guide in evaluating and prescribing policies and policy-making processes.

The World Bank indicators list six areas central to good governance for the purpose of measurement and evaluation. These areas are (1) Voice and Accountability, (2) Political Stability and Absence of Violence, (3) Government Effectiveness, (4) Regulatory Quality, (5) Rule of Law, and (6) Control of Corruption. Within international relations these can be seen as the common core of good governance conceptions. Though at first sight inherently political the assessment of governance does not so much regard the 'goodness' or justification of political structures and processes underlying the indicators. Rather the contributions each of these indicators make to the desired end of effective free markets that foster economic growth are evaluated. Superficially the World Bank thereby appears not to violate its Articles of Agreement while indirectly these indicators not just prescribe governance as instrumental to economic growth but enforce political norms. The World Bank thus attempts to walk the fine line of prescribing principles

of good governance to governments while simultaneously refrain from political interference. [34]

In each of these areas the indicators aspire to an end that is only briefly elaborated upon, according to some rendering good governance needlessly vague and devoid of substance (Doornbos, 2001; Grindle, 2004, 2010). According to others such brief elaboration fosters the implementation of good governance policies in specific contexts and thereby constitutes the basis of its attractiveness in the evaluation and assessment of governance's contribution to economic development. Kauffman and Kraay[35], the authors of the World Bank's governance indicators, minimally elaborate upon the six areas as follows:

1. Voice and Accountability intends to capture the extent to which "citizens are able to participate in selecting their government". Though not necessarily excluding other non-democratic modes of government, voice and accountability is informed by a liberal conception of government.
2. Political Stability and Absence of Violence concerns the political structure of a country and the likelihood of government being "destabilized or overthrown by unconstitutional or violent means".
3. Government Effectiveness is a qualitative assessment of public services and their independence of political bargaining. Moreover, effectiveness relates to the "quality of policy formulation and implementation and the credibility of government's commitment to such policies".
4. Regulatory Quality concerns the consistency in formulation and implementation of policies that "promote private sector development".
5. Rule of Law, a contested concept itself, within the World Bank's perception chiefly concerns the extent to which "agents have confidence in and abide by the rules of society" with a focus on "contract enforcement, property rights, police, and the courts".
6. Control of Corruption measures the "extent to which public power is exercised for private gain". All forms of corruption, from the petty to the grand, by all actors, e.g. from bureaucrats to private elites, are considered.

The prominence of the governance indicators is reflected by the fact that nearly all (e.g. economic, political, and corporate) conceptions of good governance, as will be shown below, either rely on these indicators as substantive basis for good governance principles or integrate them into their conceptions of good governance.

[34] The extent to which the World Bank and IMF respect their Articles of Agreement can be legitimately questioned given their good governance conceptions directly concern political and not solely economic policies.
[35] See www.govindicators.org.

2.2 *Political Definitions*

A second set of good governance conceptions within international relations and developmental research can be described as political. Generally, these are more comprehensive conceptions employed by states, international political institutions, and NGOs. Unburdened by the administrative and managerial embargo on political interference of the World Bank's Articles of Agreement, these institutions and organizations employ a more explicitly value-laden and political meaning of good governance in the development discourse (Botchway, 2000). Thus, whereas economic definitions employ good governance as instrumental to a specific path of economic development (i.e. free markets with democratic oversight) political definitions are less explicitly instrumental and rather focus on normative conceptions of what makes governance good. Both meanings, however, concern the goodness of public governance (i.e. the state) and, as will be shown, divergence between the two meanings is relatively marginal.

In their developmental programmes most Western governments have articulated conceptions of good governance as standards conditioning developmental aid. Moreover, supranational institutions such as the EU[36], the institutions of the UN, and sector-specific governmental and non-governmental groups such as the OECD and a multitude of NGOs have formulated their own conceptions. While each of these conceptions emphasise different aspects of good governance their components do not diverge significantly. For instance, while nearly all include respect for human rights and effective public service provisions, European governments tend to emphasise human rights whereas sectorial institutions such as the OECD emphasise the effectiveness of public services.

Political definitions of good governance generally tie together the ideas of democracy, effective and efficient governance, and human rights as the best recipe for development. This is most explicitly evidenced by the definitions of good governance provided by the United Nations and its subsidiary organisations. The general UN definition of good governance equates 'good' with 'democratic' governance. The generality of the UN good governance principles (equity, participation, pluralism, transparency, accountability, rule of law, effective and efficient public administration) in practice implies "the holding of free, fair, and frequent elections, representative legislatures that make laws and provides oversight, and an independent judiciary to interpret those laws".[37] European states also focus explicitly on the need for representative, democratic politics and institutions, and protections of human rights. Nearly all countries that include the concept of good governance into

[36] For a more elaborate debates on the use of good governance within the EU's foreign policy see Börzel, Pamuk, & Stahn (2008), Pettai & Illing (2004), and Tolentino (1995).

[37] See http://www.un.org/en/globalissues/governance/

their developmental policies and programmes include a statement, or similar a one, that good governance requires upholding democratic principles and human rights.

In both its economic and political meaning, good governance is perceived as instrument towards the end of development. It proposes that good governance constitutes the substance of development by progressively establishing good economic and good political governance. Moreover, it simultaneously functions as tool to condition developmental aid and promote democratic values globally. The aims of economic and political definitions differ with regard to their focus on either market liberalization and protection of property rights in economic definitions, or a more general conception of good government, promoting more inclusive development through democratic state institutions, in political definitions. The differences between the two meanings reflects a division of labour in international politics rather than substantive divergence between the substance of conceptions.

Rachel Gisselquist (2012, p. 8) assembled the different and diverging definitions of good governance from multilateral institutions (including a range of European states). Her research incorporates these definitions into an overarching framework of seven core components of good governance: (1) Democracy and Representation, (2) Human Rights, (3) Rule of Law, (4) Efficient and Effective Public Management, (5) Transparency and Accountability, (6) Developmental Objectives, and (7) "a varying range of particular political and economic policies, programmes, and institutions (e.g. elections, a legislature, a free press, secure property rights)" that are conducive to the previous six components. The phrasing and goals of good governance as formulated by financial and (quasi-)governmental institutions diverge, substantively the components of this concept converge.[38] The first two of Gisselquist's components (Democracy and Representation; Human Rights) are absent from the World Bank's governance indicators. However, the World Bank's succinct elaboration of the governance indicator 'voice and accountability' explicitly identifies the ability to elect one's government as constitutive of the indicator. It can therefore be argued that there is a great degree of overlap between different good governance conceptions in the international development discourse. Moreover, from an internationalist perspective, the intuitively appropriate components have aided to rapid spread and success of the concept of good governance. However, with its increasing prominence in the development discourse raised critique against its use has increased. Two strains of critique will be discussed shortly. The first strain concerns the economic conception of development that is at

[38] This does not imply, as will be argued below, that the difference in semantics and goals do not affect the substantive meaning of separate good governance components, indicators or principles.

the core of the economic definitions of good governance and questions its economic consequentialism. The second strain is related to the practical contribution of the concept, its definitional vagueness, brevity and the (in) validity of certain assumptions.

2.3 *Critiques of Good Governance*

The first strain of critique revolves around the type of development good governance is meant to foster (Doornbos, 2001; Gisselquist, 2012; Grindle, 2004, 2010; Kurtz & Schrank, 2007). The ends of good governance are frequently depicted and evaluated in economic terms from the perspective of international financial institutions.[39] Extending the reach of markets is, for instance, still at the core of the World Bank's vision: good governance should enable building institutions for markets to foster economic growth (World Bank, 2002). Consequently, the measurement of good governance is often depicted in terms of growth in developing countries. The inclusion of political prescriptions within an economic argument marries free-market neo-classical economics with liberal democratic politics. Abrahamsen (2000) argues that this instrumental approach to democracy as a justificatory strategy for small government and free markets undermines the need for robust public institutions in developing countries. Replacing the structural adjustment programmes but building upon the Washington consensus good governance is grounded in a specific normative theory based on this marriage of democracy and capitalism, deregulated markets, and enforced property rights (Abrahamsen, 2000; Serra & Stiglitz, 2008). The substance of good governance as conceptualized by the international financial institutions limits the number of possible governing structures by equating development with economic growth. For instance, the World Bank's conception of free market and strong private property protection, thrives under a strict liberal interpretation of democratic government. In absence of an argument for, or deeper conceptualized notion of, good governance as primarily concerned with enabling economic growth this critique of economic instrumentalism holds. And such an argument has, as Abrahamsen (2000) points out, not been put forward sufficiently.

The second strain of critique concerns practical aspects of the applicability of both the political and economic definitions to developmental practice. Both the vagueness and conceptual brevity of the concept of good governance and the relationship between good governance and development are contested. Vagueness and conceptual brevity are not necessarily problematic[40] but it "is

[39] This critique mainly applies to the meaning of good governance as advanced through the World Bank's governance indicators.

[40] Especially within international relations a certain amount of vagueness and indeterminacy greatly benefits drafting and implementing policies that apply to a wide range of actors.

so in this case because of the clearly contested nature of good governance and the complexity of its components" (Gisselquist, 2012, p. 14). The governance indicators or the lists of good governance components compiled by European states or supranational institutions are defined only in brief by these institutions. As Langbein and Knack (2010) show, there is a lack of parsimony regarding good governance's components: their meaning is endless. The different components are so interrelated and loosely defined that their measurement arguably says little about actual performance. It can be argued that good governance offers an ideology rather than tools for policy evaluation (Abrahamsen, 2000).

Another practical aspect prone to critique concerns the perceived, or assumed, causal relationship between good governance and the aim of development as voiced by Andrews (2008), Langbein & Knack (2010), Grindle (2004, 2007), and Gisselquist (2012). These authors argue that the end good governance envisages is, within the most prominent conceptions, depicted in economic terms. Questions can be raised, however, regarding the causality between certain components of good governance and economic growth (Andrews, 2008; Grindle, 2004, 2007; Langbein & Knack, 2010). For instance, if good governance intends to foster economic growth, why is democracy, or 'voice and accountability', included? It is not clear that democratic governance enhances economic development and the cases that run counter are afloat. For instance, Vietnam has seen many years of economic growth without any increase in democratic governance. Similarly, China's rise to an economic superpower took place without the development of inclusive liberal institutions. The authors of the good governance indicators do off with this strain of critique as "definitional nit-picking, furthering intellectual satisfaction" rather than achieving the intended end(s) of good governance (Kaufmann, de Kraay, & Mastruzzi, 2007 p. 23-24). Indeed, many intellectual satisfactory discussions concerning good governance and development do not necessarily aid real-world progress. However, towards gaining a better understanding of good governance and what it entails the lack of parsimony and coherence is troublesome. As Andrews (2008, p. 280) states good governance implies so many things it is akin to "telling developing countries that the best way to develop is to become developed".

There appears to be a gap between the end that good governance is employed towards within the development discourse and the broader justification of its included components. For instance, decentralization might improve effectiveness, local democracy and accountability, as commonly assumed, but can decrease growth by tampering economies of scale; more transparency might foster accountability but it could also increase inefficiency due to the amount of information that needs to be processed through bureaucracies. There can be good reasons to favour promoting either of these components resting on justifications that do not rely on economic consequentialism. This

need for such broader, substantive, procedural, and moral justification and the grounds on which it can rest, will be further discussed in section five and six below. Prior to this good governance conceptions from two additional fields will be analysed: public administration and corporate governance.

3. Public Administration and Administrative Law

Moving beyond international relations and the development discourse, public administration and administrative law mark a second body of literature that invokes the concept of good governance. Administrative science primarily concerns the manner in which rules created by public institutions are devised, implemented, and justified to a broader audience. Both public administration and administrative law employ the concept of good governance to prescribe the manner in which public institutions govern over the citizenry and general public, i.e. good governance of and in public authority. Good governance in this context constitutes an administrative response to the philosophical problem of political authority[41], a response based on law, regulation, and other modes of governance. This problem, in its simplest form, consists of the legitimacy of the powers that resides with public authorities to implement and enforce coercive policies over individuals. Beyond this fundamental question of legitimacy, within the context of administrative law good governance serves a procedural aim of improving the manner in which public authorities exercise power. The responsiveness of public bodies through increased efficiency and transparency in administrative processes are examples of such procedural aims.[42]

The use of good governance within this body of literature overlaps with the development discourse. Both bodies apply good governance to the manner in which authority is exercised by public bodies and the propriety thereof. There are, however, significant differences between the use of good governance in public administration and the development discourse. In this section good governance is assessed first as concept, i.e. the manner in which it is directed towards certain aims, and secondly as practice, i.e. the more substantive content of good governance codes and principles at different levels of public administration and administrative law. Good governance in the second sense, as practice, will be briefly assessed from two perspectives: a predominantly western national standpoint, and a European perspective.

[41] See Simmons (1979).

[42] Whether the responsiveness of public administration can be subsumed under legitimacy is addressed nor answered here. Within administrative law, however, the discourses relating to increased efficiency in service delivery to citizens and transparency of administrative processes play a fundamental role. A distinction between the fundamental question of legitimacy and the procedural questions relating to increased responsiveness, efficiency, and transparency is therefore made.

3.1 Good Governance as Concept

Two differences between good governance as employed in the development discourse and its use in public administration and administrative law must be emphasised before moving towards a more substantive review of conceptions of good governance within public administration and administrative law. Firstly, within the development discourse good governance is employed as a prescriptive concept conditioning and evaluating developmental aid. In this discourse, good governance and its constitutive principles are externally, and in some cases universally, conceptualized. This means that good governance is conceptualised by institutions other than, i.e. external to, the public administrations to which the concept is meant to apply and who carry the burden of implementing its contents. In the development discourse good governance functions as "external field of normative reference" (Addink, 2013, p. 252).

Contrarily, within public administration and administrative law, good governance is internally conceptualized and applied. This means that conceptions of good governance within this body of literature are conceptualised within the same institution to which they apply. Secondly, the aim or end of good governance conceptions within administrative law and public administration contrasts with the aim or end of development (predominantly intended as economic development) within the development discourse. Whereas the instrumentality of good governance within the development discourse is tied to robust economic developmental outcomes, within public administration and administrative law good governance's instrumentality is directed more towards responsiveness, accountability, and ultimately the legitimacy of public policy making. Thus, the aims of good governance within public administration and administrative law are based more on the normative observance of rules and principles of democracy and equality than on their instrumental contribution to economic development.

Administrative law has long prescribed rules and guidelines for proper administration and good governance. These rules and guidelines constitute both hard and soft law. Codes of proper governance mostly contain the hard law prescriptions (Addink, 2013). These codes of proper governance contain more minimal prescriptions than guidelines on good governance. Proper governance can be seen as the minimal threshold for public administrations to function according to their mandate. Codes of good governance, in turn, generally supplement the codes of proper governance with additional, often soft-law, guidelines and recommendations to increase the legitimacy, efficiency, transparency, accountability and/or responsiveness of the public administration. It has been argued that the aim of good governance codes within a public administration is predominantly to increase the legitimacy of the administration (Botchway, 2000; Esty, 2006). In other words, the aim it not necessarily to strive for the achievement of a practical outcome but rather to, through the practical implementation of standards for efficiency, transparency, and accountability to increase the legitimacy of public administration.

Legitimacy, however, comes in many different forms. As discussed in relation to governance debates, legitimacy can be conceptualized in terms of input and output.[43] Thus the aim of legitimacy good governance strives for in relation to a public administration is not as straightforward as it might appear. Esty (2006) defines six types of legitimacy that different components of good governance within public administration strive to enhance. Together the six types of legitimacy paint a diverse picture and each "provides a logic for the acceptance of political authority" and "in some cases they may reinforce each other (…) [or] they may be in tension" (Esty, 2006, p. 1515). These six types are introduced here:

- *Democratic legitimacy.* This input-legitimacy can be most straightforwardly enhanced through direct elections but it can also be furthered through measures that increase representativeness of and accountability to the public.
- *Rule-based legitimacy* is an output conception of legitimacy also commonly known as Weberian legitimacy. It rests on producing rational analyses that yield the intended outcomes of rules. Rule-based legitimacy lies in, and can therefore be advanced through, the legal boundaries that are set and to which bureaucratic processes abide.
- *Order-based legitimacy* relies heavily on the predictability of rules and decisions. Order, stability, legal certainty, and predictability all contribute to order-based legitimacy. Order-based legitimacy therefore does not necessarily require democratic input.
- *Systematic legitimacy* "relies on the dispersion of policy-making responsibilities among contending institutions". In order to promote fairness and ensure effective remedies for individuals, responsibilities are systematically delegated to different governing bodies. The clearest example of such systemic legitimacy is the separation of powers in the *trias politica*.
- *Deliberative legitimacy* constitutes the legitimacy of a political authority by enabling debate and political dialogue of all actors involved in and/or affected by that political authority. This type of legitimacy is enhanced through transparency and formal equality in public administrations.
- *Procedural legitimacy* is enhanced by following the 'right' procedures in decision-making. Good governance itself enhances procedural legitimacy since following good governance prescriptions in the procedure of decision-making carries with it "a degree of inherent legitimacy" (Esty, 2006, p. 1512).

[43] See Chapter 2, section 4 at p. 37.

Within administrative law and public administration good governance codes as entirety or their separate components and principles aim to enhance each of these types of legitimacy. However, different types of legitimacy can either complement or contradict each other. Whether the advancement of a specific type of legitimacy constitutes 'good' governance thereby depends not only on the context to which the conception applies but, moreover, on the prevailing consensus as to what type of legitimacy ought to apply. The aim of good governance within public administration and administrative law is thereby more fluid than the rather singular focus on economic advancement in the development discourse. Certain types of legitimacy, result-based and deliberative legitimacy, primarily concern the achievement of specific outcomes. Others, such as democratic or procedural legitimacy relate to the properness of inputs. Below it will be shown that what good governance entails in the practice of administrative law and public administration is often triggered by concerns of responsiveness by citizens and the general public. Good governance proposes to justify and increase the legitimacy of public administration. More generally it can be stated that different good governance principles enhance different types of legitimacy, that can, and do, contradict each other and are treated accordingly in practice.

3.2 *Good Governance in Administrative Practice: Substance and Principles*

Good governance codes and principles within public administration are more diffuse than those proposed within the development discourse. This can be attributed to differences in the levels of administration good governance is applied to and the aims of good governance therein. A short overview of two levels of good governance within public administration will exemplify this.

3.2.1 National Level

At the national level there is a clear distinction between two types of good governance practices: on the one hand the hard-law provision of administrative law that prescribe the manner in which decision-making has to take place and which statutory requirements must be met. On the other hand the soft-law provisions towards good governance that are only indirectly enforceable and rather purport to be guidelines and 'checks' for public administrators to perform due diligence (Cane, 2011, pp. 153–157). As Addink (2013) argues, the first type is better conceptualized as 'proper governance' setting the minimal threshold for public administrations to abide by. These national codes will be left out of the present assessment.

The soft-law provisions of good governance within national public administration can be divided in two types. Firstly, top-down guidelines devised by national institutions for local administrations to improve their conduct. Secondly, good governance codes devised by public organisations for both

their internal conduct and their external relations with, primarily, citizens. This varies from ministries to the judiciary which, in different countries and within different contexts, increasingly draw up such codes of good governance. These codes aim to improve the responsiveness and effectiveness of public administrations in their service delivery to citizens. Moreover, they generally specify the manner in which administrations should interpret and implement more general legal requirements. These codes thereby constitute soft-law mechanisms in the form of guidelines while outside of these codes similar principles are often embedded within hard 'legal' provisions. Codes of good governance in this context contain the principles of properness, transparency, participation, effectiveness, accountability, and the rule of law (Addink, 2010, 2013). These different principles all aim to increase a certain type of legitimacy. Moreover, most national codes of good governance prescribe or institutionalize external checks. Most prominent example of such external auditing is the presence of ombudsmen in many western democracies that control the functioning of public administrations according to principles of good governance (Reif, 2004). Thereby, these national codes of good governance are primarily 'soft' interpretations, specifications, and guidelines of existing legal requirements for administrations and officials.

3.2.2 European Level

To date the European Commission's 'White Paper on governance' constitutes the most elaborate statement on good governance within the EU public administration (Commission of the European Union, 2001). The document, and the principles it specifies, was a direct reaction to the growing debate on the democratic deficit at the level of European decision-making (Armstrong, 2002; Føllesdal, 2003).[44] It can be argued that good governance at the EU level is a direct reaction to a crisis of governance relating to this democratic deficit. EU politics have been, and still are, criticised for their lack of responsiveness and democratic input legitimacy while its rules have an increasingly constitutional character. In part as reaction to this democratic deficit the European Commission developed the White Paper on governance that sets out principles to increase the legitimacy of political authority and outlines strategies to achieve it.

The challenge the Commission faced was to accomplish more inclusive and accountable EU policy making within the context of limited direct democratic legitimacy of the Union. The White Paper lists five good governance principles adherence to which should reinforce the legitimacy of EU policy-making: openness, participation, accountability, effectiveness, and coherence. The White Paper is a good example of how different types

[44] For overviews of this debate on the EU democratic deficit see Majone (2001), Moravcsik (2004), Føllesdal & Hix (2006), Featherstone (1994).

of legitimacy are fostered in order to make up for a lack of other types (Føllesdal, 2003). The White Papers' principles are thereby not without controversy. Openness refers to the manner in which the EU, its institutions, and Member States communicate to the general public. The openness principle can be seen as enhancing deliberative legitimacy. Participation refers to the inclusion of experts, other governing bodies, and Member States in developing and implementing EU policies through methods of coordination. The participation principle increases the procedural legitimacy of the EU. Accountability, according to the Commission, is to be enhanced by more clearly defining the roles of different actors in legislative and executive processes. Thus, the accountability principle aims at fostering systematic legitimacy. Effectiveness in the context of good governance according to the White Paper concerns the timely deliverance of objectives. It can be argued that this interpretation of effectiveness in terms of measurability seeks to enhance result-based, i.e. Weberian, legitimacy. Lastly, the principle of coherence directly relates to increases in authority and demographic diversity. The coherence, predictability, and understandable nature of policies, according to the Commission, requires strong political leadership and thereby seeks to establish order-based legitimacy.

Good governance within the public administrations of the European Union exemplifies the diffuse nature of the aims of good governance and the principles that constitute it. It has been criticised as a diversion tactic to ameliorate or simply circumvent democratic deficiencies, the White Paper on governance favours other types of legitimacy than democratic legitimacy ordinarily associated with political authority (Eriksen, 2001). For instance, the achievement of increased accountability through clearly demarcated roles rather than tying it to the principle of openness can be questioned. This is, however, not the place to make statements as to what the proper meaning of good governance within EU public administration is. The apparent disregard of input conceptions can, for instance, be attributed to the lack of representative political structures in EU politics outside of parliament and the general unwillingness of Member States to increase these since it would involve a significant transfer of democratic sovereignty away from them. The focus on output conception of legitimacy can therefore not be simply attributed to the Commission's standpoint, but should be viewed in the broader context of European politics. This is not the time or place to engage in an assessment of European policy-making and its legitimacy. However, it must be concluded that within public administration good governance is still diffuse: it is directed towards different aims, and responds to different problems in different practices. Within the broader context of governance as opposed to the narrower concept of government the EU's aim to increase political legitimacy through more output directed rather than input conceptions of legitimacy, resembles a broader trend.

3.3 Critique of Good Governance Within public Administration and Administrative Law

The fields of public administration and administrative law are concerned with good governance in relation to the legitimacy of their service delivery to citizens. The conceptions of legitimacy employed in this field are diverging and often in contradiction. Not only the meaning of good governance itself but also its added value can thereby be contested. A better understanding of good governance within the context of public administration and administrative law requires knowledge of the aim towards which the concept is directed. As stated, this aim lies in constructing, establishing, and enhancing the legitimacy of public institutions, or of administrative procedures absent such institutions. Legitimacy comes in many forms and can be achieved in different ways. Democratic inputs, responsiveness, efficiency, and transparency all increase the legitimacy of public administrations. However, as argued the aim of legitimacy can be diverse and contradictory. Input and output conceptions of legitimacy can clash just as efficient service delivery not necessarily benefits from responsiveness. Democratic and rule-based legitimacy can undermine each other as the former relies on representative structures and the formulation of a general will whereas the latter on rational analysis within professional bureaucracies.[45] Moreover, underneath the enhancement of a certain type of legitimacy lies a political choice. Most clearly in the White Paper on governance the European Commission's strategy is to further types of legitimacy other than democratic legitimacy. This 'choice' of aims has been criticised at the EU level as furthering technocracy and corporatism at the expense of democracy (Eriksen, 2001). Furthermore, the very choice itself is depoliticized by administrative law's procedural approach. The variety in forms of legitimacy overcrowds the good governance discourse in administrative law in absence of explicit justification of different types of legitimacy. Thereby the guidelines and interpretations that good governance offers within the administrative context remain indeterminate as to the goal they serve. The 'good' of good governance is unclear.

This indeterminacy is best understood through three types of uncertainty. Firstly, as stated, there is uncertainty about the aims of good governance and about the reasons these aims are advanced. Secondly, there is uncertainty about the relations between different components of good governance. These components can be in contradiction but, moreover, so can their underlying types of legitimacy be. Thus, procedures can exist that successfully

[45] See Bevir (2010, pp. 34–109) for analysis of this shift from moral and political values towards theories of rationality in legitimizing bureaucracies. In general, the process of legitimizing is increasingly directed at bureaucratic officials through benchmarks, standards, and indicators rather than through politicians through appeals of moral and political values of representative democracy.

implement good governance principles while these procedures do not achieve good governance in practice. This leads up to the third uncertainty namely the practical implementation and guidance of good governance principles. As good governance principles can reinforce and contradict each other there is uncertainty as to what good governance entails in practice. Within administrative law and public administration good governance can justify wide-ranging practices based on different types of legitimacy. These types of legitimacy themselves are often contradictory. Therefore, it remains indeterminate what constitutes good governance as its use within administrative law and public administration can justify diverging, opposing, and contradictory practices as 'good'.

4. Business Administration and Corporate Governance

Debates concerning corporate governance within the discipline of business administration constitute a private sectors perspective on good governance. Corporate governance thus does not directly deal with issues of political authority or public governance. In the discourse from business administration good governance is interpreted differently than in those more closely tied to political institutions and public policy-making. Analysis of good governance within this private sector discourse is warranted because corporations are increasingly powerful governance actors in civil society through networks, markets, partnerships, and self-regulatory initiatives. Moreover, corporations constitute the economic backbone of free-market economies. Therefore, corporations not only influence the capability of public institutions to achieve good governance but also are governance actors themselves and thereby relevant subjects of good governance discourses. This section is primarily concerned with how good governance is defined within business administration.

The meaning of good governance within business administration is ambiguous. Two clarifying distinctions can be made from the onset. Firstly, there is a difference between the inward perspective of good corporate governance and the outward perspective of corporate social responsibility (CSR). Below both perspectives will be briefly explored. Secondly, within both perspectives one can distinguish between principles of good governance established externally, i.e. outside of corporations, and corporate principles drafted and implemented from within the business community itself. More generally, good corporate governance is often mediated or controlled by states through corporate law, non-governmental organizations, and the larger public, including media outlets.

4.1 Codes of Good Governance

Within business administration the dominant interpretation of good governance refers to the manner in which corporate boards govern their business in relationships to shareholders. Since the 1992 publication of the Cadbury Report[46] on the financial aspects of corporate governance in the United Kingdom multiple western governments started implemented codes of corporate governance.[47] These codes regulate the internal structure of corporate governance and are issued by either government, stock exchanges, or associations of directors, investors, professional, or managers (Aguilera & Cuervo-Cazurra, 2004, p. 423). In cases where national legislatures did not adopt such codes, private initiatives flourished within the corporate sector establishing codes of good governance protecting the interests of investors and shareholders. Detailed studies by Aguilera and Cuervo-Cazurra (2004, 2009) analyse the content of these good governance codes. Semantically these codes deal with 'good governance', however the governance they encompass is directed at a "set of norms that regulate the behaviour and structure of the board of directors" (Cuervo-Cazurra, 2002, p. 84). Corporate good governance is primarily concerned with the manner in which corporations are managed. The positions of investors and shareholders are central as their interests warrant protection from board authority. Aguilera and Cuervo-Cazurra (2009) argue that the two main purposes of codes of good governance in business administration both impose checks and balances on a corporation's internal governance structure. The first purpose is to improve the governance of a company's board and the second to increase the accountability of that board to its owners, i.e. shareholders. Therefore, these conceptions of good governance might be relevant in the context of corporate sustainability, i.e. sustaining a corporation into the future, but not necessarily for the purposes of this research as good corporate governance does not directly relate to the outward, social, effects and relations of corporations but rather concern the responsibilities of board to shareholders.

In contexts where corporations are governed by codes of good (corporate) governance through national legislation, their implementation relies to a large extent on enforced self-regulation governed by non-majoritarian institutions such as financial watchdogs. Governance codes substantively define the standards corporate actors should abide by. In contexts absent legal codes of good (corporate) governance, or where such codes are deemed insufficient, corporations embark on the voluntary implementation good corporate governance principles internally. International organisations provide guidance in this process (Aguilera & Cuervo-Cazurra, 2004). A

[46] http://www.ecgi.org/codes/documents/cadbury.pdf

[47] For an overview of different corporate governance codes see http://www.ecgi.org/codes/all_codes.php

leading tool are the OECD principles of good governance. According to the OECD these principles are "a means to create market confidence and business integrity, which in turn is essential for companies that need access to equity capital for long term investment" (OECD, 2015, p. 3). The principles are intended to assist both policy-makers in developing corporate governance codes that improve the internal governance structure of companies and corporations directly seeking to implement or standardise corporate governance through best practices. Thus, much in the same manner in which principles of good governance within administrative law serve to regulate public authority, good corporate governance serves to regulate the conduct of the boards of corporations. Substantively the principles resemble those of administrative law albeit directed at private actors and often include the protection of shareholder rights, integrity of the board, the disclosure of financial information, and accountability and responsibility mechanisms for individual actions to shareholders (Tricker, 1984, pp. 6–7).

4.2 Corporate Social Responsibility

The inward perspective of good corporate governance is of only limited relevance in conceptualising good governance because it concerns the specific practice of corporations' internal governance. In other words, it primarily concerns the managerial level of corporations' internal governing structure and responsibilities of its directors vis-à-vis its owners. The societal power of corporations, however, warrants them relevant subjects for broader social duties and thereby to more expansive discourses on good governance (Garriga & Melé, 2004). And in a time when societal governance mechanisms become increasingly horizontal and reliant on market and networked actors, conceptions of good governance must be developed to guide corporate actors' conduct and their effects on the larger society they are part of, contribute to, or negatively impact. The business community, often under pressure of the larger public, has taken up this challenge in the discourse on CSR. While not directly related to formal policy-making, CSR intends to regulate the external effects corporate conduct has on society. The concept of CSR will be introduced here shortly. Additional assessment concerning different CSR practices is taken on in Part II. The current introduction will therefore be conceptual only.

CSR is a widely diverse self-regulatory and soft mechanism whereby the private sector seeks to regulate the impact of corporate conduct on society. Comprehensive studies of CSR generally conclude that while many different proposals have been made as to the content of CSR, there is no commonly shared definition (Carroll, 1999; Dahlsrud, 2008; P. Jackson & Hawker, 2001). Generally, CSR covers five dimensions: the natural environment, the social impact of corporate conduct, the economic contribution of corporations, identification and incorporation of stakeholders, and the voluntariness of

rules (Dahlsrud, 2008). Of these dimensions the aspect of voluntariness is the most prevailing. As Carroll (1999) shows, from its inception in the 1950's CSR has emphasized its voluntary nature as essential (Walton, 1967, p. 18). CSR stipulates actions and intentions of corporations, or of what other governance actors such as the OECD expect, that are not prescribed by hard law (OECD, 2015; Vogel, 2008). CSR is therefore most commonly defined as 'going beyond what is legally required'. Consequently, there is no unified conception of the other dimensions of CSR and what they entail as their denomination falls on the discretion of corporations. Given the soft-law and self-regulatory nature of CSR, substantiations of, for instance, the social aspect are often made in reference to international soft-law initiatives such as the OECD Guidelines for Multinational Enterprises. These guidelines specify that corporations should aim to contribute to the economic, environmental, and social progress of the societies in which they operate. To do so corporations are encouraged to disclose information pertaining to their financial results and social impacts including working conditions, corruption, human rights impacts through codes of conducts and reporting (OECD, 2011). Such initiatives offer guidance to corporations to integrate societal concerns into their business conduct. In general, the content of CSR initiatives resembles accepted international standards concerning working conditions such as the ILO core principles, environmental impacts, and corporate transparency (Jackson, 2010, p. 69; Vogel, 2010, pp. 67–69).[48]

4.3 Critique of CSR as a Conception of Good Governance

The voluntary nature of CSR has left its content underspecified. Beyond the general direction of CSR to assess the impact of corporate conduct on economic, environmental, and social processes it does not contain prescriptive or evaluative standards or principles. As informative of good governance CSR thereby fails to contribute meaningful content beyond a general willingness of corporate actors to consider their societal contributions on the basis of voluntariness. CSR offers no substantive conception of good governance. As Brammer et. al. (2012, p. 4) note, through CSR corporations have sought to develop mechanisms to be more socially responsible but it is "fair to say that the literature on CSR (…) has neglected the societal aspects". The primary concern in CSR literature, largely published within business and management journals, is the relationship between socially responsible conduct and corporate financial gains. While the question whether it is morally good if a corporate actor does the right thing for instrumental reasons is interesting it is not to be answered here. That this relationship dominates much of the literature exemplifies the voluntary nature of CSR (Aguilera & Cuervo-Cazurra, 2004). Studying the monetary relationship between CSR and corporate performance

[48] See Chapter 5, section 3.2.2. at p. 155 for a more extensive discussion on CSR.

is however, important and will be discussed in Chapter 7. On top of this the literature has "treated the 'social' element as a black box" (Brammer et. al., 2012, p. 4). In constructing a conception of good governance, CSR initiatives and mechanisms are a good test in practice[49] but of limited insight in developing a broader conception of good governance given that it leaves precisely those aspects of governance that correspond to the 'good' blank or its determination to the discretion of corporate actors. In practice CSR takes the form of codes of conduct, non-financial disclosures, and other forms of social reporting. In these codes and reports corporations make public the standards it holds itself by, or aspires to do so. The substance of these efforts is relatively sparsely specified. Therefore, the most prevailing critique of CSR is that it purports to window-dressing rather than assessable improvements of corporate conduct. Its voluntary nature leaves great discretion to corporations to appear as socially responsible without substantively improving it. CSR can constitute a strategy for legitimation and justification without substantially improving the impact of corporations on societies.[50] Corporations however do open themselves up to increased reputational accountability by making public the standards they aspire to abide by. Their assessment is, however, ad-hoc and not subject to legal sanction. Beyond this willingness of corporate actors to consider corporate responsibilities they might bear, CSR does not offer a substantive conception of good governance.

5. Indeterminacy and Contradiction in Good Governance Principles

Across disciplines and practice good governance means and aims at many things. Retrieving the substantive meaning and productive aim of the concept, as we have seen, is difficult given the wide variety of conceptions available and often superficial substantiation of their content. There might even be multiple reasons why an overarching definition of good governance is futile given the wide variety of practices the concept is applied to. It is, however, clear that good governance seeks to guide the actions of governments, policy-makers, corporations, NGOs, financial institutions and a wide range of other governance actors. Moreover, the concept intends to do so towards an aim describing the good that governance strives for or as standard of evaluating governance. A brief overview of principles that the very diverging

[49] Part II at p. 125.

[50] More recently one can witness a move away from social reporting towards the formulation of how corporations core business contributes to societal values. For instance, Facebook frames its core business as contributing to global connectivity and social interaction rather than publishing reports on the societal impact of their business model: personalised advertising.

conceptions of good governance share, their common principles, can shed light on the ends towards which good governance intends to lead. These 'common principles' are not presented as a definitive list of good governance principles nor as a final definition of good governance. Rather the common principles constitute the basis of understanding good governance itself, its aims, and its problems. Across disciplines, discourses, and practices good governance requires participation, efficiency and effectiveness, transparency, accountability, the rule of law, and inclusiveness. However, the same objections made to conceptions of good governance within separate academic disciplines can be made to such broad overarching components boiling down to the question what they mean and require substantively and towards what aim they are directed. Formulated differently: it remains unclear what is good about good governance. With the previous sections in hand we can attempt to further define these components, their proper role, and aim:

- *Participation.* Interpretations of participation as principle of good governance differ in range, i.e. who participates, and in legitimization, i.e. towards what purpose do they participate. In political definitions participation refers mainly to different forms of democracy. This ranges from prescribing a liberal democratic model of representation through election to deliberative networked democracy. In other definitions a principle of participation requires only the participation of those with financial stakes in policy-making, for instance shareholders, or the participation of all those who are affected by policies or conduct by governance actors, for instance all stakeholders. Participation often functions to legitimize governance mechanisms. The type of legitimacy participation promotes differs across conceptions. Within the development discourse democratic legitimacy is promoted through elections while the European Commission's White Paper on Governance employs participation towards improving the outputs of policy processes, enhancing procedural legitimacy.
- *Effectiveness and Efficiency.* As principles of good governance effectiveness and efficiency are incorporated in all conceptions. Whether political or economic, national or global, internal or external, good governance is agreed upon to require the effective and efficient drafting, implementation, and execution of policies. The relative weight that is given to these components differs across conceptions. It is thereby indeterminatrinciples. Generally speaking, it is clear that both effectiveness and efficiency focus on the output of policy processes and are measured by outcomes.

- *Accountability.* A principle of accountability is present in good governance conceptions operating from both the perspectives of public institutions and of private actors. Within both perspectives accountability is included as primary tool to clarify the governance roles of actors. It serves to establish both who is responsible for what, from the perspective dominant in public administration and corporate good governance, and who is responsible to whom, from the external perspective dominant in international relations (Addink, 2010, 2013). The construction of clear governance roles and accountability mechanisms in turn puts important checks on governance processes. The type of accountability most appropriate within conceptions of good governance is rarely made explicit. In other words, accountability is included in most, if not all, conceptions of good governance, but what types of accountability are advanced and how these are to be implemented is left open. This is arguably caused by the more general problem of accountability in light of the shifts governance signifies.[51]
- *Transparency.* Arguably in direct relation to the principles of accountability, transparency is crucial in all discussions on good governance primarily because it is assumed to reinforce other aspects. Transparency serves participation by empowering civil society actors through information disclosures, just as accountability is directly served by the information available about governance processes. Beyond political processes, transparency increases the competitiveness of markets and thereby increases efficiency and cost-effectiveness. Especially in the CSR literature good governance is primarily taken to require disclosing non-financial impacts of corporate conduct. However, besides the positive role that transparency plays towards achieving good governance it is indeterminate what is covered by a principle of transparency, i.e. what should be transparent. For instance, it is widely acknowledged that policy-making requires a level of secrecy just as it is generally accepted that more information does not necessary lead to improved accountability (Etzioni, 2010; Roberts, 2012).
- *The Rule of Law.* Within the context of good governance, a principle of the rule of law generally refers to the basic principles of equality before the law and an independent judiciary. On the one hand these constitute the very basics of good government as one that respects the rights of individuals and is itself subject to duties enforced by a judiciary. On the other hand, the rule of law has an instrumental function by establishing the predictability of rule-making and legal decision-making required for both civil society and an open economy to flourish.

[51] See Chapter 2, section 3 at p. 33.

- *Human Rights.* While not present in all definitions of good governance, within those conceptions that do make an appeal to them, human rights serve primarily as a universal 'rule of law'. In the public and political perspectives these are the rights that the state must respect and protect for its governance to be good. In the private governance and corporate perspectives, especially within CSR documents, human rights constitute a threshold that private agency cannot actively interfere with. As such human rights can be seen as a threshold of minimally good governance.

The common principles of good governance paint a general albeit complex picture. The great generality and malleability of its components gives good governance the feel of a "shopping list" out of which one can pick those ingredients necessary to justify the policy or action a governance actor intends to develop (Botchway, 2000, p. 161). The principles that comprise good governance are indeterminate, biased towards outputs, and contradictory. These three elements problematize achieving good governance. They will be discussed here before proposing an approach to construct good governance that ameliorates them. It will be argued that good governance lacks a normative grounding of the good it strives for. An approach is proposed to construct such normative grounding. This approach concerns a procedural argument towards constructing the normative grounding of the good. The proposed procedure bases itself on Rawlsian liberal neutrality and the wide applicability of good governance.

Indeterminacies in the translation of good governance principles to practice constitute the first element. Do principles of good governance apply to procedures and processes of policy-making or to policy outcomes and achievements? Is the aim of good governance to achieve efficient governance in a specific context or democratic and responsive governance? Or either of these in different contexts? Good governance principles are subject to many interpretations and all are consistent with the generality of the overarching concept. Consequently, both on the level of conceptualisation and practical implementation indeterminacy exists as to what good governance requires. Its components are multi-interpretable and can serve diverging purposes. Responsiveness can refer to democratic legitimacy, output-centred accountability, or corporatist civil society engagement. Arguably these different forms of responsive governance are apt to achieve good governance in different contexts. The generality of the concept itself, however, does not aid in answering such questions. This indeterminacy can be ascribed to two aspects of policy implementation itself: (1) the wide range of practices to which good governance is to apply and (2) a need to circumvent value-laden and foundational debate. Both will be shortly assessed.

Firstly, good governance is applied to a wide variety of practices while incorporating similar components. What these components mean in diverging contexts and practices necessarily differs. For instance, what is efficient in one place can be counterproductive in other places: efficiency in political decision-making entails different measures, for instance a degree of secrecy, than efficiency in market transactions, in which transparency aid efficiency. Moreover, the aims or desired outcomes of good governance conceptions differ across practices and are only rarely singular. Within international development abiding by good governance principles seeks to achieve democratic state institutions, an open global economy, and controls on corruption. It is unsurprising that achieving any of these aims requires vastly different policies to be implemented while referring to the same principles of good governance. One explanation of the indeterminacy of good governance principles thus is that it is impossible to determine what good governance principles, whatever they may be, entail given the wide variety of contexts its principles are applied to and towards the aims to be achieved. Or even whether principles are the proper form to cast good governance in. the meaning changes depending on the actors that implement it.

Secondly, good governance is a heavily value-laden concept which aids to its indeterminacy in both academic and policy discussions beyond the process of practical implementation (Botchway, 2000). It can therefore be argued that the search for definitions and clearly defined aims of good governance is futile. Interpretations and definitions of good governance bring to the fore or inject its principles with normative subject-matter. The general orientation of good governance appears to circumvent such foundational issues by leaving normative contestation to debates of practical implementation. These foundational issues are rarely directly analysed or assessed with normative arguments. Generality avoids such arguments, contributing to a superficial acceptance of the discourse but not to clarity on its aims and the manner in which to achieve them. Responsive governance, for instance, is not necessarily liberal democratic but can, when applied to different practices, be tailored to local or context-specific circumstances and value-systems. Foundational controversies are depoliticized and transformed to issues of practical implementation in specific policy contexts. All this, it can be argued, aids the general acceptance of the good governance paradigm.

The second element concerns the implicit bias of conceptions of good governance towards specific types of conduct. That good governance is a value-laden concept is uncontested but which values good governance advances is unclear. As discussed above, such debate is understood to be bypassed in order to accommodate different value-systems and normative justifications. This circumvention, however, has covered foundational issues concerning the value-system that good governance proposed in fog (Abrahamsen,

2000, p. 139). The normative justifications of and values advanced by good governance are influenced by the political background from which it rose. As indicated in the analysis of the development discourse, good governance rose to prominence after the Cold War. In the decades after, western states, and under their influence many international institutions, adopted conceptions of good governance. Moreover, western corporations are dominant in private governance perspectives of good governance (Aguilera & Cuervo-Cazurra, 2004) shaping the content of, for instance, their CSR policies according to governance frameworks they are familiar with. Conceptions of good governance's have an implicit bias towards output conceptions of legitimacy. "Good governance (…) has clearly shifted the interest away from the 'input' side of the political system to the 'output' side of the political system" (Rothstein, 2012, p. 11).

Apart from indeterminacy and an implicit bias in good governance, the third element concerns the contradictory nature of components of good governance conceptions, or the common principles as listed above. As Esty (2006, p. 1523) notes, "elements of good governance will at times be mutually supporting and at other times be in tension". Good governance principles, even in their most general form, cannot be fully met simultaneously. For instance, participation in policy-making can counteract efforts to increase efficiency. In similar ways can accountability in certain circumstances increase effectiveness while limiting efficiency given increased checks and balances accountability requires. Not all governance actors have both the capabilities and the resources to engage in this process. Contradiction between principles is not necessarily troublesome nor is it unexpected. Concepts covering a wide range of contexts and fields, such as good governance, always contain contradictory elements. Prescribing principles to a practice as broad as 'governance' is necessarily contradictory and trade-offs must always be made just as different interests must be balanced. The combination of these contradictions with the indeterminacy and implicit bias to outcomes becomes troublesome as it limits the guidance good governance can offer in making such trade-offs or in balancing different components and underlying interests. Adherence to good governance principles runs the risk of becoming a benign effort with little practical consequences.

The level of generality and internal conflict circumvents arguments relating to the substantive side of good governance principles and their aims. While arguably aiding the general acceptance of the good governance paradigm, indeterminacy and contradiction undermines clarity on the manner in which policy-makers and governance actors can achieve good governance. The very goal of good governance is thereby under threat: to guide action and evaluate policies towards a normatively justified 'good'. The final section of this chapter will introduce two suggestions from the literature towards

a solution. It will be argued that good governance should be approached as an inherently normative concept. This normative conception of good governance can evaluate the propriety of and ultimately prescribe processes of governance.

6. Towards a New Conception of Good Governance

The previous section argued that the indeterminacy and contradictions inherent to good governance conceptions undermine the capability of the concept to guide the action of governance actors. A reconstruction of good governance in order to reinforce its capacity to guide action must engage on an abstract level with identifying the necessary components of an action-guiding conception of good governance. Such reconstruction has to do so without undermining the general acceptance of the concept nor its wide applicability. Distinguishing between normative and practical action-guidance is helpful in outlining requirements to revitalize good governance. The latter, practical action-guidance, prescribes context-specific courses of action. To a great extent practical action-guidance is thus concerned with issues of practical implementation and specific policy-making that differs across the contexts in which good governance is to be achieved. The former, normative action-guidance, is concerned with the abstract, moral, justification and prescription of courses of action. In the case of good governance, it is this normative grounding that prescribes the 'good' of good governance independent of the practical implications. In achieving normative action-guidance of good governance it is therefore necessary to assess this moral component. This moral component should constitute what the good is that good governance prescribes beyond, or above, practical and context specific circumstances.

Clarity is crucial during the very first steps of conceptualising a novel conception of good governance. It is therefore necessary to set out the contours of the proposed conception of good governance before assessing the cases from which the substantive conception of good governance will be distilled. It is necessary to, firstly, provide good governance with a normative grounding that firmly constitutes what the good is on a normative albeit general level. Secondly, this normative conception must be sufficiently broad to be applicable to a wide range of practices and contexts while simultaneously specific enough to demarcate the clear boundaries of good governance cannot be achieved. This section will elaborate on how these two elements are, firstly, reflected in the current literature and, secondly, how they translate into requirements for a conception of good governance. These two elements are procedural rather than substantive meaning that they construct the necessary requirements a procedure to conceptualise the normative

ground of good governance should adhere to. These requirements are picked up in the next chapter where the substantive normative grounding of good governance is argued for based on social sustainability and human rights.

Good governance has a strong normative component (Addink, 2013). According to Rothstein (2012, p. 11), the "first requirement for a definition of good governance is thus that it is based in a normative theory that gives some orientation for what should be regarded as 'good'". Good governance proposes to be a concept for the evaluation and prescription of policy-making according to an external normative standard or theory. The first step of a good governance conception thus must be to argue for a conception of the good in relation to policy-making. Existing conceptions of good governance are implicitly based in a normative theory as demonstrated by its conceptual history in international relations. Many of the critics of the good governance paradigm across different disciplines contest this normative component of good governance. Most critique is levelled against the economic outlook and consequentialism, contradictory components, and focus on measurable outcomes (Eriksen, 2001; Hazenberg, 2015). However different governance mechanisms, such as markets, hierarchies, and networks are not "intrinsically 'good' or 'bad'" (Rhodes, 1997, p. 47). But the current good governance paradigm is not neutral towards a conception of the good or specific types of governance. The focus on outcomes, effectiveness, and efficiency demonstrated this. This focus, however, remains wanting in terms of a normative justification.

The normative grounding of good governance to be conceptualised should lie outside of specific governance structures or processes. A normative grounding of good governance that seeks to tackle the issues of indeterminacy and contradiction must in its conceptualisation be liberally neutral and applicable to a wide range of contexts as good governance "will vary depending on the policy-setting" (Esty, 2006, p. 1523). Liberally neutral here means that the process through which a conception of the good that can ground good governance should not favour a specific type of practice, whether it be the good life or good government, but assign to all actors, individuals or corporations, the most extensive freedom to determine their good compatible with everyone enjoying equal freedom (Rawls, 1993). It must be noted that this liberal neutrality is not part of the substantive conception of the good grounding good governance. Rather it is a procedural requirement to be adhered in order to accommodate a wide-range of worldviews in the conceptualisation of the normative ground of good governance. The process through which the good is argued for requires this liberal neutrality to provide action-guidance to a wide range of practices and worldviews. As will be argued for in Chapter 4 the substantive content of the good argued for quite significantly limits negative liberty and thereby 'most extensive

freedom'. However, only through such liberally neutral external normative grounding can a 'good' balance be struck in evaluating governance processes.

Good governance's wide applicability must inform the procedure through which the concept is normatively grounded. This has two implications. Firstly, the normative grounding of good governance cannot be overly extensive as to exclude a wide range of governance practices from its action-guiding prescriptions. The normative grounding must simultaneously accommodate a wide range of practices and be general enough as to incorporate context-specific circumstances into the equation. The 'good' that normatively grounds good governance should not prescribe a single governance structure for all contexts. Secondly, good governance cannot be an end-all concept that prescribes in specific how governance should be executed. In relation to the objection of contradiction it was already shown that the very general conceptions of good governance of present conceptions can, and at times do, conflict. Good governance should rather be conceived as a "limitation of essentials" that can accommodate unforeseen consequences of governance mechanisms (Botchway, 2000). Such a limitation of essentials requires cutting as many unnecessary, indeterminate, and contradictory components and principles as possible. Since good governance's prescription will and must ultimately be context specific its application and eventual outcome will differ across disciplines and practical contexts. Thus, even with a stronger normative grounding constructed through a liberally neutral procedure the outcome of good governance's policy prescriptions and evaluation will diverge across policy contexts: from the private governance of financial markets to the public governance of water provision. Given the wide variety of practices that good governance is applied to it appears to be more appropriate to search for limiting factors and a threshold in thinking about what constitutes good governance. That way a normatively grounded threshold can be established what good governance aims for and through which governance can be evaluated. This normative grounding evaluates and prescribes governance for it to be called good irrespective of practice, discipline, and broader governance context. This normative grounding does not directly make good governance more determinate in its principles or translation to practice. It does, however, offer a moral justification of the good it strives to achieve. Such a grounding directly aids the translation of good governance into practice by providing a practice-independent action guiding standard. In relation to the other elements problematizing good governance a normative grounding ameliorates the bias towards outputs since the normative grounding is not based in practice and aids overcoming contradictions by grounding components of good governance in a single conception of what is good about good governance.

In order to conceptualise such a practice-independent conception of good governance this thesis will proceed by constructing the normative grounding of good governance based on the concept of social sustainability and basic human rights.

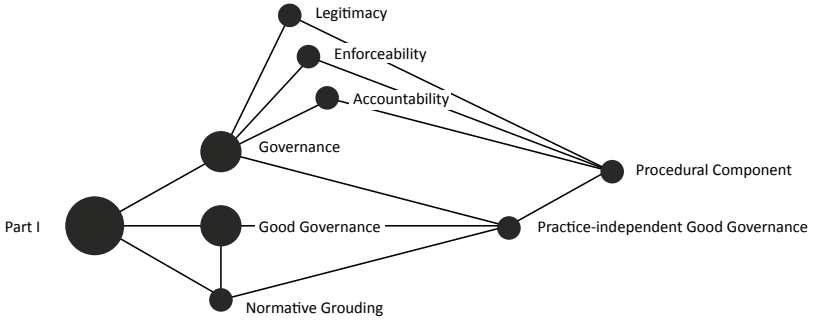

Figure 7 *Argumentive Structure Chapter 3*

4 SOCIAL SUSTAINABILITY AND HUMAN RIGHTS

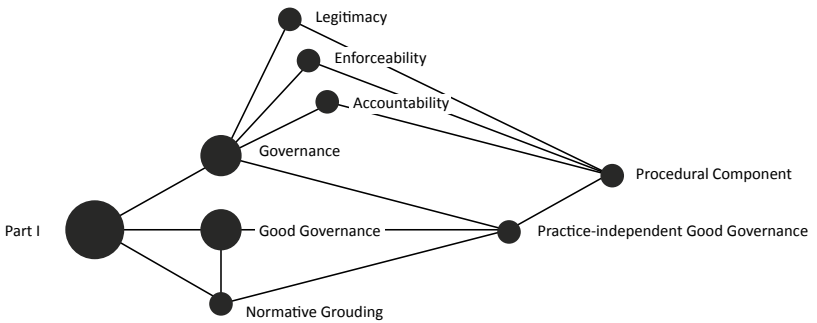

Figure 8 *Overview Chapter 4*

1. Introduction: Social Sustainability as Normative Grounding?

The previous chapter concluded that good governance's lack of normative grounding undermined its action-guidance. Absent justification of the good that the concept promotes its prescriptions and evaluations remain indeterminate, biased towards outcomes, and contradictory. This chapter will argue for the normative grounding of good governance in social sustainability interpreted through basic human rights. Such normative grounding of good governance must be constructed through a liberally neutral procedure and be expansive enough to accommodate the wide range of practices that good governance is applied to. In constructing such a conception of good governance a limitation of essentials was proposed. This limitation of essentials serves both the applicability to a wide range of practices and of developing a normative threshold for governance to be good. This normative grounding should not, however, be theorized from isolation. As good governance is a prescriptive and evaluative concept of different modes of policy formulation, implementation, and adherence, its normative grounding should be oriented towards policy goals and application in practice.[52] This chapter will argue for social sustainability as goal of good governance and, consequently, ground good governance in the proposed normative justification of this goal. In doing so it will draw on both international practices and discourses on sustainability, sustainable development, human rights, and their critical analysis.

Looking at international practice the rise of sustainability and sustainable development as the leading paradigm in which societal goal are cast can be witnessed. Over the last three decades sustainability and sustainable development have risen to prominence as the commonly accepted ideal that policy, development, and innovation should strive to achieve. From international development to local implementation strategies and private sector initiatives, actors increasingly cast their goals in terms of sustainability. In conceptualising good governance towards the realisation of social sustainability it is therefore crucial to gain a general understanding of sustainability and sustainable development. Prior to constructing the normative ground of good governance it should be clarified that the requirement of liberal neutrality necessitates engaging in public interest formation. Here it is held that the most basic public interests can be formulated from both theory and international practice. More expansive substantiations of public interests are generally accepted to require some form of public participation, representation, and/or deliberation (Held, 2006). The basic

[52] For a philosophical justification of a practice-dependent perspective see Sangiovanni (2008) and James (2012). More generally it can be argued that in political theory the relevance of practice is often neglected (Robeyns, 2008).

public interests this thesis refers to are goals and standards that enjoy wide moral justification in theory and are generally accepted in both domestic and international practice. It is assumed that the substance of these public interests is relatively uncontroversial and therefore do not require extensive justification or active public interest formation.

This chapter proceeds in two sections. In order to better situate a concern for social sustainability its roots in the more expansive concepts of sustainability and sustainable development are studied. The next section is therefore devoted to a discourse analysis of sustainability and sustainable development. It will argue that sustainability has a clear triune nature that integrates environmental, social, and economic concerns. The social component of sustainability, i.e. social sustainability, is, however, underrepresented in this discourse and thereby lacks generally accepted substance. This underrepresented position will be briefly discussed. The discourse analysis of the first section concludes that in order to be informative of the good of governance social sustainability requires further substantiation.

The second section sets itself this task of substantiating the social component of sustainability as normative ground of good governance. Social sustainability is interpreted in terms of basic human needs and interests that require acknowledgement and protection within governance contexts. Human rights are proposed as the proper framework to substantiate the social component. Human rights, however, exist in many forms and in legal practice statism concerning duties and responsibilities for human rights dominates. Consequently, the traditional legal interpretation and practice of human rights might conflict with the wide applicability of good governance. Therefore, a conception of human rights based on both legal practice and moral constructivism is proposed. It will be argued that this conception can mitigate the strict requirements of legal human rights concerning the distribution of duties associated with claim rights. It thereby simultaneously expands the legitimate application of human rights to the broader context of governance. This conception is furthermore contrasted with other dominant human rights theories: the legal doctrine of horizontal effect, natural rights theory, the entitlements approach, and the capability approach. Ultimately the proposed conception of human rights is brought back to the sustainable development discourse and its relation to one crucial component of sustainability: the interests of future generations. As such this chapter sets out to dissect what sustainability requires and ultimately proposes a novel interpretation of social sustainability as relevant action-guiding normative ground of good governance. Finally, this chapter thus establishes a normative component, beyond the procedural one, of practice-independent conception of good governance.

2. Sustainability: A Discourse Analysis

Understanding social sustainability requires basic knowledge of the discourse on sustainability and sustainable development. Therefore, this section engages in a limited discourse analysis. Sustainability and sustainable development, two concepts deemed to be political buzzwords, contradictions (Sneddon, Howarth, & Norgaard, 2006), and oxymoron (Redclift, 2005) have proven to be extraordinarily potent in academic literature and policy documents.[53] Sustainable development is here taken to include the concept of sustainability and the terms are used interchangeably (Waas, Hugé, Verbruggen, & Wright, 2011, p. 1639).[54] They often constitute the terminology in which policy goals are cast. Great diversity exists in the ways in which meaning is attached to these two terms and their use. Given that the present discourse analysis is limited breadth it does not seek to compile definitions of these concepts (Fowke & Prasad, 1996; Pezzey, 1992a, 1992b). Instead it builds on existing literature, examining the state of the art and offering a critical but constructive argument to, ultimately, further substantiate social sustainability. The critical elements, unsurprisingly, focus on the lack of clarity and definitional vagueness of sustainability and sustainable development. The constructive elements base themselves on the dominance of sustainable development in international practice.

Here, sustainability and sustainable development are interpreted as contested concepts (Connelly, 2007; Dryzek, 2013; Jacobs, 1999). Their contested nature stems from the observation[55] that the academic discourse on sustainability offers a wide range of interpretations, definitions, and contestations regarding the concept. Contested concepts have two levels of 'meaning' and the distinction between these two levels is helpful in making sense of the sustainable development discourse (Gallie, 1956; Jacobs, 1999). First level meanings are necessarily broad and vague but encompass all elements constitutive of the concept. Second level meanings are interpretations, understandings and ultimately contestations of the first level meaning. Gallie (1956) illustrates the difference between first and second level meaning through a discussion of the concept 'democracy'. On the first level, according to him, there is acceptance that democracy represents a form of government in which the people operate as sovereign and exercise control

[53] A literature search on Google Scholar (excluding patents and citations) for the term 'sustainable development' in the title yields 1.310 results for the period between 1982-1993 while the period between 2004-2015 yields 19.100 results. Similar increases in academic output are seen in searches for 'sustainable' (from 3.030 to 48.700 results over the same period) and 'sustainability' (from 875 to a staggering 37.900 results over that period).

[54] Though according to some sustainability is either narrower (Barnes & Hoerber, 2013a) or broader (Pezzey, 1992a).

[55] Rather than from normative argument (Connelly, 2007).

over the executive and legislative branch. On the second level contestation takes place regarding the substantive meaning of the concept: what does it mean for a people to be sovereign and in what way should control be exercised? Does one, for instance, favour a deliberative, participatory or direct ideal of democracy? Contestation is thereby taken to refer to the meaningful and substantive debate concerning the proper meaning and implications of concepts.

2.1 First Level Meaning: The Environmental, Economic and Social Component

The origins of concepts can often be traced back further than one envisaged. Some trace sustainability's emergence back to the use of Sustainable Maximum Yield in American fisheries in the 1930's (M. Graham, 1935; Mebratu, 1998). Others (Grober, 2012) go further back by claiming the concept was already present in 1713 when German nobleman Hans Carl von Carlowitz wrote on 'sustainability' in relation to yields.[56] Moreover, as early as 1992 Pezzey (1992b) collected sixty separate and often contradictory definitions of sustainability and sustainable development. Given the sheer increase in academic publications within the sustainability discourse such an endeavour has become near impossible. Moreover, many authors have tried to elucidate the discourse surrounding sustainability and sustainable development (Hopwood, Mellor, & O'Brien, 2005; Lele, 1991; Meadowcroft, 2000; Mebratu, 1998; Mitlin, 1992; Pezzey, 1992a; Redclift, 1987, 2005; Robinson, 2004). Given that this discourse analysis is instrumental to gaining an understanding of social sustainability it builds upon a limited selection of this existing body of literature. The first level meaning of sustainability will be informed by the highly influential report of the World Commission on the Environment and Development, *Our Common Future (WCED, 1987)*, and the four of the most cited overviews of the discourse published in academic peer-reviewed journals.[57] Together the meta-perspectives of the overviews along

[56] The sentence von Carlowitz uses is "eine continuirliche beständige und nachhal– tende Nutzung". Grober (2012) argues that 'nachhaltig' translates best as 'sustainable' within the context of the book.

[57] Compiling the most cited overviews of a discourse that encompasses disciplines from economics and corporate governance to ecology and international relations is no easy task. Most repositories are indexed according to discipline(s). Given that the sustainability discourse spans multiple disciplines and that certain disciplines reach significantly higher citations than others these repositories are not used. This also explains the focus on overviews of the discourse rather than singular contributions. By 'overview' research that analyses usages, meaning, and practices of sustainability and sustainable development as primary topic are meant. The use of 'sustainability' or 'sustainable' as adjective to, for instance, management, ecology, or urban planning are thereby excluded. Google Scholar citations are used because it offers a cross-disciplinary database that allows for quick assessment of the nature of the literature. Within Google Scholar it is, however, not possible to arrange search results according to citation. The algorithm works

the arguably constitutional document *Our Common Future* constitute sufficient insight to construct the first level meaning.
Most cited overviews of the discourse:

Lele (Lele, 1991)	2135 citations (Google Scholar)
Hopwood et.al (Hopwood et al., 2005)	1282 citations (Google Scholar)
Robinson (Robinson, 2004)	1043 citations (Google Scholar)
Mebratu (Mebratu, 1998)	951 citations (Google Scholar)

At different times and from altering perspectives these authors have analysed sustainable development either as a conceptual history (Mebratu, 1998), an analytical 'mapping of the field' (Hopwood et al., 2005; Lele, 1991), or through a constructive argument (Robinson, 2004). Despite the differences in perspective a triune nature of sustainable development features across disciplines and approaches. This triune nature incorporates three core components: an environmental, economic and social component. Lele (1991, p. 607), though highly critical of the concept, describes sustainable development as an "environmentally sound and socially meaningful form of development". Robinson (2004, p. 381) states that sustainable development "provides a focus for a series of concerns that go to the heart of the interconnected debates over environmental, social and economic conditions." Hopwood et al. (2005, p. 40) note that sustainable development is used, both in general and in their work, "to describe attempts to combine concerns with the environment and socio-economic issues" while Mebratu (1998, p. 493) explicates the interwoven "environmental, economic and social dimensions".

This triune nature is furthermore reflected in *Our Common Future* (WCED, 1987), usually depicted as the start of the modern use of sustainability. Commonly referred to as the Brundtland Report it was produced by The World Commission on the Environment and Development tasked with formulating a "global agenda for change" and headed by former prime minister of Norway Gro Harlem Brundtland (WCED, 1987). The report defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their

along multiple parameters. Therefore, this discourse analysis bases itself on four 'of' the most cites overviews rather than the four most cited. The first is a close approximation, the second cannot be determined with absolute certainty concerning the discourses on sustainability and sustainable development, not through any dataset. Moreover, it is acknowledged that Google Scholar citations are generally inflated. On the whole, they do offer an appropriate tool to start this discourse analysis. The conducted search concerned publication with 'sustainability' or 'sustainable development' within their titles published in academic journals. From the results a qualitative assessment was made according to subject-matter and scope of the publication, i.e. whether they are an overview of the concept and debate or, for instance, applications of the concept to specific subjects.

own needs" (WCED, 1987, p. 43). In this process of meeting the needs of both the present and future generations priority should be given to the present-day worst-off (WCED, 1987, p. 43). Moreover, the report puts forwards that the most stringent threat to the ability of future generations to meet their needs is the status of our natural environment and its continued degradation. This definition still plays a pivotal role in shaping the contours of the sustainability discourse both in- and outside academia. The Brundtland definition thus brought together the three fields of environmentalists, pointing out the environmental limits on growth and the need for conservation; economists, insisting on the need of economic growth, reform, and development; and social activists, advocating primarily poverty relief and inequality. Stressing that the common goal of sustainable development can only be achieved through mutually enforcing efforts forced traditional opposition between these fields to the background. Beyond the seminal report and four of the most cited overviews, other authors define sustainability similarly. For instance, Kemp and Martens (2007, p. 5) define sustainability as providing "for the fundamental needs of humankind in an equitable way without doing violence to the natural systems of life on earth". Pezzoli (1997, p. 549) states that sustainability is an effort "promoting environmentally sound approaches to economic development". Adams (2009, p. 15) interprets sustainability as the acknowledgement that "tight and complex links exist between development, environment, and poverty".

The triune nature of sustainable development constitutes the first level meaning of this concept. First level meanings are unitary but vague. A concern for the environment is reflected in the acknowledgement that the natural basis of both economic growth and social wellbeing is deteriorating, undermining the potential to further growth and wellbeing into the future and the need for conservation strategies. The economic component is reflected by acknowledging the need for economic development in the global South and economic reforms in the North alongside a need for innovation to meet the needs of all while respecting the environment. And the social component is present in concerns for rising inequality within societies, diminishing options to improve individual wellbeing, and the need for institutional protection of group- and individual livelihoods. This first level meaning is often presented through simplified models such as three pillars, three concentric circles, a Venn diagram, or as corners of a triangle that connect the components (Pezzey, 1992a; Rydin, 2008). Moreover, these three components are fundamental to the idea of the 'triple bottom line' (people, planet, profit) influential in CSR debates (Elkington, 2004, p. 3). The next section elucidates the second level meaning regarding these components and shows how there is a striking absence of substantiation regarding the social component and what it entails both theoretically and practically.

2.2 Second Level Meaning: Economy vs. Environment

The widespread general acceptance of sustainability's triune nature is not reflected in second level contestation. Substantive debate and contestation predominantly concerns the environmental and economic components and their relationship. This main line of contestation will be discussed here. Through this analysis, the second level meaning of sustainable development is excavated and will it be shown that the social component requires further substantiation in isolation from the other components.

The main line of contestation concerns the reconciliation of the economic and environmental components. How can sustained economic growth be reconciled with the protection of our natural environment? Prominent publications in the sustainability literature concern the (in)compatibility of environmental and ecological conservation with economic growth (Adams, 2009; Daly, 1990; Redclift, 1987). One the one hand, proponents of the primacy of the environmental component argue that the destruction of nature is a consequence of human actions and our current economic paradigm (Naess, 1989). On the other, proponents of the primacy of sustained economic growth argue that only economic growth can create the material conditions for the innovations and changes necessary to achieve sustainability (Solow, 1993). The positions taken up in contesting the economy-environment link can be placed on a continuum ranging from weak(er) towards strong(er) sustainability (Haughton & Hunter, 1994; Hopwood et al., 2005; Neumayer, 2003; O'Riordan, 1996; C. Williams & Millington, 2004). On the furthest end of strong sustainability one finds those who object to the very idea of sustainable development on the basis of its focus on human well-being, i.e. its anthropocentrism. According to these authors the concept disregards the inherent value of nature outside of catering towards human needs (Naess, 1989; Rees & Roseland, 1991). Proponents of strong sustainability stress the importance of value changes and behavioural adaptation. On the other far end, i.e. weak sustainability, it is argued that sustainable development requires first and foremost economic growth (Daly & Cobb, 1989; Solow, 1993; J. Taylor, 2002). Its proponents argue that the resources necessary to achieve sustainability can only be achieved through increased economic growth and thereby favour the primacy of the economy in sustainability concerns. More generally, on the continuum raging from weak to strong sustainability different answer are given to the question what is to be sustained.

The notion of substitution is crucial to differentiate positions on this continuum (Constanza & Daly, 1992; Neumayer, 2003). Proponents of weaker/weakest sustainability assume that nature is instrumentally valuable through its contribution in providing the means for human development and well-being. Moreover, weak sustainability holds that man-made substitutions can replace natural resources in the quest towards economic growth and sustainable development (Dollar & Kraay, 2002; Solow, 1993). For instance,

man-made nature reserves can substitute unspoiled natural habitats or new ways in which to win drinking water from oceans can substitute the depletion of fresh water supplies on our planet. Proponents of weak(er) sustainability take an optimistic stance towards the human ability to innovate. Consequently, economic growth should not be limited unduly by environmental constraints since economic growth fosters the innovations necessary to meet the needs of a growing population with higher demands. Those on the strong(er) end of the sustainability continuum emphasize the limited carrying capacity of our earth and its incompatibility with our current economic paradigm. Redclift (Redclift, 1987), Daly (Daly, 1990), and Adams (Adams, 2009) all argue that the goal of economic growth is incompatible with 'green development'.[58] Rather sustainability requires a novel conception of what development is, one that is not cast in terms of growth but in terms of conservation and carrying capacity. From the strongest side of this continuum sustainability requires policies benefitting the natural environment itself either because of its own worth or because the human species cannot live without it (Rees, 2008).

Debate between positions on this continuum constitutes the main line of contestation and has dominated the sustainability discourse. For instance, an edited volume on sustainable development by Barnes and Hoerber (2013b), and Redclift's (1987) and Dryzek's (2013) seminal works concern contributions regarding arguments concerning either the economy, the environment or both. This dominance resulted in a relatively subordinated position of the social component's contestation (Agyeman, 2008; Bostrom, 2012; Cuthill, 2010; Dobson, 1999). As Dillard, Dujon, and King (2009, p. 2) state "concerns with environmental and economic sustainability have eclipsed efforts to understand the social aspects of sustainability". Despite the general acceptance and inclusion of the social component on the first level, substantiation and contestation regarding this component rarely transcends the level of lip service. Generally, the social component is taken to relate to what 'meeting needs', as per Brundtland definition, entails. In this regard interpretations range from equity and the distribution of resources between individuals, societies, and generations necessary to achieve it (Jacobs, 1999), economic and social rights (Kemp & Martens, 2007), and participation in decision-making processes (Jacobs, 1999; Robinson, 2004). However, these positions are seldom argued for or challenged as to why these are the proper interpretations of the social component within the general framework of sustainability nor within specific developmental contexts.[59] Moreover, it is left unsubstantiated which distribution of resources best reflects sustainable development, which social and economic rights are to be protected, whose duty it is to do so, what participation in decision-making entails. Furthermore,

[58] See also Goodland (1995) and Constanza and Daly (1992).

[59] One notable exception is the contribution by Amartya Sen (2013) who argues for an interpretation of sustainability in terms of individual liberty and capabilities.

there is considerably little argument regarding what the needs of future generations entail and whether we can contribute to them and if so in what way. This does not constitute a critique towards the environmental and economic components but rather exemplifies the underrepresented position of social concerns in the sustainability discourse.

Within the discourse the social component of sustainability is often employed in a derivative manner; as a reason supporting environmental protection or continued economic growth. The social component is predominantly treated as instrumental to either environmental or economic concerns. The social component is taken to solely concern the natural basis of continued existence while intuitively it requires substantial further steps, not the least of which are defining needs, outlining appropriate institutional approaches towards meeting them, and assessing the environmental consequences of actually meeting these needs. Firstly, from a strong sustainability perspective human well-being, whatever it may entail, is instrumentally substantiated through statements echoing that a concern for the poor derives from environmental considerations because the poor have no choice but to destroy their environment (Dryzek, 2013; WCED, 1987). However, poverty alleviation is an intrinsic good rather than instrumental to environmental protection and should be substantiated as such. Secondly, social concerns are left unsubstantiated, mainly among proponents of weaker sustainability. This often happens through assumptions of trickle-down economics arguing that only increased economic growth can foster poverty alleviation (Dollar & Kraay, 2002; Dryzek, 2013, pp. 155–156), or by, for instance, equating social wellbeing with consumption rates (Beckerman, 1994). In many contributions the social component is conceptualised solely in terms of economic growth. It appears that the assumption that if the economy grows eventually all will benefit is still stubborn in weak conceptions of sustainability.

In cases where the social component is not treated instrumentally or derivatively, it is given substance mainly by reference to existing UN policies. The Millennium Development Goals, the Rio+20 declaration, and more recently the Sustainable Development Goals are frequented in this case. Furthermore, as is the case with the Sustainable Development Goals, goals articulated in these policies can be, and are at times, in contradiction with each other.[60] But it is exemplary that contestation concerning the social component is absent on the second level, arguably undermining the balancing act necessary to achieve sustainability (Christen & Schmidt, 2012, pp. 405–406).

[60] This does not suffice as a critique of the Sustainable Development Goals or the Rio+20 declaration. In the international arena policy-making is assisted by minimal substantiation as leaving sufficient discretion to actors enables the formulation of context specific policies. See p. 93-96 below.

2.3 Understanding the Social Component's Absence

A sustainable society cannot exist without careful consideration of its social aspects. As this thesis central research question concerns the conceptualisation of good governance towards the realisation of social sustainability seeking to understand the source of the social components' subordinated position is a first step towards its substantiation (Agyeman, 2008; Bostrom, 2012; Cuthill, 2010; Dobson, 1999). This section will briefly discuss the aspects at the root of the social components subordinated position in the sustainability discourse. Consequently, it will be argued that the social component requires substantiation in isolation of the environmental and economic component.

A trait nearly all commentators ascribe to sustainable development is the general vagueness surrounding the concept (Jahnke & Nutzinger, 2003; Kemp & Martens, 2007; Mebratu, 1998; Norton & Toman, 1997; Robinson, 2004). The generality of the first level meaning and the lack of agreement on the second level make sustainability flexible and fit for multiple purposes. These ambiguities trace back to *Our Common Future.* For instance, the WCED states that even though there are no clearly identifiable limits on economic growth "those who are more affluent [must] adopt lifestyles within the planet's ecological means" (WCED, 1987, p. 9). Statements in this vein question clarity: if there are no strict limits, how much weight is attributed to the environmental component; does it mean that those living within developing countries can live outside the planet's ecological means; is the denial of strict limits an argument for weak sustainability; or is the idea of the 'planet's ecological means' an argument for stronger environmental protection, potentially at the economy's cost? The ambitious plan to integrate the world's most pressing problems, environmental degradation, economic development and severe poverty, into one concept comes with the cost of vagueness and ambiguity.

Some (Lele, 1991; Redclift, 2005) declare the intellectual bankruptcy of sustainable development due to its unsubstantiated nature and argue for its replacement by more specific commitments. Others perceive it as an oxymoron and a concept that can "be used to promote what may be unsustainable (…)" (Robinson, 2004, p. 374). Such 'cosmetic' sustainability, 'greenwashing', or other occupational strategies are the most vivid example of the troubles vagueness can lead to. Cosmetic sustainability (Robinson, 2004) renders sustainability a hollow adjective without meaningful content employed as justificatory strategy for any concept it is attached to. Such cosmetic sustainability can be witnessed all around us and reflects the characterization of sustainability as a buzzword. Sustainability is increasingly employed to make something 'good'. Sustainability is a good term in the sense that whatever it means, that thing is good. One can, for example, find literature on sustainable nuclear energy, which at least appears to be counterintuitive (Koning & Rochman, 2008). Sustainability has been "used to justify and legitimate a myriad of

policies and practices ranging from communal agrarian utopianism to large-scale capital-intensive market development" (US NSF, 2000, p. 1). The ability to occupy the ambiguities surrounding the concept and use it to advance unsustainable practices is one consequence of its vagueness.

A number of authors locate the roots of sustainability's inherent vagueness in the need to create a political opportunity towards achieving its goals and leaving sufficient room for policy-makers to tailor policies to specific contexts (Robinson, 2004; Sneddon et al., 2006; Zaccai, 2012). The integrative opportunity of sustainability, these authors argue, enables a wide range of actors to commit themselves to sustainable development and thereby contributes to the ability to get all actors on board towards its achievement. Widespread contestation on the second level is necessary since it directly informs and influences policies formulated and implemented by private actors, governments and supranational institutions. In isolation, no actor can bring the problems reflected by the core components of sustainability to solution. Despite the threat of cosmetic sustainability, there is a good argument in favour of a more integrative discourse using terms that appeal to all (Sneddon et al., 2006, p. 265).

This necessity to include as wide a range of actors (governments, NGOs, supranational organization and multinational corporations) as possible requires an adequate vocabulary. A largely managerial language prevails in the sustainability discourses (Baker, 2007; Hopwood et al., 2005; Kemp & Martens, 2007; Pezzoli, 1997; Robinson, 2004). A managerial language is ordinarily understood as a language that refers to large units of analysis without recourse to specifications of these units. Thereby, a managerial language leaves room for discretion for those commanding different units and in developing specific policies. Such managerialism is reflected both in the academic literature, exemplified by the vagueness of the first level meaning and in policy documents from the UN, EU, IMF, national governments, NGOs, and corporations both large and small that to a great extent rely on the first level of meaning. Exemplary in this regard is the shift from *regulation* towards *shared responsibility* (Zaccai, 2012). Rather than top-down enforcement of rules by states sustainable development seeks to persuade a wide range of both public and private actors to take on a shared responsibility. Sustainability must appeal to all actors equally in order to convince all stakeholders, especially unwilling nations a wide range of private actors to contribute to the achievement of sustainable development.

The incremental and managerial style contributes to the integrative nature of sustainability by addressing governments and corporate actors simultaneously (Robinson, 2004, p. 378). For corporations, this style is attractive because of the leeway the idea of shared responsibility and vagueness of sustainability presents them: no radical changes are imposed through hierarchical commands in order to be 'sustainable' and there is room

to set out in which way(s) they choose to be sustainable. For governments, this style is attractive as it takes pressure away to act unilaterally to confront global problems. Moreover, the shared responsibility lessens their regulatory burden and is more accustomed to times in which states' regulatory power is decreasing (Rhodes, 1997). This integrative and managerial language creates both a political opportunity and lies at the root of the social component's omission in substantiation. The social component of sustainability is without much contestation and only superficially depicted as a form or combination of equity and the (re)distribution thereof, poverty relief, protection of individual freedoms, health, and participation in one's community's decision making processes (Hopwood et al., 2005; Jacobs, 1999; Kemp & Martens, 2007; Lele, 1991; Mebratu, 1998; Robinson, 2004). These policies are historically drafted, implemented, and enforced through the command-and-control structure of the state. The responsibilities of the wider range of actors that sustainable development addresses traditionally require abiding by the legal frameworks of states and international institutions, i.e. through regulation. Therefore, actors other than governments, especially business and other private sector organizations do not generally perceive it as within their responsibilities to further the social component through an idea of shared responsibility. Assuring that everyone's fundamental needs are met, rights are protected and a more equal and just distribution of resources, both within societies, generations and between the global North and South, is still widely perceived as the business of national governments and supranational political institutions.

Sustainability's conceptual force lies in the diagnosis that the problems facing our planet cannot be brought to solutions through unilateral actions or by addressing issues in isolation. In relation to good governance the sustainability discourse fits the criterion of wide applicability given its integrative effort. For what concerns the content of social sustainability, however, the discourse itself provides only limited insight. At present, it appears that the biggest challenge for sustainability is to appreciate its social dimension and to further substantiate it both theoretically and through policy proposals. Given the relatively subordinated position of sustainability's social component one might object to or question the continued reliance on the concept and why, given its problematic substance, it is not set aside (Lele, 1991; Redclift, 2005). The reason the semantics of sustainability are adhered to are simple but fundamental. Sustainable development and sustainability constitute the frame in which goals of policy-making are casts and is here to stay. It has proven to be incredibly prominent in debates regarding human development, environmental protection, economic growth and private-sector marketing. As such its terminology and frame constitutes an important opportunity to cast social goals that are historically associated with state-conduct into a discourse more apt to the context of governance and the

changing powers and relationships between societal and transnational actors. McKenzie (2004, p. 12) states that in order to achieve sustainability, social sustainability "must first be defined as distinct from environmental or economic sustainability in order for it to develop its own models".[61] It is only after further conceptualization of the social component that it can be integrated into "a truly interdisciplinary model of sustainability" (McKenzie, 2004, p. 12). It is this task that the remainder of this chapter embarks on. Social sustainability will be developed in relative isolation of environmental and social concerns (Magis & Shinn, 2009). This isolation is necessarily relative to the other two components given that environmental conditions must permit the achievement of any conception of social sustainability. Moreover, economic relationships are in their very nature social undertakings.

3. Interpreting Social Sustainability

Conceptualizing social sustainability as normative goal of good governance requires adherence to the requirements of good governance as liberally neutral and expansive enough to be applicable to a wide range of practices. On top of that, the conception must incorporate sustainability's core commitments of futurity and inter-generational solidarity alongside the integrative essence and (political) opportunity. This requires that any substantiation of social sustainability must be compossible with the environmental and economic components. The social costs of sustainability elaborated in the previous section have led some to embark on the task of defining social sustainability. Most define social sustainability in the same terms as the general sustainability discourse but in isolation of the other pillars: human needs, well-being, equity, social cohesion (Cuthill, 2010; Sachs, 1999; Vallance, Perkins, & Dixon, 2011). Moreover, some argue that there are multiple types of social sustainability relating to the state of development in a given context (Vallance et al., 2011). Generally, these conceptions of social sustainability do not provide the necessary normative argument necessary to ground good governance. Their grounding is relatively superficial, for instance, increased well-being is a good independent of context. These conceptions consequently suffer from justifying an overly wide range of practises and thereby not provide guidance in action and the threat of cosmetic application remains.

The remainder of this chapter develops a conception of human rights as interpretation of social sustainability. Due to insufficient normative grounding, good governance is indeterminate, biased towards outputs, contradictory in

[61] See also Magis & Shinn (2009, p. 16) who state that "to adequately identify and employ the contributions of social sustainability, it needs to be understood as a phenomenon distinct from, albeit interrelated with, ecological and economic sustainability".

its components and consequently lacks action-guidance. Social sustainability, while generally accepted, proved incapable of providing this normative grounding given its own indeterminacy. It will be argued that interpreting social sustainability through a constructivist conception of human rights can provide the necessary normative grounds. Human rights are favoured over other possible interpretations for three reasons. Firstly, human rights and sustainability are commonly said to be mutually enforcing (Dobson, 1999; WCED, 1987). The language and framework of human rights constitutes an intuitively logical first step towards a concretisation of social sustainability. Secondly, human rights are widely accepted as concrete obligation for public actors, both national and international. Moreover, human rights and the minimal obligation of non-interference are increasingly acknowledged to inform the (moral) obligations and responsibilities of private actors, though not necessarily in their legal form.[62] Human rights offer a substantiation of social sustainability's content. Thirdly, a framework of human rights can incorporate a wide range of different obligations for a wide range of actors to abide by. As such human rights can set a clear threshold of what is deemed socially sustainable. Given that a human rights framework necessarily engages with corresponding legal and moral duties the proposed interpretation challenges the cosmetic and hollow application of social sustainability. Social sustainability interpreted in light of human rights normatively grounds good governance. Thereby, the practice-independent conception of good governance is expanded with a normative component.

Here human rights are not conceptualised through international human rights law but rather through the moral unity of rights and duties. This approach, it will be argued, enables the application of human rights across functional spheres and, thereby, moves beyond the legal realm. After constructing this conception, it is contrasted with other dominant conceptions of human rights in the transnational sphere: the legalistic doctrine of horizontal effect, the moral doctrine of natural rights, the economic entitlements approach, and the Aristotelian capabilities approach. Finally, the relation between the proposed conception and the needs of future generations and the internationalism of *Our Common Future* is analysed. These aspects remain fundamental to the achievement of social sustainability and are constitutive of the normative grounding and aim of good governance.

[62] Within human rights theory it is increasingly debated whether private actors bear human rights responsibilities and if so what the nature of these responsibilities are (Deva & Bilchtiz, 2013). Moreover, the business practices subsumed under Corporate Social Responsibility constitute minimal acceptance from the private sector that they bear at least some responsibility for human rights (see Chapter 3 at p. 67 For more substantive discussion of the human rights obligation of private actors see Chapter 6, section 2 at p. 168).

3.1 Human Needs

Sustainability's core commitment revolves around the ability of individuals and peoples to meet their needs in both the present and future. Meeting needs, however, is as broad a commitment one can envisage. A central question is which needs are of such moral importance to invoke (moral) obligations on others to not only refrain from harming but to secure them. In relation to defining the moral grounding of good governance these needs must be minimal as to be applicable to a wide range of practices. Moreover, social sustainability itself might be under threat if more expansive needs are incorporated resulting in potential overregulation. This threat exists especially in undermining the ability of people to meet their needs when their individual or group autonomy and liberty is infringed upon. This could disregard personal or group agency constituted by the autonomy to choose a conception of a "worthwhile life", the liberty to pursue this conception, and having the "minimum material provision and education" necessary to exercise autonomy and liberty (Griffin, 2008, p. 311). Therefore, just as good governance, social sustainability is aided by a limitation of essentials (Botchway, 2000). This it means that social sustainability is best interpreted as the ability of individuals and groups to set their desired ends and the availability of the basic means to achieve these, i.e. effectively exercise their autonomy and liberty. Such a minimal interpretation moreover conforms to the liberally neutral procedure in conceptualising the moral grounding. Liberal neutrality requires non-perfectionist reasoning since perfectionism undermines individuals and groups to set their own ends (Dworkin, 1978; Rawls, 1993; Waldron, 1989, pp. 1145–1146).

Human beings, as individuals and in groups, require certain basic needs to be met to enable them to act purposefully and autonomously. Meeting basic needs functions as a prerequisite for autonomous decision-making and the ability to employ resources to autonomously set goals. Ultimately, basic needs are a threshold to the exercise of human agency. At minimum, subsistence, security, and liberty are needs necessary to be met in order to purposefully exercise human agency (Shue, 1980).

In international practice and in moral philosophy the tool that guarantees meeting these needs are human rights. They protect the most fundamental needs of individuals. The fulfilment of these needs is necessary in order to enable individuals and groups to both independently set their ends and achieve them. Unsurprisingly the Brundtland Report casts its recommendations within the framework of international human rights. The protection of the needs is moreover essential to achieve the other pillars of sustainability. Environmental sustainability is in jeopardy, as the Brundtland Report notes, when the world's poor have no choice but to destroy their environment (WCED, 1987). Nor can economic sustainability be achieved if individuals do not possess the basic resources to effectively and purposefully participate in economic relationships (Solow, 1993).

3.2 *Human Rights*

Human rights are inherently moral, both in their description and justification of rights that we have in virtue of our humanity (Griffin, 2008; Tasioulas, 2010; UN, 1948). Simultaneously human rights are protected through legal mechanisms at the international, regional, and national levels through various legal instruments. As Besson (2015, p. 289) notes human rights are "at once moral and legal rights".[63] Put differently, human rights are rights we have in virtue of our shared humanity and not in virtue of the states of which we are citizen (O'Neill, 2015). But without jurisdictional embedding in legal systems our human rights lack protection (Besson, 2015). In this section and the next this moral-legal nature of human rights is untangled. This section focusses on the moral content of human rights while the next examines the structure of human rights as legal claim rights that require a source of bindingness in moral theory.

From the Enlightenment we inherit our modern discourse on human rights as universal moral rights we have in virtue of our humanity. A wide range of Enlightenment thinkers started treating human beings as the ultimate point of reference for the justification of coercion by both other individuals and institutions, especially the state. The social contract tradition marked this departure from justificatory strategies that were rooted in the divine towards a focus on individuals. In his *Leviathan* Thomas Hobbes (Hobbes, 1996) sought to justify the coercive powers of states through a social contract that members of societies sign in order to leave a state of nature described as war of all against all. Hobbes thereby revolutionised the justification of coercive state power as requiring justification to all members of the polity through a social contract. Building upon Hobbes' social contract, John Locke (Locke, 1988) introduced the idea of the natural rights of men. According to Locke the authority of the state can only be justified in reference to the natural rights to life, liberty, and property. The source of these inalienable natural rights is thereby not located in jurisdictions or laws but in a universal and morally relevant aspect of being human. This relevant aspect is often described in terms of 'dignity' (Griffin, 2008; UN, 1948). Human dignity requires certain aspects of individual and group life to be protected. In other words, human rights are those rights that are necessary to live with the dignity inherent to humanity.

This Enlightenment tradition of natural law explains the moral nature of human rights as pre-political and grounded in humanity itself. Human rights affirm the basic equal standing of all human beings as reflected by their universality: everyone has these rights regardless of sex, race, contribution, or belief.[64] Concerning the proper interpretation of human dignity or other relevant aspects of humanity this thesis remains silent for one reason. The

[63] Habermas (Habermas, 2010) refers to human rights are having a moral/legal Janus face.
[64] This is what Buchanan (2013) refers to as the protection of status-egalitarianism by human rights.

natural law tradition is a western discourse concerning universal human rights. Consequently, this human rights discourse has been criticised as limited western discourse. The idea of natural rights as rights we have in virtue of our humanity can, however, rely on a pluralist justification (Tasioulas, 2015). Such a pluralist justification leaves space for multiple justification of the relevant aspects of humanity to ground human rights that are not necessarily limited to cultural preconditions.[65]

Within the confines of this research human rights function as moral grounding of good governance and substantiation of social sustainability. Their simultaneous moral and legal nature is central to this endeavour. In relation to good governance, human rights purport to protect the action-guidance and evaluative properties of the concept through its moral content. Thereby they constitute a normative component of the practice-independent conception of good governance proposed. In relation to social sustainability, human rights form the minimum threshold to be protected for all in order to achieve sustainable societies. In other words, human rights are used as moral grounding and moral specification of values, not as strict legal instruments. The proposed conception consequently walks a fine line between legal human rights on the one hand and moral, or natural, rights on the other in order to capture the force of human rights without narrowing their practical application to the legal sphere (Scott & Wai, 2004).

The conception of human rights proposed therefore needs to do two things. Firstly, it should establish the moral content of good governance vis-à-vis social sustainability. This requires a basic specification of the needs that require protection. These then specify the contours of good governance. For this recourse is sought to international human rights law as it arguably best reflects the moral content with general acceptance, i.e. acceptance beyond an exclusively Western moral philosophy and is directed towards a policy-making environment. Secondly, the proposed conception of human rights should provide the first steps necessary to determine the responsibilities and duties different actors bear towards the realisation of social sustainability. Otherwise the normative grounding fails to integrate practical action-guidance into good governance. The current chapter limits itself to arguing for the conception independently from practice. The conception of human rights proposed thus constitutes an additional, normative, component of a practice-independent conception of good governance. In Part II and III this practice-independent conception is applied to transnational private relationships and thereby moves from a practice-independent to a practice-dependent conception of good governance.

[65] These can be needs, interests, the good life, community, dignity, etc.

3.2.1 Content: The Universal Declaration

The natural law tradition clarifies the moral nature of human rights. However, it does not specify the content of human rights. With regard to their content the proposed conception relies on a deliberative justification rooted in Habermasian discourse ethics (Habermas, 1981, 1990, pp. 43–116). Such a deliberative justification requires all affected to give reasons for their position in deliberations aimed at reaching understanding. This is what Habermas (1990) refers to as 'communicative action' through 'communicative rationality'. This ideal typology of deliberations among all affected towards understanding is in practice impossible in relation to human rights. Given that all individuals are affected deliberation should take place among billions of individuals which is simply impossible. However, the widespread acceptance of the dominant human rights declarations by the international community can be taken to represent individuals and peoples reflecting the Habermasian ideal.

The content of human rights that shares wide acceptance are specified in legal human rights documents. These are rights that individuals have through various international declarations, laws, conventions and treaties. It is the content of these international declarations that specify the substantive interpretation of social sustainability and thereby the normative aim of good governance. Legal human rights protect basic well-being of individuals and groups through rights to social security, rest and leisure, and an adequate standard of living including food, shelter, and education. Their general acceptance stems from the international codification of human rights through the aforementioned declarations, conventions, and treaties. These legal documents, the universal declaration of human rights of which is the most prominent, enable appeals to values concerning human well-being from an accepted institutional position. Moreover, the possibility of pluralist justification of relevant aspects of humanity that ground these rights resemble adherence to Habermasian discourse ethics in which plural justification can exist for moral convictions. This deliberative position circumvents foundational debates concerning the 'best' moral justification for any human rights as many can exist and reasonably coexist as evidenced by different human rights practices.[66] It is assumed here that sufficient moral justification can be given by good moral philosophers from diverging perspectives for those rights entrenched in international human rights law.[67] Together

[66] For similar stances see: Karp (2014, pp. 1–15), O'Neill (2015). For different moral justification of the content of international human rights law see Meckled-Garcia (2008), Tasioulas (2015), Griffin (2008) for good overviews. For a moral justification of general acceptance of the content of legal human rights but diverging human rights practices through subsidiarity see Besson (2016).

[67] For a recent example of a pluralistic justificatory strategy concerning human rights see Tasioulas (2015).

these two elements, the widespread international acceptance and pluralist justification, constitute a close approximation of communicative action.

Habermas' deliberative discourse ethics meets the requirement for the normative grounding of good governance to be based on a liberally neutral procedure because their content can rely on widespread international agreement and is morally justifiable through pluralist strategies. Outside of international legal realm, the content of these rights is increasingly incorporated into systems outside of the strict legal realm implicating their applicability beyond law. For instance, private codes of conduct and the OECD Principles of Corporate Governance and Guidelines for Multinational Enterprises rely on the content of human rights to guide their prescription in soft private-law, self-regulatory, and voluntary mechanisms (OECD, 2011, 2015). Regarding the requirement of wide-applicability reliance on the moral justification of international human rights is of limited value. As enshrined in the various legal human rights documents human rights are rights individuals hold against the state. Consequently, the state is the sole bearer of the duty to protect the enjoyment of these rights. But as the discourse on governance exemplifies, there are manifold ways in which policies and rules are drafted, implemented, and adhered to outside of a strict legal realm. A governance perspective is therefore adopted to establish a conception of the structure of human rights that can migrate their moral content to other governance mechanisms beyond the law (Scott & Wai, 2004). Thereby the second requirement of wide applicability will be met.

3.2.2. Structure: Unity of Rights and Duties[68]

This section introduces and justifies a conception of human rights best suited to normatively ground good governance. Firstly, it will argue in favour of taking duties corresponding to rights seriously in the moral, as well as legal, justification of rights. Just as the substance of human rights requires moral justification in aspects of our shared humanity, so does the assignment of corresponding duties to different actors (Besson, 2015, pp. 281–282). Given the dual nature of human rights as simultaneously moral and legal not only the content of these rights but the duties that correspond to these rights also require justification in moral theory. The duties that moral theory specifies thereby constitute the first step towards assigning actors responsibilities for the content of human rights and thereby towards action-guidance. A conception of human rights based on the unity of rights and duties in moral theory suits the task of normatively grounding good governance. Secondly, it will be shown how this conception explains certain features of international human rights law, and how it can be used to move beyond the statist paradigm and towards a governance context.

[68] This section draws on the conception of human rights proposed in Hazenberg (2016).

Human rights are here perceived as claim-rights (Hohfeld, 1919; Wenar, 2013). This means that for an individual to bear a right requires a corresponding actor to bear to duty to not harm, to protect, or to provide for the content of that right. Without specifying the content and bearer of the corresponding duties no right can exist. Human rights are moral claims rights that individuals can make towards other agents (Besson, 2015; Shue, 1996; Tasioulas, 2015). The force of these claims relies on their source of bindingness. If human rights are moral claims than this source of bindingness should be grounded in moral theory (Besson, 2015; Deva, 2013; O'Neill, 1996, 2001, 2015).[69] Questions concerning the responsibilities of different governance actors towards achieving social sustainability should therefore start with an investigation of the moral grounds of human rights duties. One aspect of the philosophical justifications of human rights proposes the appropriate metric to assess these duties: the unity between right and duty. This unity is often attributed to Kantian legal philosophy and prescribes that a right must identify the bearer of corresponding duties within moral theory consistent with human rights perceived as claim rights (Kant, 2008; Meckled-Garcia, 2008; O'Neill, 1996, pp. 122–153; Pogge, 2008, pp. 135–137). The source of bindingness thus lies at least partially in the identification of the moral duties and the relevant bearers of these duties. To determine which governance actors bear what duty and, consequently, what mechanisms are justified towards their enforcement thus hinges on the duties that moral theory specifies (O'Neill, 2015, pp. 71–78).[70] This chapter only addresses the latter part of the question, which moral duties moral theory specifies. The former part can only be addressed by moving beyond a practice-independent conception of good governance. In other words, determining which governance actors bear what duties and what mechanisms are justified towards their enforcement hinges on the actors present in specific practices and contexts.[71]

The focus on duties corresponding to rights challenges both exclusively legal notions and exclusively moral conceptions of human rights as "manifesto rights" (Feinberg, 1973, p. 64). The challenge to exclusively legal notions derives from the argument that embedding human rights in positive law alone is insufficient to establish human rights without also grounding these rights and duties in moral theory offering a philosophical justification of moral duties and rights (Hazenberg, 2016; O'Neill, 2015). As a consequence, this opens human rights duties to more diverse applications than (international) human rights law. The unity of right and duty challenges purely moral conceptions of human rights by arguing that a human right must be perceived as a claim

[69] Just as the justification of the content of human rights must be grounded in moral theory (Besson, 2015).

[70] From a non-philosophical perspective, a focus on duties has been advocated because it "assumes that human rights are non-negotiable" (Deva, 2014, p. 2).

[71] This challenge is taken on in Chapter 7 at p. 152

that individuals can make towards others. Conceptions of human rights as manifesto rights fail to constitute such claims as they fail to specify the bearer of corresponding duties. Consequently, it is put forward that human rights constitute more than a moral good, forming instead the moral basis of rights that can be claimed in practice (Beitz, 2009; Hazenberg, 2016; Meckled-Garcia, 2008; O'Neill, 2015; Sangiovanni, 2007, p. 19). In sum, the focus on duties moves the justification of human rights beyond legalistic interpretations and paves the way to their broader application in a governance context.

The unity of rights and duties is often overlooked in debates concerning the legal aspects of human rights (Douzinas, 2000; Meckled-Garcia, 2008; O. O'Neill, 2001; Raz, 2010, pp. 1–2). As Joseph Raz (Raz, 2010, p. 37) notes, in these debates it is often proposed that stipulating the value of a right for the right-holder is sufficient justification towards establishing such a right within positive law. But this is only one side of the coin. It is crucial for arguments to stipulate and justify within moral theory which agents bear the corresponding moral human rights duties. A failure to do so would prevent the moral claim from grounding a legal right, because no agent can be justifiably assigned the legal duty. In other words, the observation that the conduct of governance actors other than the state in some cases infringe[72] upon the human rights of individuals is of itself insufficient to ascribe human rights duties to them through positive law. Assigning this duty must also be justified with reference to a corresponding moral duty sufficient to ground a right.

The central question is which duties moral theory specifies. Onora O'Neill (1996, p. 152) makes two distinctions between universal and special duties, and between perfect and imperfect duties, thus establishing four types of duties: *universal perfect duties, universal imperfect duties, special perfect duties and special imperfect duties*. Before elaborating on these four types of duties, the distinctions between universal/special and perfect/imperfect duties are clarified. *Universal duties* are those duties that fall equally on everyone capable of moral agency. They are generally described as negative[73] duties with correlative liberty rights (O'Neill, 1996, p. 147). *Special duties* require positive action in the delivery of specific goods and services and therefore fall on specific actors. The counterpart rights to special duties are often coined 'welfare' rights, or "rights to goods and services" (O'Neill, 1996, pp. 147–148). *Perfect duties* specify the relevant duty-bearer with no agent-directed discretion as to what constitutes an adequate performance of the duty (Meckled-Garcia, 2008, p. 245). They provide the source of bindingness for claim rights. Finally,

[72] 'Infringe' is used here to refer to a hindrance to the enjoyment of the content of human rights. As such an infringement of human rights is not the equated with a violation of human rights. A violation requires the inadequate of non-performance of a perfect duty assigned to specific actor.

[73] Negative duties are commonly understood as those duties that require no positive action, only omission (Shue, 1980).

imperfect duties are duties that leave room for discretion in their performance. They are usually depicted as duties of charity, corresponding to charity rights belonging to the realm of virtues (Sen, 2004, p. 341). Imperfect duties cannot ground claim rights because the duty does not specify the action necessary for the fulfilment of the right. In relation to imperfect duties others can make moral claims to actors to perform them adequately but they do not have a right towards its adequate performance. Imperfect duties specify a moral good when performed adequately.

- *Universal perfect duties* are duties "held by all and owed to all". They correlate to liberty rights of which the counterpart duty requires non-interference or an omission (O'Neill, 1996, pp. 151–152). In the literature these are often depicted as negative duties (Pogge, 2008). For instance, the right to free speech requires others not to unlawfully interfere with your ability to express yourself. For free speech to be a right, i.e. given that there is sufficient moral justification that free speech is weighty enough to justify the imposition of binding duties upon others, this duty not to interfere with others' expression must necessarily be universal. Without the duty's universal application, the right to free speech is insecure. In practice, these duties are primarily mitigated through institutions and specifically through states.
- *Universal imperfect duties* correspond to virtues and as such constitute a moral good. Conversely, violations of these duties constitute a moral bad. However, universal imperfect duties are insufficient to ground moral rights because of the indeterminate nature of the action that the duty specifies. Such universal imperfect duties are "held by all, owed to none" and have no counterpart rights because they cannot be claimed (O'Neill, 1996, p. 152). One such example is the universal imperfect duty not to lie. While it is a virtue not to lie, no one has a right to be spoken to truthfully at all times.[74] Consequently, being lied to constitutes a moral bad and being truthfully a moral good both of which do not correspond to rights but rather virtues.
- *Special perfect duties* require a specific performance by the duty bearer and are therefore "held by some, owed to specified others". In relation to human rights 'the specified others' are all human beings reflecting these rights' universality. Special perfect duties are generally taken to correspond to welfare rights, or rights to "goods and services", as these rights require the positive action of a specified agent towards specified others (O'Neill, 1996, pp. 141–146; Pogge, 2008). For instance, the right

[74] Whether these universal duties are perfect or imperfect relies at least partially on the justification of the value, need, or interest the proposed right protects (O'Neill, 2001). As stated above I will remain silent on this justification. In relation to the example of lying it is assumed that no sufficient justification for a right to be spoken truthfully to or not to be deceived can be found.

to adequate housing requires some agents to bear the positive duties to protect your housing and/or provide you with adequate housing. These duties cannot fall on everyone equally because, firstly, the costs of the resources necessary to fulfil these rights can be excessive and, secondly, their performance is not compossible with the performance of all other special perfect duties.

- *Special imperfect duties* correspond to virtues that constitute a moral good. Vice versa, violations of these duties constitute a moral bad. However, these duties do not fall on everyone equally; they are "held by some and owed to none" (O'Neill, 1996, p. 152). For example, parents are under the special imperfect duty to establish a loving environment for their children, but this duty is insufficient to ground counterpart legal rights to such a loving environment (O'Neill, 1996, pp. 151–152).

The abovementioned distinctions raise the question of its implications for human rights generally, and for legal human rights in particular. In general, it means that the philosophical justification of positive human rights must specify the bearer of a perfect duty, with no discretion as to what constitutes adequate performance thereof. Without this specification, the bindingness necessary for legal human rights to be claimable cannot be grounded in moral theory. When the bearer of such a perfect duty cannot be specified, assigning a legal duty in positive international human rights law remains wanting in its justification due to the special nature of human rights as universal moral claim rights. There remain, however, imperfect duties that leave greater discretion to the duty-bearer as to what constitutes an adequate performance and do not constitute claim-rights. Nevertheless, these duties do require adequate performance, and (moral) blame is legitimately put on actors who fail to do so. Governance mechanisms other than law might be better equipped to achieve their adequate performance, as the law cannot, in all cases, legitimately do so. Since a governance perspective elucidates the manifold ways in which policies and rules are drafted, implemented and adhered to outside of the strict legal realm, a narrow legal conception of human rights undermines the necessary wide applicability of good governance. The proposed conception of human rights reliant on the moral unity between rights and duties overcomes the statist perspective of international human rights law.

As ground of good governance, the proposed conception provides it with action-guidance: working towards all actors fulfilling their moral human rights duties, both perfect and imperfect. What the nature of these duties is influences the possible mechanisms justified to employ towards good governance. As normative ground this conception is both liberally neutral regarding the procedure through which its content is determined and has wide applicability as it specifies all moral duties that can ground governance mechanisms. Lastly, these moral duties constitute a first step

towards concretizing responsibilities and thereby paths towards achieving good governance. This conception provides an action-guiding component. As such this interpretation of social sustainability as normative ground of good governance constitutes a normative component of the practice-independent conception of good governance. This normative component comprises the necessity to justify governance mechanisms in relation to the duties that moral theory specifies and the extent to which these duties can be legitimately assigned to different actors. Different practices therefore require separate assessment as to which actors bear what duties and, consequently, what mechanisms can constitute good governance.

The next sections will contrast the proposed interpretation of social sustainability and normative grounding of good governance with other potential candidates: doctrines of horizontal effect; natural rights; the entitlements approach; and the capabilities approach.

3.3 Human Rights and Horizontal Effect/Direct Application

Perhaps the most intuitive alternative to the proposed conception of human rights is the doctrine of horizontal effect. Within this legal doctrine human rights norms are directly or indirectly applied to relationships between private actors through court adjudication achieving the wide applicability of the normative grounds of good governance. Both direct and indirect application seek to apply human rights and constitutional norms to private actors. Direct horizontal effect seeks to apply human rights norms directly to actors other than the state through court adjudication (McCorquodale, 2009; Preedy, 2000). In practice, however, indirect horizontal application is more common. Through indirect horizontal application a state actor, usually a court, applies to a private relationships private law norms interpreted in light of human rights. While promising within closed jurisdictions in which states are reluctant to regulate private actors within their borders, outside of such legal frameworks the doctrine proves troublesome. Concerning a normative ground of good governance both doctrines fail to provide substantive normative grounds because of their strict legalistic approach and reliance on a single actor for its application: courts. However, as for instance Chantal Mak (2016) argues, direct and indirect horizontal application can be a justified governance mechanism in those instances where states and supranational institutions do not adequately perform their special human rights duties. In such cases judicial activism, i.e. the interpretation of private law mechanisms through public law norms or the direct application of public law to private relationships, constitutes a mechanism to pressure public actors to better perform their human rights duties. For what concerns normative ground of good governance, however, these legalistic doctrines cannot provide the grounding necessary given their narrow applicability through courts. For instance, international courts have only limited jurisdiction. It could,

however, well be that direct and indirect application constitutes an adequate mechanism towards achieving good governance in practice, especially in relation to underperforming states. Moreover, as Jean Thomas (2015) has recently argued it can be questioned to what extent the horizontal application of human rights undermines the applicability of those rights as it potentially assigns all the duties corresponding to human rights to all actors.[75]

3.4 Human Rights and Natural Rights

As introduced human rights doctrines can be directly traced back to the Enlightenment through natural rights theory. In its most basic form natural rights theory argues that there are rights humans have by virtue of some inherent aspect of them being human rather than any kind of special relationship such as membership of a community, nationality, or market transactions. Natural rights theory thereby concerns moral rights in a strict sense. Given the inherently moral nature of human rights as rights that we have in virtue of our humanity, natural rights theory is primarily concerned with the moral justification of the natural rights individuals have. The human rights conception put forward here relies on natural rights theory for the pluralist justification of the content of human rights.[76] It was assumed that pluralist moral justification for those rights enshrined in international human rights law can be provided (Tasioulas, 2015). Natural rights theory, however, falls short of providing a complete theory of human rights. As Onora O'Neill (2015) states the justification of the existence of certain human rights in moral theory is only one side of the coin. As argued, the other side consist of specifying the duties corresponding to human rights and the actors who hold them. In absence of this specification of duties and duty-holders, human rights collapse into manifesto rights stipulating a moral ideal without moral justification of how to achieve it in practice. Therefore, the conception of human rights this chapter puts forwards relies on natural rights theory. Natural rights theory, however, does remain wanting in the practical application and justification of different human rights mechanisms. Thus, while necessary to the moral justification of human rights, natural rights theory is not sufficient to provide a conception of human rights suitable to practical application.

3.5 Human Rights and the Entitlement Approach

Amartya Sen's entitlements approach at first sight seems to provide a substantive interpretation of social sustainability without direct recourse to human rights. His entitlements conception is an economic approach to

[75] See n150 below

[76] Note that only a very thin conception of natural rights as assuming that there is something morally significant about being human that requires protection independent of political or legal structures and realities is relied upon here (See Dagan & Dorfman, 2016).

severe deprivation and the product of Sen's economic analysis of the causes of famines (Sen, 1981). Its revolutionizing feature, especially in the field of economics, consists in the insight that rather than the availability of resources what matters in circumstances of scarcity is what individuals and groups can *do* with these resources. Sen (1981, p. 45) states that "the entitlement approach to starvation and famines concentrates on the ability of people to command food through the legal means available in the society including the use of production possibilities, entitlements vis-à-vis the state, and other methods of acquiring food". According to Sen starvation and severe deprivation take place either when (1) one does not have the ability to acquire or command the necessary goods or (2) one lacks the ability to avoid starvation and/or deprivation. The crucial addition to traditional economic analysis is that the ability to command one's resources to a specific end depends not just on the availability of these resources, i.e. their scarcity, but on the social and legal structures that enable individuals to command resources. Outside of economics, the entitlements approach has gained prominence in legal studies because a focus on entitlements emphasizes the importance of legal rights. In Sen's (1981, p. 166) words: "the law stands between good availability and good entitlement. Starvation deaths can reflect legality with a vengeance".

The suitability of Sen's entitlements approach in providing a substantive interpretation of social sustainability can be questioned. Social sustainability is at least partially a moral concept (WCED, 1987). The entitlements approach is an economic theory. Entitlements can be interpreted as normative concepts in legal science, but arguably not in moral philosophy: they concern legality rather than morality (Devereux, 2001). Sen himself is careful to emphasize the descriptive and empiricist nature of his approach. This approach hence provides little guidance concerning ethical-normative grounds. Without undermining the worth of the entitlements approach when it comes to the economic analysis of the most severe instance of poverty, the approach lacks a normative guideline towards a more robust conception of social sustainability as moral goal beyond the avoidance of starvation and severe deprivation. It appears that Sen himself was well aware of this. He consequently added, alongside Martha Nussbaum's seminal work, to the entitlements approach a normative theory of human well-being based on the idea that justice requires the ability to command resources rather than the availability or distribution of specific resources: the capability approach. This theory poses a more robust alternative to the proposed human rights conception and is assessed below.

3.6 Human Rights and The Capabilities Approach

Transforming the entitlements approach into a moral theory of human well-being, Martha Nussbaum and Amartya Sen developed the capability approach. Focus will be here on Nussbaum's theory as her work is leading

in the field of capabilities research. The capability approach answers the question of which resources and what distribution thereof justice requires to advance human well-being (Nussbaum, 1997; Sen, 2005). Moreover, it provides a theory of what constitutes human well-being. Starting from the premise of the entitlements approach that what justice requires are the real opportunities to achieve well-being, the capability approach makes a distinction between functionings and capabilities. Functionings are the 'beings and doings' that constitute human well-being. Capabilities are the real opportunities individuals have to achieve these functionings (Nussbaum, 1997). The capability approach central premise is that what matters for justice are the real opportunities of individuals to achieve their functionings rather than a distribution of resources. Its appeal is evident. Intuitively it is clear that what matters is not what people have, but what they can do with what they have and consequently their ability to meet the ends they set for themselves. The question then is what the capability approach specifies as capabilities necessary for human well-being.

Martha Nussbaum (1997, 2006) famously justified a list of ten groups of central human capabilities that are necessary to live life with dignity, i.e. a 'human' life. These central capabilities are: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment (Nussbaum, 2006, pp. 76–78). Nussbaum argues for these through an Aristotelian framework of the good life. This implies, as Nussbaum (2000, p. 72) states, that each of these capabilities are necessary to live a human life not so "impoverished that it is not worthy of the dignity of a human being". Contrasted with the proposed conception of human rights these capabilities are grounded in a conception of the human life rather than through a pluralist justification on the bases of needs, interests, and autonomy. This poses a challenge to Nussbaum's capability approach as potential normative ground for good governance. Firstly, the lists of capabilities can be contested as necessary for a human life. An objection could be whether Nussbaum is willing to accept that a life without the capability to play is not a life with dignity. This appears to be counterintuitive. Moreover, the list of capabilities necessary for a life with dignity makes it impossible to discriminate between different capabilities in different policy-settings. Framed in terms of the human life one cannot prioritize certain capabilities as each is equally important to bestow dignity upon life. The practical application of the capability approach in a governance context seems impossible. That the capability to play is as important as the capability to bodily integrity says little about who has the responsibility to protect these capabilities, what is required to meet them, and consequently who is at fault when they are not met. This poses a problem to the liberal neutral procedure of determining the normative grounds of good governance. The pluralist moral justification of and reliance on Habermasian

discourse ethics in international human rights provides a better ground for the substance of social sustainability.

Partially in response to these objections concerning the rigid nature of the Aristotelian justification of capabilities in the terms of dignified human life, Amartya Sen (2005, p. 158) refuses to propose a list of capabilities that is pre-determined. He argues that capabilities require some form of democratic representation in their formulation and might differ between practices. Instead Sen argues for basic capabilities, including the capability to have capabilities, but beyond this he offers little guidance on how capabilities should and could be selected. This indeterminacy in Sen's capability approach problematizes its potential as normative ground for good governance. While the normative appeal of capabilities over rivalling distributions of resources holds, as normative ground of a practical tool (good governance), Sen's theory is inadequate. It leaves the problem of indeterminacy concerning good governance open. It can provide a structure for the moral grounding but lacks content applicable to a wide range of practices. To fill this lacuna in a manner consistent with the structure of capabilities and the context of governance practice a well-suited candidate to provide such a content is an approach based on international human rights for the same reasons they are proposed here: their general acceptance and pluralistic moral justification. Moreover, the interests protected by the content of human rights arguably correspond with Sen's basic capability to have capabilities. The content of these rights does not necessarily change when interpreted through a capability perspective. In case of basic rights, a focus on the opportunity or capability to use the content of these rights in practice differs little from the protection of these rights. Moreover, the priority of duties over rights resembles the capability approach's focus on practical opportunities. In the context of this research the capability approach does not offer fundamental challenges to the proposed framework, rather it closely resembles it. The capability approach is not used in this research, however, due to its either indeterminate or overly perfectionistic conception of human well-being.

We are now in a position to bring the proposed conception of human rights back to social sustainability and to bring the normative grounding of good governance full circle. The last two sections will discuss the proposed conception's relation to future generations and to the Brundtland report *Our Common Future*.

3.7 Human Rights and the Needs of Future Generations

One of the central aspects of sustainability is its incorporation of the needs of future generations into policy-making (WCED, 1987, p. 43). The problem of the rights of future generations is well debated (Gosseries, 2008; Parfit, 1987). This is not the place to propose a theory of rights of future generations. However, given the central place they occupy within the sustainability

discourse it must be shown how their needs are incorporated into the conception of human rights proposed here. In general, it is notoriously difficult to incorporate needs of future generations into present concerns given the simple fact that they are not here (yet) and do not know who they will be. Both philosophically and legally this poses significant problems. From philosophy a notorious objection to the needs of future generations has been made by Derek Parfit (1987) whose 'non-identity problem' states that representation requires a subject. Given that future generations are a concept, they cannot be represented in present legal and political constellations. Parfit (1987) argues that, therefore, the needs of future generations cannot be represented in the present because we do not know who they are, and the moment we do we can no longer speak of 'future' generation.

Without engaging in a direct argument, the stance is taken here that there will be future generations and that we can assume they will have needs that can be affected by the conduct of those generations currently living.[77] Consequently, assumed that there will be future generations and that they will have the same or at least similar fundamental interests and moral rights as present generations in at least the near future, their needs put (moral) limits on what is permissible for us to do. The central question is which instruments are best suited to protect these needs of future generations without specifying the agent (as she is absent) or the content (as we do not know which rights best protect fundamental needs in the future). It will be shortly outlined why, firstly, the proposed conception of human rights can incorporate the needs of future generations and, secondly, why the needs of future generations overlap with those of present generations in within the framework of social sustainability.

A rights-based conception might seem inappropriate to protect the needs of future generations. This is because rights-based conceptions inherently favour actual rights-holders over those who do not actually hold any rights. In general future generations have no direct legal standing.[78] Their needs

[77] What follows hints at a response to Parfit's non-identity problem without directly engaging with his argument. This is not the time or place to develop a full theory of intergenerational justice and consequent refutation of Partfit's provoking argument. Only the first steps of such an argument are given. See n80 below.

[78] Future generations can have indirect legal standing through the state duty of care, as the recent Urgenda-case in The Netherlands has shown (van Zeben, 2015). In this case a court decided that the state failed to perform its duty of care by inadequately protecting citizens from dangerous climate change. This case shows that establishing a novel legal basis for the rights of future generation is not a necessary condition to protect their interests against the worst of infringements. The protection of these interests can be subsumed under the state's duty of care as the most serious infringements of the interests of future generations overlap with those of present generations (i.e. the interest of present generations in clean air, water, unpolluted natural resources, etc.). Even though the worst consequences of failing to protect these interests might fall upon future generations there already is a basis to bring their interests into regulatory frameworks through the duty of care.

are not necessarily best represented through strict legal mechanisms. The conception of human rights proposed here, however, incorporates the needs of future generations. At minimum it can be assumed that the basic needs of future generations will be similar to those of present generations and therefore the moral grounding of human rights as rights we have in virtue of our humanity counts for future generations as well. Thus, unless one is willing to deny future generation their humanity, the same moral principles that justify the assignment of human rights to present generations must also assign them to future generations. It can therefore be assumed that future generations have a fundamental interest in having the same, or a closely resembling, set of needs protected as present generations have through human rights. That future generations are not present and therefore cannot in the legal sense claim their rights does not undermine the moral force of their needs. The unity of right and duty central to the proposed conception aids the representation of needs of future generations. A focus on the duty-bearer over the right-holder prioritizes the performance of duties towards rights fulfilment. Thus, even though future generations cannot claim their 'rights', other actors can legitimately enforce the duties that actors have vis-à-vis the right-holder, perfect or imperfect and present or future.[79] Moreover, human rights have longevity to them corresponding to their universal nature. They must be respected, protected, and provided for by the relevant actors for as long the rights exist, and it is very improbable that the legal sources of human rights will cease to exist. Therefore, the futurity captured by the idea of sustainability is best transposed to practice through a legal framework. As Brown-Weiss (1992, p. 21) states human rights are applicable to "all members of the human family" bridging temporal distinctions and thereby bringing future generations "within its scope". This status-egalitarian function of human rights applies not just to individuals living in the present but also "affirms the basic equality" of future generations (Brown-Weiss, 1992, p. 21).

Concerning the content of the needs of future generations one might ask to what extent meeting the needs of the present generation through human rights impedes upon future generation's ability to meet theirs. Firstly, it can be argued that the needs of future generations to be protected by the present generations do not extend beyond the protection of their ability to meet their human rights for two reasons. Firstly, protecting beyond this set of needs, as represented in the legal framework of human rights, might impede on the rights of present generations by unduly limiting the means available to meet their needs, undermining the priority of the present-day worst-off. The opposite also holds: the specific content of human rights is subject to, albeit minimal, change over time as it adapts to the circumstances in which people

[79] See Fikkers (2016) for a similar argument from a legal perspective focussing on 'goal regulation'. She convincingly argues that the primacy of duties best advances the interests of future generations in the regulatory arena.

find themselves. Dogmatically sustaining the content of our present set of human rights into the future can limit the ability of future generations to adjust this content to their circumstances. When one assumes that the present content of human rights is necessary in all modern-circumstances, protection beyond it is hard to justify as it infringes upon future generations' ability to make choices of their own and adjust the human rights framework beyond what we cannot yet envisage.

Secondly, it can be argued that the most pressing threats to the ability of future generations to meet their needs overlap with those threats facing the present. The most acute ways in which present generations can infringe upon the ability of future generations to meet their needs is by infringing upon the rights of present generations. For instance, polluted air, inadequate health-care for expecting mothers, deprivation of water supplies, climate change, uncurbed use of fossil fuels and carbon emissions, etc., all directly infringe upon rights held by present generations. The continuation of these infringements would directly infringe upon the rights of future generations. Consequently, the protection of the needs of present generations through the proposed human rights conception directly aids the ability of future generations to meet theirs. The protection of social sustainability for present generations aids protecting the needs of future generations. In other words, there might be less of a generational conflict than many assume.[80]

3.8 Basic Human Rights and 'Our Common Future'

In *Our Common Future* multiple references can be found to specific social components of sustainability that warrant its interpretation in terms of human rights. Brundtland's calls for the need of social security, empowerment of vulnerable groups and individuals, giving voice to all affected subjects, and effective citizen participation are captured by the content of human rights (WCED, 1987, pp. 65–114). Moreover, the proposals are cast in the same model of "legal principles" as human rights, reinforcing their mutual links

[80] While this is not the place to argue for a full theory of intergenerational justice, the position taken here is consistent with what is called intergenerational sufficientarianism (Anderson, 1999; Frankfurt, 1987; Nussbaum, 2006). This theory states that what justice requires is that each individual has sufficient resources (in this case those things that human rights specify) to fulfil her basic needs. In the intergenerational setting this theory implies that the basic needs of the present take priority over the needs of future generations, while the needs of future generations take priority over luxury goods of present generations (Gosseries, 2008). Sufficientarianism appears to be most consistent with our intuitions about what intergenerational justice requires. An egalitarian theory of intergenerational justice would require that equal resources be available to future generations as were available to present generations. Such theories fail to take into account the changing context of human interactions as certain resources valuable to the present might be futile in the future. Utilitarian theories of intergenerational justice fail to take into account the universalism of human rights alongside the impossibility of aggregating between generations as neither size nor weight can be attached to future generation on an aggregative basis.

(WCED, 1987, p. 348). These proposals, however, consequently suffer from the same statist paradigm as international human rights law. Given that in the context of transnational governance social sustainability requires more than protection against non-performance of duties by states, the proposed conception of human rights is better suited to achieve the social aspects of sustainability that *Our Common Future* proposes. For instance, giving decisive voice to vulnerable groups does not necessary imply their empowerment vis-à-vis the state but could as well imply their empowerment towards foreign corporations. In other words, the relationships that underlie the need for empowerment are not limited to the vertical relationships between states and their subordinates, but more horizontally scattered across a diverse transnational context of governance.

The proposed conception of human rights, however, does not just pertain to sustainability. Interpreting the goal of social sustainability by the different duties legal human rights create brings with it a more substantive commitment to, at minimum, protect the rights of individuals. This is not to say that the idea of sustainability only entails human rights protection; the concept is broader and assigns duties to a wider range of actors than legal human rights do. However, at minimum, a moral specification of the duties not to interfere with the fundamental rights of individuals by all actors is a necessary component of a sustainable society. This does not imply that all actors are under perfect positive human rights duties but rather that a lack of respect for human rights by all actors infringes upon the social sustainability of a society. It seems counterintuitive, for instance, to conceive of any society worthy of the adjective sustainable, if it leaves basic rights severely underprotected, violated, and infringed upon on a regular basis. Sustainability is a broader concept that supersedes human rights but the proposed human rights based interpretation of social sustainability is arguably a necessary component of achieving sustainable societies. In line with good governance's limitation of essentials, the normative grounds of good governance thereby do not extend to all possible aspects of social sustainability. Rather the normative grounds of good governance provide a normative component to the practice-independent conception of good governance. This normative component takes the form of a generally accepted moral framework in terms of human rights and specification of corresponding duties that can be applied to a wide range of practices. Moreover, it offers direct action-guidance to good governance in practice by its specification of the moral duties corresponding to human rights. Assessing whether these can be legitimately assigned to different actors within a specific practice or context constitutes a first step towards determining the responsibilities to good governance. The migration (Scott & Wai, 2004) of the values and structure of moral human rights substantiates social sustainability without undermining the important political opportunity that sustainability opens. Given the general

acceptance of the content of human rights, and the clear specification of the moral grounds necessary to justify which duties fall on specific actors, this interpretation provides moral guidance alongside general acceptance. Thereby this normative component constructs a crucial step towards the operationalization of good governance towards a sustainable society.

4. The Normative Ground of Good Governance

Through a discourse analysis this chapter examined the potential of the of social sustainability to normatively ground good governance. The sustainability discourse provides an integrative language incorporating the world's most pressing concerns into an overarching framework. In international policy-making sustainability and sustainable development are the dominant terms in which goals are cast by national and international organisations both public and private. Two central conclusion were reached. Firstly, the broadness of the sustainability discourse creates an important political opportunity to bring wide ranging actors acting towards shared goals. The triune nature of sustainability reflects this. Environmental, economic, and social concerns are increasingly interrelated. Sustainability offers the integrative language and goal to address these concerns in concert. The inclusion of all actors in addressing these concerns moreover reflects our increasingly functionally differentiated world with shifting power relationships between national, international, public, and private actors and institutions. The widespread commitment to sustainability at the surface meets the requirements set out towards constructing a conception of good governance. It appears to meet a liberally neutral procedure, i.e. the deliberative structure through the concept of sustainability originated, and of applicability to a wide range of practice, i.e. the commitments by different actors and institutions.

The goals formulated within the sustainability discourse, however, remain vague. The analysis showed commitment to these first level goals is benign given the absence of meaningful contestation at the second level of meaning. Moreover, this second level contestation concerning the proper conception of sustainability almost exclusively concerns the environmental and economic aspects and their interrelation. The discourse analysis thus revealed the underrepresentation and underdevelopment of the social pillar. The political opportunity created through the discourse of sustainability is valuable to setting policy-goals in concert with national, international, public, and private actors. In other words, albeit vague in content a commitment to sustainability is not hollow. Social sustainability, however, required substantiation in isolation of the other components.

In providing an action guiding and liberally neutral interpretation of social sustainability a conception of human rights was proposed. Human

rights have a clear dual nature as simultaneously moral and legal commitment. Thereby they offer both normative grounds in the justification of their moral content and action-guidance in their construction as legal instruments. A conception of human rights based on the unity of right and duty was put forward. Concerning the moral content of human rights, this conception bases itself on international legal human rights declarations. It was argued that the procedure through which this content was determined constitutes a close approximation of the Habermasian ideal of communicative action through communicative rationality. The proposed structure of human rights is constructivist by putting emphasis on the duties corresponding to rights. It was argued that given the nature of human rights as inherently moral beyond the content of legal human rights the duties that correspond to human rights require necessary grounds of bindingness in moral theory. The different duties that moral theory specifies justify the imposition of different regulatory mechanisms on different actors, not just legal duties upon states. This conception offers a better substantiation of social sustainability than alternative conceptions. Thereby, these duties provide the first step towards disseminating the responsibilities for social sustainability for a wide range of actors.

The proposed conception of human rights provides the normative ground of good governance. Its content can rely on a liberally neutral procedure, it provides action guidance given the division of duties and through a metric to assign these moral duties to different actors, and broad enough to apply to a wide range of practices as no actors is from the onset excluded as duty-bearer. A normative component is thereby added to the procedural component of good governance established in Chapter 1. This normative component grounds good governance. It counters the problems of indeterminacy, output-bias, and contradictions by constructing a moral standard good governance strives towards. Countering the indeterminacy of good governance, the standard provides clarity in content, i.e. its orientation is towards a specified goal. In relation to the output-bias, the standard is inherently moral in both content and structure limiting a narrow focus on outputs. To the contradictory components of good governance, the grounding offers a practice-independent standard to justify trade-offs and striking a balance between different consideration that comprise good governance. Finally, the normative grounding is action-guiding through its embeddedness in the practical discourse of sustainability and practice of human rights. Moreover, it can be interpreted in light of varying practices and contexts to determine which actors bear what duties towards the normative goal providing a first step towards devising the mechanisms that constitute good governance in practice.

CONCLUSION PART I: A PRACTICE-INDEPENDENT CONCEPTION OF GOOD GOVERNANCE

Taken together the conclusions of the chapters comprising Part I constructed a practice-independent conceptualisation of good governance towards the realisation of social sustainability. The concepts analysed are all broad and contested. With reference to governance, a general introduction and expose on its operationalisation was offered. Three problems concerning the changes governance signifies were brought to the fore. The description of policy-making and social coordination the concept offers challenges traditional notions central to policy-making: legitimacy, enforceability, and accountability. The concept of good governance was argued to be indeterminate, output-biased, and offering contradictory components. As such what constitutes good governance is vague and contested. In an effort to remedy good governance's deficiencies a normative grounding based on social sustainability interpreted through human rights was put forward. Sustainability itself emerged as commonly accepted goal of policy-making contributing an important political opportunity to cast the normative ground of good governance in. Concerning its content, however, sustainability's social component was severely underrepresented and underdeveloped. Consequently, focus shifted to an interpretation of social sustainability in light of human rights.

More generally, the broadness of the concepts analysed require the conceptualisation of good governance to be applicable to a wide range of practices. To this end a practice-independent conceptualisation of good governance is constructed. Such a practice-independent conception implies that the relevant aspects of the conception are not determined by the specific practice it is applied to. Rather the conception offers components that can be interpreted in light of specific practices towards the formulation of what good governance in these practices requires. It should be noted that the adjective 'practice-independent' does not imply proposing an 'ideal' conception of good governance detached from practices of policy-making. In fact, it is influenced by and incorporates into its conception the descriptive meaning of governance, is constructed on the basis of the critical analysis of good governance in different fields, and grounded in a conception of social sustainability interpreted through both human rights theory and practice. Its independence from practice is thereby relative. The conception is practice-independent given the conceptualisation of its content independent of specific practices or contexts of governance. It is, however, influenced by the dominant

discourses that structured changes in policy-making the last three decades.

Based on the conceptual analyses, the practice-independent conception of good governance encompasses both a procedural and normative component. Both are briefly restated and explicated. The procedural component stems from the analysis of governance as signifier of change in policy making in Chapter 2. It was argued that the changes in policy-making governance signifies can be broadly defined as a move away from hierarchies towards more horizontal, decentred, and multi-level processes of policy making. This change affects the legitimacy, enforceability, and accountability of governance mechanisms. These governance problems require an adequate response for governance mechanisms to be good. Simplistically, if the drafting and implementation of governance mechanisms is not legitimate, enforceable, or accountable then these mechanisms do not constitute good governance. What constitutes an adequate response to these problems necessarily depends on the practice good governance is conceptualised for. For instance, an adequate response to the problem of legitimacy differs in the context of public policy making within a democracy and the context of the internal governance of corporations. The procedural component of good governance requires an adequate response to be formulated to the three governance problems without prescribing what the content of such a response should be. This content is dependent on the practice and context practice-dependent good governance is conceptualised for.

Beyond this procedural component, the practice-independent conception of good governance has a normative component based on sustainability and human rights. Chapter 3 concluded that different discourses on good governance share a common theme in the indeterminacy of the good. Consequently, different conceptions of good governance insufficiently justify prescriptions and evaluations of policy-making towards a conception of the good that governance strives for. This is, for instance, exemplified by the economic consequentialism in the development discourse or lists of contradictory principles without guidance on how to resolve tensions and trade-offs that relates to the good it prescribes exemplified by administrative conceptions. To overcome this indeterminacy and contradiction, it was argued that good governance is an inherently moral concept as it directly engages with debates concerning the good that policy-making processes adhere to or strive to achieve. Good governance thus requires normative grounding. Chapter 4 followed with inquiry into the normative grounding of good governance in social sustainability, ultimately, interpreted through human rights.

It was argued that the normative grounds of good governance are best conceptualised by an interpretation of social sustainability through the framework of human rights. Firstly, because human rights have a clear dual nature as legal and moral rights. The bridge they constitute between normative values and legal procedures aligns with the role to be performed by a normative ground of good governance, namely to incorporate moral grounding into the

prescription and evaluation of policies and policy-making processes. Secondly, because human rights provide a normative ground for good governance that can rely on a pluralistic justification not necessarily confined to specifically western conceptions of the good. Based on Habermasian discourse ethics the content of the dominant international human rights declarations was taken to inform the good substantively. Thirdly the proposed conception of human rights based on the unity of right and duties provides action-guidance in a wide range of practices. This conception specifies universal and special, perfect and imperfect duties within moral theory. Assigning human rights duties to different actors requires these duties to be grounded in corresponding moral duties. Of the duties that moral theory specifies only perfect duties can ground rights and imperfect duties correspond to virtues. This differentiation between duties offers a first step towards determining the responsibilities of different actors towards the normative goal of good governance by assessing which moral duties can be assigned to them. The extent to which duties of different actors to the normative goal of good governance can be grounded in moral theory guides the operationalisation of good governance in practice.

Taken together Part I concludes with a practice-independent conception of good governance. This conception has a normative component informed by the normative grounding of good governance and the normative goal it strives for in terms of human rights. Such normative grounding makes good governance more determinate and aids in resolving conflicts between components of good governance.[81] Moreover, this normative component

[81] Two questions may arise concerning the relationships between the normative grounding and discussed components of good governance. Firstly, what is the relationships between the procedural and normative component and secondly does this exclude consideration of, for instance, efficiency and effectiveness that are commonly understood to be a part of good governance. The answer to the first question is that the normative component aids determining the responsibilities that different actors have towards the normative goal. Answers to the three governance problems, i.e. the procedural component, are dependent on these responsibilities. Thus, when responsibilities are determined the normative goal aids the judgment of adequacy of responses to the governance problems. Following this relationship, the answer to the second question is that components such as efficiency and effectiveness can be components of good governance insofar as it constitutes an adequate response to, primarily, the problem of legitimacy given the responsibilities of a specific actor towards the normative goal and the specific context and practice good governance is conceptualised for. Efficiency can be a component of good governance when an actor bears a relevant duty towards the fulfilment of a human rights and efficiency aids the performance of this duty. This is the case in health-care where efficiency is crucial to the performance of the duty to provide the highest attainable standard of health-care. Moreover, efficiency can also be a component when an actor bears the relevant duty, or when basic human rights are not directly concerned, and efficiency constitutes an adequate response to the problem of legitimacy in a specific context or practice without infringing upon or furthering the enjoyment of a human right. This is, for instance, the case when one renews a passport. Efficiency increases the legitimacy of the actor issuing the document and possibly furthers the enjoyment of the right to free movement when the applicant plans to travel abroad.

offers guidance in the specification of the responsibility different governance actors have towards this goal. The procedural component of practice-independent good governance in turn relates to the process through which governance mechanisms are implemented and function in practice: are they legitimate, enforceable, and accountable. This procedural component thereby relates to governance practice and the actors involved in them. As the changes of that governance signifies relate to the increased horizontalisation of policy-making processes the legitimacy, enforceability, and accountability of the actors involved in these processes and the resulting policies and mechanisms cannot be straightforwardly constructed. In different contexts and in relation to varying practices these governance problems require assessment and adequate responses to be formulated to them.

Practice-independent good governance as proposed here thereby significantly deviates from the dominant conceptions of good governance in academic discourse. The latter are best described as rule-based conceptions of good governance. Such rule-based conceptions offer, primarily, lists of principles or 'rules' actors need to adhere to in order for conduct and policies to constitute good governance. As argued these principles are often contradictory, biased towards outputs, and indeterminate. Instead the practice-independent conception of good governance proposed here is procedural and normatively grounded. For good governance to prescribe policies and evaluate their content next to the process of drafting, implementing, and adhering to them the specification of the normative ground of good governance is necessary. One cannot prescribe the good without offering the content of this good. The procedural and normative components of good governance ameliorate the indeterminacy, contradictions, and output bias of good governance. In relation to the indeterminacy of prescriptions and evaluation practice-independent good governance proposes a clear threshold based on the moral duties corresponding to human rights. Governance mechanisms through which actors can violate their moral duties do not constitute good governance. The procedural component requires the assessment of the actors' legitimacy, the enforceability of policies, and accountability of both actors and mechanisms. Thereby it adds to the normative component the requirement to assess and clarify the roles of different governance actors and the mechanisms employed towards the realisation of good governance.

The balancing of different elements of good governance mechanisms and procedures is furthermore aided by practice-independent good governance. Thereby it responds to the contradictions in elements of good governance by providing a normative aim of these elements through the normative component. The procedural component aids this balancing act through necessitating responses to questions of legitimacy and accountability in this process. Contradictions can thereby be overcome by evaluating different elements as to their contribution to the normative aim of good governance

and assessing the legitimacy and accountability of actors making trade-offs between different elements. Finally, the moral content alongside the procedural component of practice-independent good governance strike a balance between the legitimacy of governance mechanisms in terms of input and output. The moral content provides robust standards no procedure can violate while the procedural component requires adequate answers to be formulated to problems of legitimacy. What constitutes good governance in practice thus depends on the practice that the proposed conception of practice-independent good governance is applied to as opposed to an external assessment on the basis of a list of predetermined principles or rules.

Good governance's application to practice requires the specification of elements that gain or lose importance in different practices and functional fields by interpreting practice in light of normative and procedural component of practice-independent good governance. Together these components offer the tools necessary to conceptualise the good governance of different practices. The interpretation in light of a specific practice translates practice-independent into a practice-dependent conception through which mechanisms that constitute good governance can be developed. The findings of Part I can now be integrated into the running visual structure:

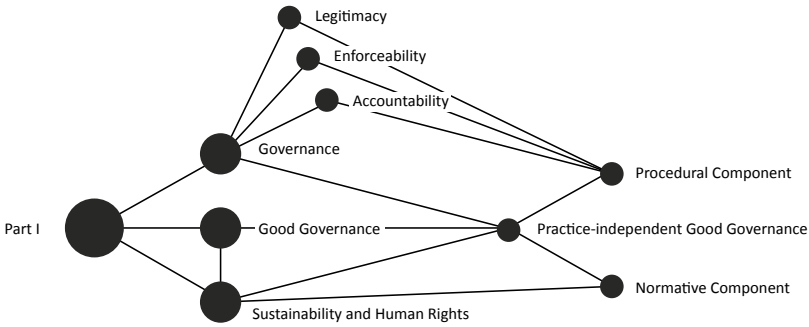

Figure 9 *Argumentative Structure Part I*

To the end of moving from practice-independence to a practice-dependent conception of good governance interpreted in light of specific practices, Part II encompasses two chapters concerning the practices of transnational private relationships. Chapter 5 comprises two case studies that exemplify these practices and the need for their good governance. Chapter 6 analyses these case in light of the practice-independent conception of good governance. The two cases and their analysis that constitute Part II exemplify the breadth and

increased influence these relationships have on the livelihoods of individuals in general and governance processes more specifically. In order to gain better understanding of the practices of these transnational relationships they are exemplified through a case studies concerning the rise and governance of big data and the production and supply chain of the iPhone in China.

Part II

CASE STUDIES

INTRODUCTION TO PART II

After the conceptualisation of a practice-independent conception of good governance Part II shifts focus from conceptual analysis towards transnational practice. As discussed in Chapter 1, practice is often treated as a nuisance to theoretical clarity.[82] Good governance, however, is a concept that rose from practice with the intention to guide it. Therefore, its normative content was sought in concepts and theories that have strong footing in and orientation towards practice: sustainability and human rights. Moreover, good governance functions primarily as prescriptive and evaluative concept. Without a practice to be applied to, good governance cannot prescribe nor evaluate policies or modes of policy-making. Thus, whereas the normative grounding of good governance of Part I required appropriate distance from practice, constructing a practice-dependent good governance of transnational private relationships requires knowledge of the workings of these private relationships, the transnational context in which they operate, and the extent to which they positively contribute to social sustainability or negatively affect it. To this end, Part II comprises two chapters devoted to practice and its analysis.

Chapter 5 introduces two case studies concerning transnational private relationships. As introduced in Chapter 1 the cases exemplify the breath of the transnational private relationships and their influence on livelihoods across the globe. The first studies one of the exponents of the digital era: big data. Big data is generated, collected, analysed, and monetised through different and changing private relationships. Especially the relationships between private individuals generating data and corporations that collect, analyse, and make business out of these data sets affect sustainability both positively by enabling communication and free association and negatively through infringements of privacy and manipulative social engineering. Moreover, a range of opaque private relationships between technological corporations that operationalise and repurpose data render their governance problematic. These private relationships are assessed and discussed within the wider governance context of the digital realm, including public and global governance structures. Both the positive contributions of big data, in areas such as health care and service delivery, and negative effects, i.e. corrosion of rights to a private live and moral agency, are discussed.

The second case studies what is arguably the epitome of the adverse effects transnational private relationships cause to individual livelihoods: transnational supply chains that source labour in low-wage countries under, often, degrading working conditions. The production of Apple's iPhone is

[82] See Chapter 1, section 2 at p. 14.

studied as example of these supply chains. Again, the different actors that comprise these relationships and the governance context in which they operate are assessed, including public and global governance mechanisms. Together the case studies offer an adequate description of transnational private relationships, their governance context, and manner in which they contribute to and undermine the achievement of social sustainability.

The second chapter of Part II comprises the case analysis. After the bare cases, including their broader exemplifying function, their descriptive content is analysed in Chapter VI. Both cases are analysed through the normative and procedural components of practice-independent good governance as conceptualised in Part I. This means that the procedural and normative component are interpreted in light of the descriptive content supplied by the cases. Concerning the procedural component this analysis determines what constitutes adequate responses to the three governance problems in light of the specific practice and context of transnational private relationships. As argued in Part I, at different levels different responses to these governance problems are necessary. In relation to the normative component, Chapter 6 takes from the cases the prominence of TNCs as most powerful governance actors in the transnational realm. The priority of duties over rights compels inquiry into the ability to assign private actors in general, and TNCs specifically, the perfect duties corresponding to human rights and thereby social sustainability. Together the analysis of the cases in light of both the normative and procedural components enables a move from practice-independent to a practice-dependent conception of good governance. The structure of Part II and its relationship to the preceding chapter are visualised below:

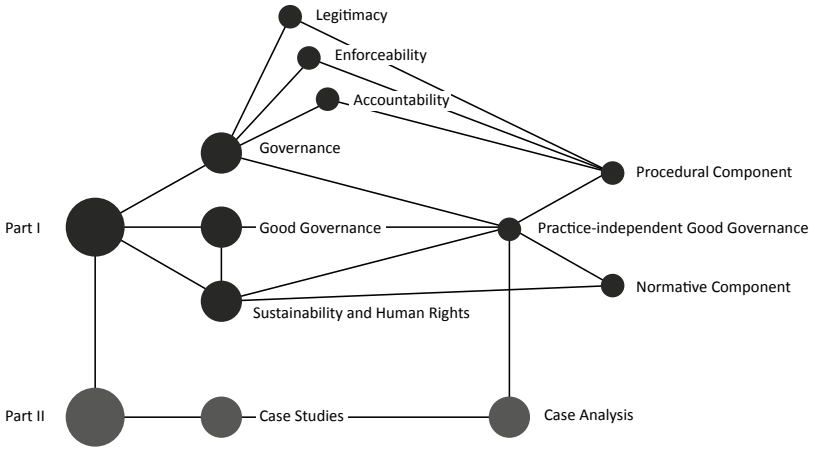

Figure 10 *Overview Part II*

5 THE PRACTICE AND CONTEXT OF TRANSNATIONAL PRIVATE ECONOMIC RELATIONSHIPS: TWO EXAMPLES

Figure 11 *Overview Chapter 5*

1. Introduction: Transnational Private Economic Relationships

Part II applies the practice-independent conception of good governance to transnational private economic relationships. Towards this end the Chapter 5 comprises two case studies concerning these transnational private relationships. It does so only descriptively and leaves the analysis of the cases in light of the practice-independent good governance to the next chapter. The description of the cases serves a twofold purpose. Firstly, to exemplify transnational private relationships as the descriptive foundation to which the practice-independent conception of good governance can be applied. The description of these relationships serves to adequately understand the practice and context that good governance is ultimately conceptualised for. Secondly, to excavate from these cases the aspects relevant to their governance in general and good governance more specifically. The context in and mechanisms through which these transnational private relationships are presently governed will therefore be assessed. Moreover, the manners in which transnational private relationships affect the ability of individuals and groups to enjoy the content of their fundamental rights is assessed. Thereby, the case studies exemplify the need for the good governance of transnational private relationships by explicating the manners in which they affect social sustainability.

Together the cases help achieve an adequate understanding of the practices and governance of transnational private relationships. They are treated as representative of transnational private relationships. Consequently, the details of these case studies are limited as their exemplifying nature does not require assessing all aspects concerning them. Moreover, a further limitation is that given their exemplary nature the constitutive aspects of the cases will be integrated into a broader practice-dependent conception of the good governance of transnational private relationships in general rather than into specific, practical proposal to achieve good governance in each of the two specific cases.

The first case concerns big data and its analysis through transnational private relationships between individuals, TNCs, and intermediary corporations. The second revolves around the production and supply chain of Apple's iPhone in China. Foreshadowing the basic description from the cases, together the diverse case studies exemplify, firstly, the functioning of transnational private economic relationships. Secondly, the cases exemplify the current governance of transnational private relationships and the manner in which these relationships shape governance itself. Thirdly, the increasing influence these transnational private relationships have on the livelihoods of individuals and the ability to achieve sustainable societies. Fourthly, the more general changing nature of governance in the transnational context

is exemplified. The description of the actors involved in these transnational private relationships, their powers, and their governance shows the necessity of conceptualising the good governance of transnational private economic relationships.

Both cases will be treated similarly to gain an understanding of transnational private economic relationships, the actors that comprise, and those govern them. First, the background and defining events of the case are introduced. Second, the actors involved are introduced to give an overview of the governance landscape and the roles played by different public and private actors. Third, an overview is provided of the different public, private, and public-private mechanisms governing transnational private economic relationships.

2. The Changing Landscape of Private Relationships and Transnational Governance: Big Data

Information is crucial to governance. Today more information than ever is generated, collected, stored, and analysed. This process resulted from the disruptive technological developments since the introduction of the Internet. The advent of big data is an exponent of the new digital era. The growth of available information has given rise to new mechanisms to collect, analyse, and operationalise datasets. The manner in which data is collected, how is it analysed, and towards what aims it is operationalised affects the livelihoods of individuals and groups both positively and negatively. Beyond its effect on individuals, these big data processes affect policy-making itself enabling better policy-decisions and predictive analysis (Davenport, Harris, & Morison, 2010). Simultaneously, the governance of the processes in which data is collected, stored, analysed, and operationalised is to a great extent internal to these processes itself, i.e. governed by the algorithms that enable these processes (Lessig, 2006). The actors driving the innovation of technologies, the collection, and operationalisation of big data are large private corporations. Moreover, data is often owned by these TNCs rather than by the individuals generating them.

The impact big data instruments and processes have on individual lives and societal governance arguably requires their good governance. Big data analytics infringes upon social sustainability by impeding the ability of individuals and groups to exercise agency by actively manipulating individuals and groups through social engineering. It will be shown that privacy, the right to a private life, ability to participate in the political process, and even free movement are challenged by these processes. As fundamental human rights these are all constitutive of social sustainability. The nature of big data and its analytics, however, poses challenges to constitute the

good governance of the transnational private relationships commanding the collection, storage, analysis, and operationalisation of big data. This is primarily the case because information itself is crucial to effective governance and in the digital era information to great extents reside on private servers, operationalised by private actors, and is generated and monetised through primarily private relationships. The advent of big data offers a compelling case to exemplify, firstly, the necessity of the good governance of transnational private economic relationships towards the realisation of social sustainability, especially in order to protect the rights and liberties of individuals and groups and, secondly, to highlight the complexity of these private relationships.

2.1 *Background and Context of Big Data*

Big data increasingly shapes our world. Not only the digital domain and its technological structure, the physical world too is increasingly affected by and regulated through big data analytics. To assess the transnational private economic relationships in the context of big data and the need for good governance a basic understanding of big data is necessary. Big data is commonly conceptualized with reference to its volume, velocity, and variety (Kitchin, 2014; Laney, 2001; Smolan & Erwitt, 2012; Vorhies, 2013). This conceptualisation through three 'V's' exemplifies how big data and its analysis is different from traditional quantitative analysis and policy-making. The V's refer to the massive[83] amounts of data that are collected and processed (volume) in real- or near real-time (velocity)[84] and comprise different types of data from diverging sources (variety). Five meta-forms of big data can be distilled (Soares, 2012, 2013). (1) Web and Social data generated from clickstreams and data-scraping on the world-wide web. (2) Machine-to-machine data generated by, among other things, satellite imagery, GPS signals, and the smart sensors comprising the Internet of Things (IoT). This includes wireless and wired systems that communicate with other devices. Smart-meters, smart-fridges, and smart-cars are just a few of the devices increasingly equipped with sensors generating data automatically shared and analysed. (3) Biometric data that can automatically identify a person such as DNA sequencing. (4) Transaction data comprised of billings, claims, and transactions individuals, corporations,

[83] Data is today measured in petabytes [10^15 bytes], exabytes [10^18], and zetabytes [10^21]. During the beginning of written history until 2011 approximately 5 billion gigabytes of data were produced. In the present this amount is produced every 10 seconds (Smolan & Erwitt, 2012). If one would store all data currently available on CDs, not long ago the prominent storing device, and stack it one would need 5 stacks reaching to the moon. Consequently, less than two percent of all information available is currently stored physically. The volume of big data is nearly incomprehensible.

[84] Whereas 'old' data is best described as stock in a warehouse (Davenport, Harris, & Morison, 2010), big data is created, collected, stored, analysed, and distributed in what approaches real-time.

and financial markets make. (5) Human generated data through phone-calls, e-mails, voice-recordings, and other data that are generated by the self.

Big data is different from traditional data through its continuous collection, storage, and analysis. The advent of big data has yielded great innovations and insights in the areas of business, academic research, developmental and humanitarian action, health care, intelligence, and policy-making. The increasing availability of information on nearly all aspects of social interaction allows for transformative analysis. Researchers and professionals alike prophesize a data revolution equal in impact and disruptive force to the industrial revolution (Mayer-Schönberger & Culkier, 2013). Not surprisingly questions relating to the governance of big data rise.

Beyond a basic understanding of what big data is, to assess its impact and the need for good governance, the roles that different actors perform in the context of big data should be known. Three types of big data actors drive the increasing availability of data and its diverse and increasingly comprehensive analysis: big data generators, collectors, and utilizers (Hazenberg & Zwitter, 2017). Big data generators are primarily individuals who 'leak' data as they navigate the world-wide web, use connected devises, and communicate digitally. This happens primarily unconsciously. For instance, when using Google's e-mail service Gmail all sent e-mails are scanned for relevant information and stored by Google. When using Google maps to navigate a journey from A to B, information concerning your movement is collected. When, upon arrival, you do a Google search for 'best restaurant in B' this too is collected and stored. Consequently, Google collects the data generated by individual that cover their interests (searches), doings (e-mails), and movements (maps).[85] Similarly, all your 'likes', posts, comments, tweets, searches, and nearly everything else one does online leaves behind information. Beyond individuals' purposeful actions that leave behind data, off-line data also creeps into the collection of big data through smart devices. For instance, GPS data is collected by simply carrying your phone or movement can be tracked using satellite imaging.

Big data collectors and utilizers are primarily private corporations that operate globally. These corporations gather, store, and operationalize information. Well-known tech companies such as Facebook and Google have business models that rely primarily on the collection of as much information possible about individual users, groups, and social trends. These, and other corporate, actors collect data in primarily two ways. Firstly, by 'scraping' the web, collecting information from social media and forums. Scraping is done by algorithms that independently search the web for information relevant to the aims given to the algorithm by a corporation, primarily for advertising purposes. Thereby the information scraped necessarily is identifiable and

[85] This is just a fraction of the data individuals leave behind through their usages of Google products. See https://privacy.google.com/your-data.html

personal as this constitutes their relevance to advertisement. This information is repurposed, connected to other data-sets, and ultimately sold. In this category corporations such as Buzzmetrics, Acxiom, and RapLeaf can be found whose business models rests on collecting information left behind by individuals on the web either consciously or unconsciously. Secondly, data is collected through 'free' products and services data directly from the individual without intermediate forums or social media. The usage of these products and services, such as Facebook and Google Search, creates valuable data for these corporations. These transnational tech-corporations utilize data primarily through consumer profiling and the sale of this information to advertisers or by providing a platform for advertisement directly. Moreover, big data is utilised to improve the very products used to collect the data. For instance, through every Google search query Google learns more about you which simultaneously aids personalising advertising and improving future search results.

The analytics that big data enables are increasingly employed in fields ranging from advertising and political campaigns to health care research and surveillance. Beyond an ever extensively profiling of individuals according to behaviours and personality traits, big data analytics offers the opportunity to anticipate situations. Ranging from who is susceptible to buy what product to where outbreaks of infectious diseases are likely to occur and whether anomalies in cell distribution will develop into cancerous tumours.[86] These big data processes offer big opportunities and big threats to individual rights and entire societies (Tene & Polonetsky, 2012, 2013; Will, 2015). Big opportunities can greatly improve the resilience of social systems. Advances are made in health-care by better profiling risks for diseases and overall increasing the speed of the developing medical treatments (Chen, Chiang, & Storey, 2012, p. 1173; Murdoch & Detsky, 2013; Tene & Polonetsky, 2012, 2013, pp. 245–247). In the energy sector, smart grids can better and more effectively distribute energy (Tene & Polonetsky, 2013, p. 248). In relation to climate change, The Climate Group (2008) argues that big data analytics aids the reduction of carbon emissions. Fraud in financial transactions is more easily combatted when an algorithm can filter out anomalies based on big data (Tene & Polonetsky, 2013, pp. 249–250). For developing countries big data offers better solutions at lower prices in the above-mentioned fields (Tene & Polonetsky, 2013, p. 247). Moreover, it contributes to more effectively distributing aid and in settlement of refugees (Zwitter, 2015). In general, big data enables corporations, governments, and NGOs to make "smarter decisions" (Davenport et al., 2010).

[86] In relation to big data and cancer treatment see: https://research.cornell.edu/news-features/cancer-and-big-data-analytics.

Its mirror image, however, is that predictions based on big data enable large scale infringements upon individual and group privacy, manipulations, and social engineering. Privacy laws are eroded (Boyd & Crawford, 2012, pp. 671–673). Big data make anonymous data redundant as repurposing datasets enables the relatively easy re-identification of the individuals behind data (Will, 2015). Predictive analysis of crime and illness can lead to stigmatisation and social exclusion (Tene & Polonetsky, 2013, pp. 253–254). These predictive aspects of big data can lead to a pre-emptive obedience that runs counter to conceptions of freedom central to liberal societies (Will, 2015). Predictive opportunities of, for example, individuals' movements in the aftermath of a humanitarian crises improves the delivery and effectiveness of aid greatly. But predicting their movement can also enable less benign actors to abuse that information to plan potentially catastrophic actions (Hazenberg & Zwitter, 2017; Zwitter, 2015). It can be employed towards great goods and potentially even worse bads. An example will explain the challenge big data poses and the breadth of the data that is collected.[87]

Among the most prominent actors in the big data realm are data brokers. These are corporations that collect and operationalize large quantities of data for profit. Acxiom is a data broking corporation based in Little Rock, Arkansas. Acxiom collects and analyses more than 50 trillion unique data transactions per year. A data transaction being a like-button clicked, comment posted, cookie accepted, or web-based search conducted. No corporation has profiles of individuals as detailed as Acxiom. Nearly every American citizen has a personal profile with Acxiom along with millions of non-Americans to a total of 700 million profiles. Each of these profiles compiles on average 1500 data transactions per individual ranging from Facebook 'likes', to traits such as gender and phone number to political sentiments and health issues (Singer, 2012).[88] Acxiom collects these data from social media, tracking cookies, posts on forums, and by scraping other clickstreams. It systematizes data into detailed consumer profiles categorised to best serve the interests of their clients. These clients range from retail stores seeking customers to advertising agencies that want to advertise products to potential customers, and few know customers better than Acxiom does. It has been said that Acxiom's business model, as those of other data brokers, is to know you better than you know yourself (Goodman, 2015, p. 150). To know the products that you want before you want them, to know where you want to go before you are planning to go there, and to understand why you align yourself with certain convictions better than you do yourself.

[87] This example covers a single corporation and a single, through prominent, use of big data. It does not exemplify the full breadth of the goods and bads of big data analysis.

[88] To exemplify the value of such data Youyou et. al. (2015) showed that through big data analysis ten Facebook 'likes' are sufficient to know a person better than their colleagues, seventy 'likes' are enough to know more than a person's friends, a 150 'likes' what parents know, and 300 'likes' to know an individual better than their partner.

At the surface the analysis of information to improve advertising or other forms of marketing might appear benign. A common sentiment is that if we are going to be subjected to large scale advertising we would rather have relevant advertising. To a great extent, as discussed, the analysis of big data creates great benefits to both individual lives and societies as a whole. Acxiom's practices, however, can be intrusive of the private lives we live. Data brokers categorise individuals not only as 'interested in technology' or 'wealthy' but also as 'left-leaning Christian', 'survivors of rape', and 'victims of domestic abuse' (Goodman, 2015). The availability of such information, identifiable by name and address, can do more harm than the good of personalized advertising. Insurance companies can buy information from Acxiom they are not themselves allowed to collect from individuals directly (Beckett, 2014).[89] Acxiom has readily available categories such as 'living with AIDS'. Individuals do not know what information big data collectors and utilizers have on them, or what is being done with that information. For instance, a search on plus-sized jeans might end up in your insurer's health records (Beckett, 2014). To a great extent, Acxiom and similar companies can "leverage this information for their own purposes, whatever they might be, whether profit, surveillance, medical research, political repression, or blackmail" (Goodman, 2015, p. 150).

Moreover, if information is available it is often likely to be abused one way or another. On August 8 2003 Acxiom was hacked and over 1.6 billion customer records were stolen from them and their clients (Howard & Erickson, 2009, p. 741; Lyman, 2003; Rousseau, 2003). One can imagine the malicious purposes that detailed profiles of individuals can serve. Beyond the external threat of data breaches by hackers and data leaks, corporations like Acxiom themselves pose a threat to individual lives and societies as a whole. The predictive ability of big data analytics lends itself to social engineering. There are cases that found fast-food being advertised and discounted primarily towards lower income classes and individuals suffering from obesity without their knowledge. Or predatory lending and cheap credit cards being advertised to individuals in the lower income brackets or, for instance, white Americans receiving holiday offers and discounts more than African-Americans (Goodman, 2015). This happens through the detailed profiles that data brokers such as Acxiom, Epsilon, Datalogix, Rapleaf, and Flurry can offer to their clients. Because of such 'soft' social engineering it becomes increasingly difficult to move beyond the categories that corporations put you in and target you through to nudge you towards products, holidays, votes, careers, and other choices without your knowledge, let alone consent.

[89] See also the case of Patientslikeme.org, an online forum for patients to share often deeply personal experiences and even medication plans that was scraped for data by Buzzmetrics and eventually sold to numerous corporations including insurance and pharmaceutical companies (Goodman, 2015; Zwitter, 2015). Moreover, health agencies themselves sell medical records that are insufficiently anonymised to insurers directly (Donnely, 2014; Robertson, 2013; Sweeney, 2013).

Notwithstanding the benefits of big data and the breakthroughs it has already led to, for instance, in the fields of humanitarian action (Zwitter, 2015) and medicine, the extent to which big data usages potentially infringe upon the livelihoods of individuals and groups requires good governance of the private relationships that shape the collection and utilization of big data. The next section will examine the roles and powers of actors in the digital era.

2.2 Actors, Roles, and Power

This section outlines the actors affected by the growing usages of big data and the manner in which new balances of powers emerge in its wake. It will be shown how the potential detrimental effects of the private relationships shaping the collection, storage, and utilization of big data affect the ability to achieve social sustainability. Firstly, the potential negative effects on individuals and groups and the links between big data collection and analysis with social sustainability are outlined. Secondly, the actors with most power in big data are identified alongside the emerging new private actors in the digital era.

Individuals and social groups are, within the big data process, primarily data generators. To paraphrase the common saying "if it's free, you are the product"[90], individual identities, traits, and dispositions indeed are the product that data collectors, brokers, and utilizers make profit from. There are clear benefits big data brings to individuals and groups, including improved service provision, unprecedented technological communication, an increasingly personalized digital realm, and advances in health care. Moreover, it has never been easier for individuals to connect, share experiences, and form collectives. With only a couple of clicks individuals can align themselves with others across the globe around causes they care about. Advances in data-driven research directly benefit individuals. Our understanding of genetics, diseases, and epidemics is greatly improved, and continuously improves, through big data analysis. These aspects and many other innovations improve the livelihoods of individuals.

Big data, however, also poses significant threats towards individual and group rights and well-being. Firstly, the extensive profiling by private corporations of individuals can, and in cases does, interfere with the rights of individuals to a private life. It has been shown that Facebook can better determine whether you suffer from specific mental illnesses than offline questionnaires by doctors (Inkster, Stillwell, Kosinski, & Jones, 2016). Arguably, it takes 300 'likes' and a set of open data to model these 'likes' through to know you better than your partner does (Youyou et al., 2015).[91] Moreover, rights such as freedom of movement of both individuals and groups are

[90] See for instance Goodson (2012) and Solon (2011).
[91] See n88 above.

challenged. Extensive GPS tracking, location services, and data scraping can restrict the ability of individuals to travel. Common examples are relatively benign cases such as two British citizens who announced on Twitter they were going to 'destroy America' what, they stated at border security, was slang for partying. They were, however, apprehended and returned to the United Kingdom upon arrival in the United States (Compton, 2012). More profound are the abilities to track refugee streams by, for instance, linking satellite imagery, GPS tracking, and social media posts. Beyond the potential benefits of such abilities, the risks are evident. Big data analysis enables the targeting of vulnerable groups and limit their freedoms and ability to effectively exercise their rights. Social engineering arguably poses the most significant threat to individual and group rights, and thereby to social sustainability (Zwitter, 2015). Vulnerable groups can be targeted by for profit firms and engineered to act not in their own best interests but in that of for-profit corporations. Even elections can be manipulated by engineering sentiments on social media and thereby influence the analysis of social data (Ehrenberg, 2012; Grassegger & Krogerus, 2017; Zwitter, 2015).[92] On a more abstract level, big data affects the ability of individuals to foresee the consequences of their actions potentially compromising their moral agency (Zwitter, 2015). Related to the ability to foresee consequences is that the processes of data collection, storage, and utilisation take place continuously without being particularly noticeable. As Richards and King (2013, pp. 42–43) note big data promises to make the world more transparent but the manner in which it does so is increasingly opaque. Individuals, for instance, do not sense or perceive the data they leave behind and what is done with it, by whom, and towards what ends.

Within the transnational private relationships that shape the big data realm power resides primarily with the TNCs collecting and utilising data. Beyond TNCs two further types of actors can be identified as data collector, utiliser, or both: states and public institutions and new digital actors. TNCs, however, own and have direct access to the largest data pools and the expertise to effectively use them. These data sets are, moreover, located primarily within the private sector on private servers in favourable jurisdictions. These private actors such as tech corporations become increasingly powerful. More so because ownership in general is in the hands of those collecting and repurposing rather than generating big data (Richards & King, 2013, p. 44). TNCs such as Facebook, Google, Buzzmetrics, and the aforementioned data brokers like Acxiom thus have significant power over others in both private and public-private relationships as these corporations not only push the boundaries of technological abilities, they also best analyse and monetise

[92] For instance the role that the company Cambridge Analytica played in both the Brexit and Trump campaigns (Grassegger & Krogerus, 2017). See a video-presentation of its CEO at https://www.youtube.com/watch?v=n8Dd5aVXLCc (last accessed 10-02-2017).

it. Especially their relationships with the individuals that generate data TNCs can operate relatively unconstrained and either anonymously or by providing access to products in exchange for data.

States and public institutions collect and utilize big and, primarily, open data, i.e. data freely available to everyone. Public policy increasingly employs big data analysis to predict the outcomes and effectiveness of policies (Kim, Trimi, & Chung, 2014). In general, however, these public actors lack the technological knowledge or the versatility to keep up with private actors. Big data for public policy is thereby primarily collected and utilised in concert with TNCs. The power of states as data collector and utiliser is thereby dependent on the extent of a private corporation's involvement. Put differently, the traditional power of states is affected. Open big data pools are readily accessible by everyone. The playing field for information has levelled and the state's monopoly on information and surveillance dissolves as similar, and in many cases better, capabilities reside with private actors.

Beyond states and private corporations, new actors have emerged. These actors collect and utilise data: private individuals, hacking collectives, and advocacy groups. With the right tools and knowledge, individuals can exercise significant power over other big data actors. Hackers and hacking collective are behind most of the data breaches in governments and corporations. Advocacy groups such as the different occupy movements utilise big data and data-based tools to organise and make themselves heard. Hackers and hacking collectives monetise stolen data. These new actors operate in a relatively unregulated sphere that bridges the gap between the digital and physical world. Small groups and individuals operating as hacktivists, cyber-criminals, and cyber terrorists challenge the power of both TNCs that store, broker, and monetise big data and of that of states (Hazenberg & Zwitter, 2017; Zwitter, 2015).

2.3 Governance Landscape

Big data processes are ambivalent (Will, 2015). The very same processes offer opportunities and threats to individual lives and societies as a whole. Big data technologies, moreover, disrupt governance mechanisms. This section discusses the governance landscape of big data. It will be shown that the processes of big data generation, collection, storage, analysis, and operationalisation are governed through two types of governance. The first type of governance relates to the processes from the generation of big data towards its utilisation of big data and lies in the technology that enables these processes. This technological type of governance is communicated primarily through terms of agreement. The second type relates to more traditional agent-centred governance mechanisms. It will be shown that big data is relatively sparsely governed by a myriad of different mechanisms involving a range of different actors. In contrast to off-line data, big data is, while

arguably more intrusive, regulated less (Davenport, Barth, & Dean, 2012). The different relationships between private actors and the dominance of technological corporations shape the governance landscape. The governance of conduct relating to big data, the power of different governance actors, and factors complicating easy solutions towards good governance are assessed. It will be argued that the mechanisms governing the collection and operationalisation of big data are opaque and indeterminate. Opaque because governance mechanisms are either covered by a veil of code or reside in overly burdensome legal documents approvable by a single convenient click. Indeterminate because on the one hand the powers of TNCs increase but are simultaneously challenged by new actors. On the other hand, governance is indeterminate because the responsibilities of different actors towards the content of social sustainability and their governance roles are unclear in light of both the innovative contributions big data processes make and the reputation of governance actors in handling big data.

In 1999 Lawrence Lessig showed that within the cyber realm code is law. He argued that the code that lies behind digital process structures the possibilities within them, including the options individuals have within the cyber realm. Code dictates what is possible and thereby code is to be perceived as the law of cyber space (Lessig, 1999, 2006). Whereas Lessig is concerned with the code and thereby law of the 'cyber' in general, the same analogy is warranted in relation to big data. Similar to Lessig's thesis, in relation to big data the processes through which this data is generated, collected, stored, analysed, and operationalised rely on algorithms. There is not a human operator categorising an individual's Google searches, a self-learning algorithms does so. What is possible with big data, and thereby what is done with big data hinges on the code that structures its collection and operationalisation. These algorithms and codes are primarily privately constructed and reside in the servers of private corporations.[93] Moreover, they are central to the business models of big technological corporations and thereby inaccessible to the wider public. This governance through code is thus internal to big data processes and shapes its possibilities.

The generation and collection of big data through these algorithms is governed primarily through terms of agreements between corporations and consumers. These terms specify the information that individuals agree will be analysed, repurposed, and operationalised. They furthermore stipulate the rights corporations have over this data, i.e. what their algorithms are allowed to do with it. This mode of regulation underrepresents the weaker party, the consumer in this case. For instance, it would take approximately 80 days per

[93] Excluding the code and algorithm of data-scientist working in the public sector and publically funded research. Though it should be noted that the Google Search algorithm and the algorithms behind Facebook were all developed at American universities.

year to fully read and comprehend the terms of agreements one has to either accept of decline (McDonald & Cranor, 2012).[94] Moreover, there is significant distance between the direct benefits for the consumer, access to a service or improvement of user experience, and knowledge of the data collected and what is done with it. The brokerage and utilization of big data is opaque and individuals are generally in disadvantaged information positions. A relatively small number of TNCs, including Google and Facebook, collect and broker the bulk of available big data. The generation of this data relies on the algorithms that obscure the process and simultaneously form the basis of their business models. Resulting from the combination of the impenetrable veil of code that structures data collection and utilisation and the near impossible task to understand the terms that data generators have to agree with big data generators are in general not is a position to effectively and conscientiously assess the trade-offs that are made when entering into these private relationships.[95]

Both the algorithms and the terms regulating what is incorporated in big data analysis govern big data. Perhaps counter-intuitively big data is thus internally governed by the same technological processes that enable it. In direct reaction to this internal and technological governance, novel mechanisms to escape these types of governance have been developed. These in turn are governance mechanisms within the realm of big data, though less often employed. TOR-browsers and VPN-networks are two examples of technologies that enable individuals to browse the web anonymously and thereby create no valuable data for collection, analysis, or operationalisation. Both these technologies can be perceived as governance mechanisms themselves as they alter the possibilities of big data collection and analysis purposefully.[96] The private relationships that are central to big data generation and utilisation are thus, firstly, governed by the technologies that enable it and, consequently, by the actors that own them.

Big data is also externally governed by, primarily, public actors. Public actors govern big data through national and supranational law, at least within the EU. Such governance is largely ineffective for three reasons. Firstly, the regulation of big data through command-and-control hard law has a pace

[94] See the estimation by McDonald and Cranor (2012).

[95] For instance, beyond the time it takes to read all terms of agreement a survey has shown that of the small percentage of people that do read such terms only 17% actually understands them (BBC, 2014).

[96] Purposefully altering possibilities can be considered as a form of social coordination or policy-making. When I purposefully alter the possibilities that you have to acquire a product, I govern your relationships with that product. The purposefulness of this altering these possibilities is crucial for it to constitute 'governance'. Crude facts of nature, for instance, do not constitute a governance mechanism. The sun does not govern the production of tomatoes in the Netherlands by not being warm enough. The government does by purposefully allowing the construction of greenhouses to enhance the sun's energy.

slower than the technological innovations meant to be regulated. As Brown and Marsden (2013, p. xv) state "code changes quickly, user adoption more slowly, legal contracting and judicial adaptation to new technologies slower yet, and regulations through legislation slowest of all". Secondly, once adopted legal provisions often miss their target due to the technological abilities to escape their prescriptions. A good example is the European 'right to be forgotten' (Newman, 2015; Rosen, 2012). While in theory this right to be forgotten can be justified as a substantiation of privacy in the digital era, in practice the extraterritoriality of big data undermines its effectiveness. Big data is extraterritorial in nature.[97] The swiftness in which it can be displaced to other jurisdictions, or even outside any jurisdiction, problematizes the ability of public governance mechanisms to achieve good governance as their authority is to great extent limited by nationality. The collection and utilisation of big data is a global process. Owners of data can with a single click displace their data sets to jurisdiction benevolent to their interests. Moreover, even individuals and hackers can, with increasing ease, operate anonymously in the digital realm through the aforementioned VPN and TOR networks. Thirdly, the threat of rigid regulation or overregulation undermining the benefits of big data analytics exists (Hemerly, 2013; Will, 2015).

The external governance of big data processes by public actors is largely ineffective because the context of big data collection and operationalisation is unfriendly to governance actors who lack access to technological processes that constitute the internal governance of big data. Therefore, in this external governance landscape an imbalance in power exists. The major technological corporations have a clear power advantage over other actors. They possess great leverage in governance mechanisms, and the ability to escape regulations. For instance, in devising legal regulations of big data, public actors must rely on knowledge and information of these corporations as the knowledge concerning the algorithms structuring data collection and operationalisation reside in private hands. The transnational nature of the collection and flow of data advantages corporations that operate transnationally. The sheer complexity and multi-facetted nature of big data, along with relative indeterminacy as to the potential detrimental effects of regulation, is best understood by technological corporations. Moreover, products and services relying on big data analysis have become integrated into the lives of individuals to such an extent that withdrawal of data generating services and products comes with high costs. Beyond the external governance through hierarchical commands through the public structures there are increasing attempts to govern big data processes through mechanisms that incorporate different actors (Will, 2015).

[97] A different example is the recent acquisition of WhatsApp by Facebook in which EU regulators required their data-sets to remain separate, a clause later violated by Facebook and met with impunity.

Examples are, for instance, the initiative on artificial intelligence 'Partnership on AI for the benefit of people and society' that provides an ongoing dialogue between technological corporations, including Apple, Google, and Facebook, civil society organisations, NGOs, and academia to discuss and steer technological innovations (Hazenberg & Zwitter, 2017).[98]

The mechanisms that govern big data processes are thus firstly, technological in nature and constituted by actors choosing to use services that challenge the imbalance in power. Secondly, public actors attempt to adapt legal mechanisms and frameworks to the disruptions of new technologies. However, the imbalance in power between public actors and TNCs alongside the possibility of overregulation render these mechanisms largely ineffective towards comprehensive regulation. Thirdly, novel mechanisms, though still in infancy, are emerging that seek to govern big data processes and the dominant TNCs through an integrative approach.

A central finding in the first case is the ambivalence present in both the contributions and the governance of transnational private relationships through which big data is collected, analysed, and operationalised. This ambivalence has two aspects: opacity and indeterminacy. Firstly, big data processes are opaque. Algorithms as primary governance mechanisms are known only to the actors who develop them to collect, analyse, and operationalise big data. Thereby the potential to positively contribute or negatively affect social sustainability are hidden behind a veil of code. The governance of relationships between this code and, primarily, individuals is characterised by a similar opacity. The terms of agreements that govern these interactions are near incomprehensible. Secondly, big data processes are ambivalent in terms of their outcomes and possible governance mechanisms. Both the outcomes, whether they be positive or negative, and the possible governance of big data processes, and the appropriate governance actor, are indeterminate. Given the capabilities of big data to contribute to societal goods and social sustainability and to simultaneously pose significant threats to them there is indeterminacy as to what good governance requires. Legal norms notoriously lag behind technical innovations, but the potential threats of illegitimate usages of big data posed to a range of fundamental rights require a form of regulation and/or oversight. Public actors, traditionally conceived as proper keeper of the public interests, lack the capabilities to effectively govern many technological innovations and have been implicated in large scale privacy violations through data collection themselves.[99] Public governance of the big data technologies easily triggers prospects reminiscent of Orwell's big brother (Schwartz, 2000; Will, 2015). States and public

[98] https://www.partnershiponai.org

[99] The revelation in, for instance, the Snowden files evidence this. See Bauman et al (2014) and at https://www.theguardian.com/us-news/the-nsa-files

agencies have been subject to critique for the widespread collection of data on individuals and data leaks themselves. There is simultaneously an increased need to govern usages of big data and increasing indeterminacy concerning the proper role of different actors and governance mechanisms. Public governance runs the risk of overregulation, undermining the benefits of big data and technological innovation. Beyond this indeterminacy concerning the potential benefits and threats of big data two further indeterminacies can be identified. Firstly, the dominant position of TNCs requires checks, but it is unclear which actors can effectively perform such checks. The introduction of new actors to the governance landscape creates continuously changing power relationships (Hazenberg & Zwitter, 2017). The effectiveness of possible governance mechanisms is thereby challenged. Secondly, the complexity and opacity of the trade-offs that data generators, primarily individuals, make to reap the benefits of big data analytics arguably corrodes their agency to make informed decisions.

Together these aspects complicate the determination of responsibilities of transnational private relationships in achieving social sustainability, the proper governance mechanisms, and the roles of different actors in them. It is clear, however, that the processes of big data collection, analysis, and operationalisation in general, and the power of TNCs specifically requires good governance towards the realisation of social sustainability. The transnational private relationships commanding big data processes have the ability to greatly contribute to social sustainability while simultaneously posing significant threats to it. In the next chapter this descriptive case is therefore analysed in light of the practice-independent conception of good governance. In order to retain a wide scope, the next section of this chapter will introduce a second descriptive case concerning the transnational supply chains producing consumer goods with a focus on the production of Apple's iPhone.

3. Transnational Corporations, Global Supply Chains, and Labour Standards: The Production of the Apple iPhone

On January 23rd 2010 19-year old Ma Xianhqian jumped from her high-rise dormitory on a factory campus. The previous week she worked 11-hour overnight shifts every day (Clarke & Boersma, 2017). That month she had worked a total of 286 hours, including 112 hours of overtime, thrice exceeding the legal limit (Barboza, 2010). Ma Xiangqian was the first of thirteen suicides at Foxconn facilities in China. On top of them four attempted suicides took place, with the individuals surviving badly injured (SACOM, 2010). This includes Tian Yu who, after being send back and forth between Foxconn facilities, was increasingly unsure how to obtain payment for her first month of employment. She jumped from the window of her dormitory leaving her

bedridden for the rest of her life at 17 years old. The suicides were preceded by large scale labour unrest, strikes, and protests for increases in wages and improvements in working conditions.

Foxconn is the chief manufacturer and assembler of consumer electronics in the world, producing approximately forty percent of the world's electronic items (Duhigg & Barboza, 2012). As such it assembles the majority of Apple's consumer products, and the suicides described all took place at facilities assembling iPhones and iPods. The Foxconn suicides reinforced public outrage and activism concerning scandals relating to the working conditions of labourers in low-wage countries producing consumer goods for western corporations and western markets. Such scandals were previously primarily witnessed within the garment industry and the extractive sector.[100] Given Apple's status as leading electronics brand and the solid incorporation of Foxconn in its supply chain to assemble Apple products, special and increased scrutiny from media and the general public fell upon them (Clarke & Boersma, 2017).

This section examines the case of Apple's supply chain producing the iPhone in Chinese facilities. This case exemplifies the more general workings of transnational supply chains and their effect on the livelihoods of individuals involved in and affected by them. Within supply chains products are produced primarily for the markets of developed economies in North America and Europe. In the following, firstly, the bare outline of the case, the actors involved and their responses are given. Secondly, the wider context of the iPhone's production process is scrutinised. Thirdly, the governance landscape within which these processes take pace is assessed. This landscape includes the legal frameworks of both corporations' home- and host-states, self- and sectoral regulation, contract governance, and multi-stakeholder initiatives.

Apple is among the most valuable brands in the world (Brand Finance, 2017; Millard Brown, 2016).[101] Over the last three months of 2015 it reported its highest profit of 18.4 billion. The corporation holds in excess of 200 billion in liquid assets (Tepper, 2015). In 2015 it sold 231.5 million iPhones.[102] Throughout the world Apple employs approximately 110.000 people, mainly at their San Francisco headquarters and Apple Stores across the globe (Clarke & Boersma, 2017). The supply chain for the iPhone alone comprises 785

[100] For an overview of scandals concerning the garment industry see Elliot and Freeman (2001); Ross (2014); Doorey (2011); Taplin (2014), and for extractive sector including conflict minerals and oil see Wenar (2017).

[101] BrandFinance and Millard Brown are the two leading organisations conducting research into brand rankings. From 2011 onwards Apple has topped their lists of most valuable brands only seceding the top rank to Google in 2016 (Brand Finance, 2017; Indvik, 2011; Millard Brown, 2016).

[102] For a statistical overview of iPhone sales from 2007-2016 see https://www.statista.com/statistics/276306/global-apple-iphone-sales-since-fiscal-year-2007/

suppliers in 31 countries (Clarke & Boersma, 2017, p. 5).[103] The lion share of suppliers, 349, are located in China. In China, Apple's main subsidiary is Foxconn. Foxconn is a Taiwanese technology manufacturer with facilities in China where it employs more than 1.2 million individuals (Alexander, 2012; Duhigg & Barboza, 2012). Within these facilities consumer electronics are produced and assembled, including the 230 million annual iPhones. Foxconn facilities accommodate up to 300.000 individuals at a single location and many constitute campuses rather than workplaces offering on-site catered housing in dormitories (Clarke & Boersma, 2017). The transnational private relationships between Apple and its subsidiaries directly affect the livelihoods of those employed by either corporation, their subsidiaries, individuals working in the larger supply chain, including those in the extractive sector in India and Sub-Saharan Africa mining resources, close relatives dependent on income from the supply chain, and ultimately the consumer buying the iPhone.

Following two decades of increasing scrutiny being paid to working conditions in the supply chains of the global garment industry[104], in 2006 the scope of attention widened to include the manufacturers of electronics. A scandal built up around Apple's supply chain after reports emerged concerning degrading working conditions at locations where Apple sources components. British newspaper the *Mail on Sunday* sent reporters to two facilities in China producing iPods. They encountered working conditions were akin to "being in the army" (Klowden, 2006).[105] Mostly female employees worked 15-hours including unregulated overtime ("if they ask for overtime we must do it"), earning US$50 per month (Klowden, 2006). The first facility visited employed 200.000 individuals and offered onsite 'free' housing where employees slept a 100 to a room. At a second facility employees worked 12 hours daily and payment was double at US$100 per month. However, half of the monthly wage was used for off-site food and accommodation. Apple was consequently accused of sourcing 'sweatshop' labour.

The inclusion of consumer electronics in the 'sweatshop' debate caused increased scrutiny being paid to working conditions in, primarily, Chinese facilities manufacturing these products. After reports on the minimal amenities, low pay, extreme hours, and dangerous conditions, including prolonged exposure to chemicals and other health and safety issues, the scandal escalated for Apple in 2010 with the thirteen aforementioned suicides at Foxconn facilities (Clarke & Boersma, 2017). Moreover, in 2011 an explosion in a Chengdu Wintek factory left three dead and many injured,

[103] See http://comparecamp.com/how-where-iphone-is-made-comparison-of-apples-manufacturing-process/ for a detailed overview of the locations of Apple suppliers.

[104] For a good overview of this process the cases of Nike and Levi's are exemplary Doorey (2011).

[105] For the full report from the Mail on Sunday see http://www.dailymail.co.uk/news/article-401234/The-stark-reality-iPods-Chinese-factories.html (last accessed 1-12-2016).

reinforcing activist claims that the degrading working conditions comprise more than a wage related issues and that the health and safety of hundreds of thousands of workers were at constant risk (Clarke & Boersma, 2017; Rundle, 2011). The controversy was, and still is, aimed primarily at Apple due to it, firstly, being the best-known electronics company in the world and, secondly, because of its wealth. The general reaction being that workers should not suffer unbearably producing products for western corporations who take home enormous profits and arguably have the financial ability to drastically improve working conditions in their supply chains. Apple proved to be the perfect case for activism precisely because of its well-known public image and status as the highest valued company in the world.

In relation to growing concerns regarding the working condition in supplier facilities Apple took action, thereby acknowledging at least a minimum of responsibility for conduct by subsidiaries and conditions in its products' supply chains. In 2005, following other corporations, Apple established and implemented a 'Supplier Code of Conduct' (Frost & Burnett, 2007, p. 107).[106] In 2007 the code of conduct was rewritten, arguably in light of growing media attention. As part of this new code the company publishes an annual report concerning supplier responsibilities. The code states that "Apple's suppliers are required to provide safe working conditions, treat workers, with dignity and respect, act fairly, and ethically, and use environmentally responsible practices wherever they make products or perform services for Apple" (Apple, 2007, p. 1). Any violation of the principles specified in the code of conduct "may jeopardize the supplier's business relationship with Apple, up to and including termination" (Apple, 2007, p. 1). The code applies to supplier as well as their subsidiaries and subcontractors (Collins, 2014). In an attempt to monitor compliance with the code and thereby going beyond what the law requires, Apple hired an independent auditor in 2006 to audit the production facilities (Frost & Burnett, 2007). These first audits found that in 35% of the cases Apple's 60-hour workweek limit was surpassed. In general, however, workers were happy with their earnings on at least minimum-wage level and their dormitories (Clarke & Boersma, 2017, p. 11).

Following the 2010 suicides Foxconn responded with wage increases, installed netting around dormitories, and introduced 24-hour counselling teams. Apple hired suicide prevention specialists and promised to continue working with Foxconn to improve working conditions (Apple, 2011). In relation to explosions in two Wintek facilities in Chengdu, Apple audited all factories processing the aluminium dust that caused the explosions to prevent

[106] This supplier code of conduct was modelled after the Electronic Industry Code of Conduct initiated by Dell, HP, IBM, and Cisco (Frost & Burnett, 2007, p. 107). The latest version (2016) of Apple's 'Supplier Code of Conduct' can be retrieved here: (Apple, 2007, p. 1). The 2005 version can be found here https://image2.sina.com.cn/IT/it/2006-06-18/U58P2T1D995340F3647DT20060618165929.pdf

future accidents. In follow-up audits the relationship with one supplier was terminated "until modifications are in place" (Apple, 2012). In 2014 Apple CEO Tim Cook stated that they are "measuring working hours of 700.000 people. I don't know anybody else doing this. And we are reporting it, and we are showing a level of care that I don't see in other places." (Clarke & Boersma, 2017). On top of the efforts introduced by Apple and its suppliers, Apple joined the Fair Labor Association (FLA) as the first tech-company in 2012.

The FLA is a university based multi-stakeholder NGO that, among other things, conducts unannounced third-party audits at factories in the supply chains of its members. The FLA started as initiative auditing the facilities that produce university branded clothes and over time expanded to one of the leading NGOs monitoring the compliance of its members with their code of conduct.[107] It provides a standardised code of conduct that members must subscribe to along with annual reports with recommendations and publicly available summaries of these reports and the consequent improvements made by members and their subsidiaries. In their reports, after their mandatory baseline audit on working conditions in Apple's supply chain, the FLA found that progress had been made at the audited Foxconn facilities within the timeframe the FLA set, but still found that improvements were necessary in 2013 and remained necessary in 2015, including improvements in working hours, safety conditions, and worker representation (Fair Labor Association, 2013a, 2013b, 2015).

The responses by Apple and its primary supplier Foxconn combined with third-party audits by the FLA paint a picture in which all actors are determined to achieve better and safer working conditions for employees throughout the supply chain. From multiple sources, however, reports have emerged that paint a less optimistic picture. The Centre for Research on Multinational Corporations, China Labor Watch, SACOM, and the Chinese Institute of Public and Environmental Affairs all found damning practices including direct safety hazards at facilities, involuntary overtime, and concluded that many of Apple's promises remained unfulfilled (China Labor Watch, 2012, 2013, SACOM, 2010, 2011; Van Dijk & Schipper, 2007). That the responses by the different actors within the supply chain have not been effective to eradicate all excesses from the production cycle was further brought to the public eye in 2014. A report by the BCC programme *Panorama* found that passports and other identification documents of workers were seized by recruiters, workers sleeping in overcrowded dormitories, sham safety controls, forced overtime, and up to 16-hour working days (BBC, 2014; Wakabayashi, 2014). This shows that the assessment of reports by all parties must be approached with similar scrutiny, not the least because the specific

[107] For a full overview of FLA members, ranging from American universities to Adidas and Nestlé see http://www.fairlabor.org/affiliates.

responsibilities of corporations for conducts taking place in their supply chains is unclear. In order to fully appreciate the content of these practices, and consequently be able to scrutinise them, the context within which these supply chains operate must be considered.

3.1 The Context of and Actors in Corporate Supply Chains in China

The global supply chains employed by global brands to manufacture consumer products are a feature of free-trade induced globalisation. Assessing their context thus requires at least minimal assessment of these aspects: free-trade and globalisation. Moreover, the outcomes of global supply chains in the regions where production takes place illuminates and deepens insight in debates concerning 'sweatshop' labour, free-trade, and globalisation beyond newspaper headlines and activist slogans. These processes are introduced and discussed here within necessary limitations as this is not the place to engage in extensive debates concerning globalisation and the merits of free trade. Furthermore, the present discussion limits itself to the context of global supply chains that manufacture products in China, in line with the specific case studied here. It should be noted, however, that the processes described concerning the Chinese context are similar to the ones in other national contexts and that, though deviations always exist, general trends can be observed in low-wage countries (Milanovic, 2016).

Central to the post WWII international constellation was an effort to increase trade between nations to stimulate economic development and greater interdependencies between peoples. After the cold war's demise this process intensified as it became relatively unhinged by ideological disputes. Though globalisation is by no means a recent phenomenon, the process of fast technological advancements, reductions in the costs of transportation and communication, and of trade liberalisation through, primarily, the reduction of tariffs and protection of investments significantly sped up the integrative process. A core aspect of globalisation is that the growth in cross-border exchange of goods, resources, knowledge and the movement of people and services across national borders increased global interdependencies. This process has opened paths for TNCs to seek cheap labour in low-wage countries, investment funds to seek higher returns in the global south as economic growth slowed in high-wage countries, and nation-states to further the process of harmonization of rules governing local economies. Globalisation and international trade have opened up resources to both western corporations in the form of labour, resources, and new markets for products and to low-wage countries by attracting investments, further professionalising the economy, increasing employment, and directly contributing to economic growth.[108]

[108] There are multiple debates concerning the extent to which trade liberalisation and globalisation contribute to growth in low-wage countries though in general consensus is that

The transnational private economic relationships encompassing transnational supply chains are one of the driving forces behind this process of globalisation. Beyond the, primarily, institutional[109] endeavours towards free trade and harmonization of market regulation, private corporations and especially TNCs exploit the opportunities of international trade that economic and political institutions shape. Transnational supply chains are the chief exponent of this process. These supply chains diversify production processes. Resources are extracted at those mines that offer highest quality and lowest extraction costs, technical production is located to those areas with the right combination of expertise and wage competitiveness, and unschooled production processes move to low-wage countries. A crucial aspect of these supply chains is not just diversification in the locations of extraction, production, and assembly but the diversification of ownership. Most TNCs do not own the mines that extract the resources nor do they own the factories that produce their product or employ the factory workers assembling them. Transnational supply chains operate through subsidiaries and contractors and thereby constitute a production process owned by many and commanded by TNCs.

As stated above, for the production of the iPhone Apple relies on 785 different contractors in 31 countries. For the production to remain efficient different actors command different parts of the supply chains. In China, the assembly of the iPhone is outsourced to Foxconn. Foxconn in turn outsources the assembly of the constitutive parts of the iPhone to different businesses (Clarke & Boersma, 2017). Transnational supply chains are an interdependent interlocking of contractors and sub-contractors. This complexity and scale renders a complete oversight of the production processes near impossible. Thereby, ownership of different aspects of the production process is opaque and most actors can hide behind complex legal structures of contracting-out and sub-contracting to avoid responsibilities for wrongs committed.[110] Concerns are primarily directed at TNCs who command transnational supply chains (Levi et al., 2013, p. 21). It is, however, clear that the specificities of transnational supply chains are more complex and the responsibilities of the different actors integrated in these supply chains to a great extent indeterminate.

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to a significant extent economic growth in low-wage countries is either directly or indirectly linked to international trade. It should be noted that the extent to which developing countries are able to take full advantage of the opportunities globalisation offers greatly hinges on the robustness of their domestic political institutions (Rodrik, 1997, 1999, 2001).

[109] Such institutional endeavours are exemplified by international economic institutions such as the WTO, IMF, OECD alongside political institutions such as the UN and its agencies, the EU and nation-states primarily through trade agreements such as EMU, NAFTA, CETA, etc.

[110] Though supplier codes of conduct, when interpreted as specifying contractual obligations, do specify responsibilities of different suppliers (Cafaggi, 2016).

A major aspect to be considered in describing the workings of transnational supply chains is the broader socio-economic context of the states where production takes place. The complexity of transnational supply chains and the consequent diffusion of responsibility for conduct between multiple actors are easily dismissed as processes detrimental to (good) governance. These supply chains are, however, efficient and produce benefits to corporations, individuals, and societies. The Chinese case is a striking example of both the good and bad. Over the last thirty-five years China has introduced a great number of reforms to its economy, including land reforms and the introduction of market mechanisms. During this period 800 million Chinese have been lifted out of extreme poverty while the population was growing significantly (The World Bank, 2017).[111] Though economists attribute this incredible increase in material well-being to a great extent to successful land and agricultural reforms, a significant part the growth necessary to lift half of the population out of extreme poverty is estimated to be directly linked to international trade, investment, and transnational supply chains that produce in China (Bardhan, 2007). Moreover, in general factories that are integrated into international supply chains offer better working conditions and wages than non-exporting sectors of the economy (Bardhan, 2006a, 2006b; Milanovic, 2016; Powell, 2014).

The regions on the producing side of transnational supply chains in general benefit from these processes at a macro-level despite scandals and the unequal distribution of the monetary benefits of production (James, 2012). When one looks beyond the Chinese context it is clear that this trend is not country-specific. In Bangladesh and Pakistan, for instance, wages increased after transnational supply chains relocated production processes to these countries (Bardhan, 2006a, 2006b). Despite the many scandals from these countries concerning, especially, the garment industry many individuals are "banging on the gates of these 'sweatshops' to seek employment" that offers a more sustainable income and better working conditions than many local alternatives (Bardhan, 2006b, p. 23). It must be noted that this does not mitigate the graveness of labour-related scandals such as the Foxconn suicides. It does imply that it is easier to say things are wrong than pointing out what precisely is wrong[112] and where the responsibility to remedy lies. On the one hand, western TNCs command supply chains in which basic rights of individuals to safe working conditions, subsistence allowances, and

[111] See the World Bank China Country Report at http://www.worldbank.org/en/country/china/overview#3

[112] This assumes that a 'wrong' requires agency. The sun scorching the earth is not a wrong in itself, the manner in which the people affected by droughts are assisted can constitute a wrong. Similarly, low-wages are not necessarily a wrong in itself but they are when these wages are the result of exploitative structures and exemplify gross inequalities between individuals and sectors (James, 2012).

worker representation are undermined and infringed upon. On the other, these supply chains have integrated developing countries into the global economy[113] lifting millions out of poverty, generally offering better working conditions and pay than non-exporting sectors of local economies. Such indeterminacies make the determination of responsibilities and consequent achievement of good governance of these transnational private relationships increasingly complex.[114]

3.2 *Governance Landscape*

At present transnational supply chains in general and Apple's iPhone supply chain in specific are governed through five types of regulation: (1) hard law of both home and host state, (2) voluntary self-regulation, (3) sectoral regulation, (4) contract governance, and (5) multi-stakeholder initiatives (Koenig-Archibugi, 2004; Moon, 2002; Vogel, 2010; Cynthia Williams, 2017). Each of these modes will be discussed with reference to the governance of Apple's supply chain in general and its production in China.

3.2.1. National Law

TNCs bear a wide range of legal duties stemming from both their home- and host-states. While jurisdictions differ, common trends can be discerned in the regulation of transnational supply chains and TNCs. It is useful to distinguish between home- and host-state legal requirements and between soft and hard law. The TNCs commanding transnational supply chains are incorporated predominantly in the United States or European Member States. These home states assign two types of legal duties to TNCs that directly relate to the livelihoods of individuals employed within the supply chain.[115] Firstly, duties stemming from hard law that regulates the import of goods. The US adopted a ban on the import of goods produced through forced and child labour in early 2016.[116] The European Parliament has brought a similar proposal to the European Commission.[117] The broadness of such bans and regulations, however, oftentimes undermine the effectiveness of enforcement of these laws. For instance, the fact that these bans concern not properties

[113] With the important exception of large parts of agricultural sectors of developing countries' economies.

[114] See James (2012) for an extensive argument concerning when production processes constitute exploitation and thereby a 'wrong' and when instances of low-wages and sweatshop-labour does not.

[115] Only those requirements that pertain to the livelihoods of workers in the supply chain are discussed here. Omitted from the assessment are thereby regulation that concern the qualities of the products themselves.

[116] 19 U.S. Code §1307

[117] 2009/2219(INI) and for progress on the initiative see http://www.europarl.europa.eu/legislative-train/theme-europe-as-a-stronger-global-actor/file-ban-on-import-of-goods-produced-using-modern-forms-of-slavery

of the imported product itself but rather the circumstances of production, complicates enforcement as it requires the knowledge of entire supply chains rather than the testing of a product. These requirements are likely to function more as efforts to motivate corporations to perform due diligence in their supply chains as scandals could trigger legal action.

Secondly, home states regulate TNCs and their supply chains through a combination of hard and soft law requirements directed at reporting. Especially within the EU corporations that are traded at one of the European exchanges are required to publish annual reports pertaining to the non-financial aspects of their conduct including environmental and employee matters, anticorruption measures, and respect for human rights. In general, however, there are no sanctioning mechanisms relating to the content of the reports. Their valuation is left to market mechanisms. Some countries, most prominently Germany and the UK, adopt a 'comply or explain' policy that allows corporations to argue why they do not report on non-financial issues as the law requires and if such reasoning is deemed sufficient they are relieved of their duty to report (Sanderson, Seidl, Roberts, & Krieger, 2010).[118] A European Commission directive[119] relating to non-financial reporting refers to the Global Reporting Initiative (GRI), the OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, and the ISO 2600 as guidelines in reporting. These non- and inter-governmental guidelines offer guidance to structure the content of non-financial reporting and disclosure. In general, it can be said that in relation to the requirements of these guidelines consensus has built around the International Labour Organisation's core labour standards, respect for human rights, and UN environmental standards (O'Rourke, 2003, p. 7; Vogel, 2010, p. 69). These concern basic standards and principles regarding the protection of health and safety, wages and hours, and environmental impacts (O'Rourke, 2003). In the US four disclosure requirements are part of the Dodd-Frank Act (Williams, 2017, pp. 17–18).[120] Relevant for transnational private relationships are the requirements in relation to the extractive sector and those sourcing minerals from conflict zones. The Dodd-Frank Act's Provision 1502 requires corporations to disclose mine safety reports, the mines they source from in conflict zones with focus on the area of the Republic of Congo, and a "publish what you pay" clause for these resources (Williams, 2017, pp. 17–18).

Apple, as headquartered in the US, is not subject to legal requirements for non-financial reporting other than those relating to conflict minerals. In relation to conflict minerals, Apple announced that as of 2016 all of its 242 subsidiaries and contractors sourcing or processing minerals are subject to

[118] For the German corporate governance code see http://www.dcgk.de//files/dcgk/usercontent/en/download/code/2015-05-05_Corporate_Governance_Code_EN.pdf
[119] DIRECTIVE 2014/95/EU
[120] Dodd-Frank Wall Street Reform and Consumer Protection Act: Pub.L. 111–203, H.R. 4173

external audits by third parties (Chasan, 2016). In a statement Apple's Chief Operating Officer (COO) stated that "We could have very easily chosen a path of re-routing our supply and declared ourselves conflict-free long ago, but that would have done nothing to help the people on the ground" (Chasan, 2016). Non-governmental organisations have both praised Apple for its process towards realising a conflict-free supply chain in which profits do not flow to parties engaged in violent conflict and criticised it for not doing enough. For instance, Amnesty International found in 2016 that child labour was still present in the mines where Apple's supply chain sources minerals from (Amnesty International, 2016) whereas Global Witness praises Apple for not declaring its products 'conflict free' but rather reporting its efforts to strive towards more sustainable sourcing practices and continuous improvement (Oboth, 2016).

Host states regulate TNCs indirectly through primarily labour and environmental law. This regulation is indirect as these laws protect workers and the environment from illegal conduct by subsidiaries and contractors of TNCs. Many of the countries where production of consumer goods through transnational supply chains take place have labour laws modelled around the core ILO standards. These include limits on weekly hours, overtime, pay, and health and safety prescriptions. When scandals arise, however, they by and large take place in contexts of unable or unwilling governance. In such low-governance zones states can be unable to enforce national law because of a lack of resources due to a weak economy or widespread corruption (Risse, 2012). Conversely states can be unwilling to enforce out of fear to lose foreign investments[121], disrupt the economy when wages increase non-gradually[122], to impede economic growth necessary to sustainably develop their country, or because of authoritarian and kleptocratic regimes are simply not concerned with the wages and working conditions of its citizens. In case of the production of the iPhone, Chinese labour law applies to the Foxconn facilities. For what concerns working hours, Chinese law limits working hours to 8 per day and a maximum of 44 per week. Exceptions can be made through overtime of up to 3 hours per day with a maximum of 36 hours of overtime per month.[123] As evidenced from the cases these labour law provisions are structurally under- and un-enforced. Moreover, Chinese law prohibits independent worker representation through unions. The bargaining positions of labourers is thereby structurally undermined and contradicts ILO standards and Apple's own supplier code.

[121] Globalization has brought with it competition between nations for investments. Transnational supply chains' search for cost-effectiveness favour low-wage countries and therefore enforcement of labour law can undermine foreign investment.

[122] An abrupt hike in wages in a specific sector can be a trigger for social unrest.

[123] China 1994 Labour Law, Chapter 5 at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm

The governance of transnational supply chains through the public law of home and host states is thereby largely 'soft' in nature. In relation to home-state law, the governance of transnational supply chains primarily focusses on reporting and disclosure regimes with no sanctioning mechanisms. In relation to host-states governance the hard law governing working conditions hinges on the willingness and ability of these states to enforce the law which often remains wanting. Thereby the working conditions in transnational supply chains are ineffectively governed. TNCs, however, engage in a range of self-regulatory mechanisms to govern their transnational supply chains that will be discussed below.

3.2.2 Voluntary Initiatives, Contract Governance, and Corporate Social Responsibility

Beyond national law TNCs and supply chains are governed through different modes of governance that rely on private initiative, self-regulation, and voluntariness. These initiatives can be grouped together under the umbrella of CSR and contract governance. These will be discussed here.

3.2.2.1 Self-Regulation

Private actors increasingly seek to regulate their own conduct and those of others within their supply chains through self-regulatory initiatives. These initiatives are voluntary as no external actor requires private actors to do so. Corporations primarily engage in self-regulation through reporting on non-financial aspects of their business conduct (Jackson, 2010; O'Rourke, 2003; Vogel, 2010; Williams, 2017). Of the 250 largest corporations in the world 93% publish non-financial performance beyond what law requires (Williams, 2017). The dominant form of reporting is through the publication of a code of conduct and annual reports on performance relating to this code of conduct. The substantive basis of these codes of conduct differs per corporation and sector as the social impacts of corporations' hinge on the work they do. There is, however, a shared baseline in these codes of conduct informed largely by the already mentioned GRI, UN Global Compact, OECD Guidelines for Multinational Enterprises, and the ISO 2600. In general, they pertain to environmental impacts, wages and hours of employees directly or indirectly employed by the corporations, and human rights effects of business conduct. Whether and in what manner reports are published is subject to discretion of the corporations themselves as they voluntarily publish them. Voluntary reporting initiatives are often responses to scandals[124] or market trends[125]

[124] The reporting initiatives of Nike and Levi's are an exemplification of self-regulation triggered by scandal (Doorey, 2011).

[125] Recent reporting initiatives and disclosure regimes pertaining to environmental sustainability and fair trade can be interpreted as reaction to market trends (Taylor, 2005).

(Doorey, 2011; Jackson, 2010, p. 91). Over the last two decades the number of corporations voluntarily reporting on their non-financial performance has risen in the wake of scandals concerning environmental degradation, child labour, and sweatshop labour conditions. Both these scandals and the consecutive consumer demand for ethical products has increased voluntary reporting initiatives.

Positively interpreted, voluntary initiatives can be seen as aspirational documents in which corporations acknowledge they have responsibilities beyond the adagio that the only corporate responsibility there is, is to make as much profit as possible within the confines of the law (Friedman, 1970). However, these voluntary initiatives, such as self-regulation through self-imposed codes of conduct, are subject to two critiques (Koenig-Archibugi, 2004). The first argues that self-regulation is inconsequential and unreliable. Given that private actors voluntarily make codes of conduct and report on them the amount of discretion undermines the reliability of the disclosed information and gives no guarantees that action will be taken when performance was found to be in violation of the code. The second argues that even if self-regulatory initiatives are reliable they ignore key stakeholders (Koenig-Archibugi, 2004). Given their voluntary nature not only compliance and reporting is discretionary but also the drafting, implementation, and monitoring of codes themselves. There is thus no guarantee that those affected by the code or those whose position it seeks to improve are heard in this self-regulatory process (Zamboni, 2016, pp. 406–414).

Within the confines of the iPhone case, Apple's codes of conduct, including its supplier code of conduct, are typical examples of voluntary self-regulation. As an American corporation, Apple is not required by law to report on non-financial issues nor to stipulate the conduct they require of suppliers. The standard critique of voluntary self-regulation can be levelled against such codes of conduct too. To what extent they represent actual efforts towards improvement in supply chains or marketing efforts to decrease reputational accountability is uncertain as they are no public or third party checks on these voluntarily expressed commitments.

3.2.2.2 Sectoral Self-Regulation

Beyond self-regulation, private actors increasingly choose to jointly regulate their sectors or industries. Two forms of sectoral self-regulation can be distinguished: sectoral codes of conduct and sectoral certification regimes. Given the high costs of compliance to production and sourcing standards beyond what the law requires, in specific sectors corporations have joined efforts. A primary reason for such sectoral regulation is to lower the ability of competitors to take advantage of a corporation's efforts towards ethical production and sourcing (Koenig-Archibugi, 2004). Efforts to regulate the sector as a whole levels the playing field between competitors and

reduces uncertainty between them and the costs of unilateral initiatives. A second reason for sectoral self-regulation is when the reputation of a single corporations closely relates to how the sector as a whole is perceived. Examples of sectoral self-regulation are the Responsible Care programme of the chemical industry, the Guidelines for Good Manufacturing Practice of the pharmaceutical industry, and the World Federation of Sporting Goods Industry (Haufler, 2001). In practice, sectoral regulation takes the form of sectoral codes of conduct or certification regimes. In both cases corporations are required to report on their performance and are some cases be subject to external audits to assess compliance when a corporation chooses to join a sectoral association. Its voluntariness is thereby less discretional as voluntary self-regulation. The same two critiques that are levelled against self-regulatory measures, however, still stand their ground against sectoral self-regulation. Firstly, sectoral regulation still constitutes a case of business actors assessing the performance of other business actors on the basis of standards "designed and managed by business actors themselves" (Koenig-Archibugi, 2004, p. 253). Within such self-regulatory regimes there is an inherent incentive not to publish violations and enforce sanctions as the reputation of the entire sector and its governance is at stake. Secondly, stakeholders other than business themselves have no voice in sectoral self-regulation.

In the case of Apple and its production in China, or in the technological sectors as a whole, sectoral self-regulation is largely absent. This can be attributed to the nature of the sector and the absence of industry associations. Technology to great extent relies on innovation and the protection of intellectual property. Sectoral codes of conduct and audits can undermine the profitability of their operations. More generally, TNCs with extensive supply chains are in generally reluctant to publish their suppliers, contractors, and subsidiaries as their supply chain optimisation is a core feature of profitability (Doorey, 2011).

3.2.2.3 Contract Governance

The above discussed types of self-regulation can be interpreted through the lens of contract governance (Cafaggi, 2013, 2016; Cafaggi & Iamiceli, 2014; Grundmann, Möslein, & Riesenhuber, 2015). Contract governance is an interpretation of the private rules that govern interactions between private actors beyond the transaction cost interpretation of economic contracts (Williamson, 1979). As a research programme, it incorporates findings from multiple disciplines, including sociology and behavioural sciences, to assess the mechanisms for and reasons behind compliance with private contracts interpreted in their widest sense (Grundmann et al., 2015). Contract governance is a perspective that moves beyond contract "as an instrument of dispute resolution" but perceives of contract as a private governance mechanism for "steering and coordinating human behaviour" (Grundmann

et al., 2015, pp. 40–41). The core assumption of contract governance is that just as nations solidify their norms in constitutions and derivative public law, private actors constitute their norms in the contracts that govern private relationships (Catá Backer, 2008). Especially in relation to contracts that govern long-term and cross-border relationships this constitutional character of contracts directly governs transnational private relationships and specifically their supply chains (Grundmann et al., 2015, pp. 20–26).

The different self-regulatory initiatives such as codes of conduct, certification regimes, and standard setters can be interpreted as contracts within which private actors assign rights and duties to each other concerning qualities of products beyond the price and performance of the product itself. Especially in transnational supply chains such contract governance is increasingly prominent as evidenced by, for instance, Apple's supplier code of conduct (Cafaggi, 2016). Standards concerning the production process of a product in a specific supply chain including, among other things, environmental sustainability and working conditions are incorporated into commercial contracts. As mechanisms that steer and coordinate private conduct, contracts are increasingly employed towards the integration of societal values into private supply chain governance. In relation to their subject-matter these contracts, as discussed above, rely on different parties for their content. Supplier codes can, for instance, be developed in isolation by TNCs commanding supply chains or base themselves on private standards such as the GRI, sectoral, or NGO standards. Moreover, contracts can incorporate sectoral certification regimes into their governance of supply chains (Marx, Wouters, Maetens, & Swinnen, 2012).

Across sectors and different TNCs contract governance takes different forms. The incorporation of, in this case, societal values into contracts can be implemented by a single TNC[126], throughout a sector[127], and with or without collaboration with NGOs for standards setting and monitoring purposes.[128] In general, the perspective of contract governance seeks to interpret the voluntary initiatives of private actors through the legally more robust framework of private law. In relation to the standard critique of self- and sectoral regulation the perspective thereby opens the path towards, for

[126] These are primarily the many supplier codes implemented by TNCs with no direct reference to externally drafted principles or standards. See for example Nestlé's supplier code at https://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf and Cafaggi (2016, p. 231).

[127] A prominent example of sectoral contract governance is in the field of pharma and attempts to regulate their supply chains towards societal beneficial behaviour without the incorporation of non-corporate actors into the process. This is exemplified by the principles of responsible supply chain management issued by the Pharmaceutical Supply Chain Initiative (PSCI). See https://pscinitiative.org/home.

[128] See the section below for initiatives that integrate non-corporate actors into this process through multi-stakeholder initiatives.

instance, enforcement of societal values in private relationships through courts (Beckers, 2015; Collins, 2014). However, adequate performance of these components of contracts requires identifying the parties responsible for adopting and implementing different aspects of the contract throughout a supply chain. The interpretation of self-regulation through the lens of contract law itself thus does not adequately respond to the two standard critiques. For these initiatives to be successful the contracts should specify "(1) the clear definition of objectives for suppliers, (2) the identification of indicators to measure the achievements and identify the failures, (3) the patterns of improvement, and (4) the instruments to assess the performance" (Cafaggi, 2016, p. 237). Given the costs associated with these steps and because critique for inadequate performance is often directed at the TNCs commanding supply chains, some private actors move outside the realm of self-regulation. NGOs are incorporated into supply chain governance to assess these steps by providing the objectives, identify indicators for measurement, track improvement, and assess performance throughout supply chains. In those cases, governance moves beyond self-regulation and towards multi-stakeholder initiatives.

3.2.2.4. Multi-Stakeholder Initiatives

Finally, TNCs and their supply chains are governed through multi-stakeholder initiatives, a form of civil regulation. Multi-stakeholder initiatives, in varying consortiums, bring together business, NGOs, international organisations, and sometimes states in order to regulate the conduct of TNCs. As a form of networked governance it places corporate behaviour under the scrutiny of transnational civil society actors including, but not limited to, states, international organisations, and NGOs (Baccaro & Mele, 2011; Baumann-Pauly, Nolan, van Heerden, & Samway, 2017). By some these initiatives are heralded as the third way between failing national regulation and overly discretionary self-regulation (Utting, 2002, p. 66). Multi-stakeholder initiatives are, however, still voluntary as TNCs are not required to join them. After subscribing to these initiatives, TNCs can, however, be subject to external monitoring, reporting, sanctioning. Civil regulations occupy a middle ground between enforceable external regulation and self-regulation. They are primarily directed at tackling a single and common concern by integrating different stakeholders into the process of negotiating and adopting norms and principles that each stakeholder can consequently own and enforce (Tamo, 2015, p. 77). Most multi-stakeholder initiatives operate through a standardised code of conduct that subscribers must adopt and external third party audits to monitor compliance. Prominent examples are the certification schemes that emerged after the UN Rio Declaration on Sustainable Development: Marine Stewardship Council (MSC) and the Forest Stewardship Council (FSC) (Marx et al., 2012). Other initiatives do not rely on certifications but rather on

due diligence in supply chains. The Kimberley Process for conflict diamonds is one of the often-heralded success-stories of multi-stakeholder regulation (Tamo, 2015). The Kimberley Process regulates the export diamonds by certifying and monitoring the diamond trade from conflict-ridden regions.

In general, external standard setting and certification has advantages over self- or sectoral-regulation. In terms of accountability corporations open themselves up to external scrutiny. Moreover, they promote a variety of interests and external monitoring and reporting contributes to meeting societal expectations. Thereby multi-stakeholder initiatives go beyond market-driven codes of conduct (Bernstein & Cashore, 2007). Furthermore, multiple multi-stakeholder initiatives emergent from interaction between business, NGOs, and international organisations have been translated into law. The Kimberley Process[129] and the FSC[130] are two examples of multi-stakeholder initiatives that have been, indirectly, legally implemented in different states. Multi-stakeholder initiatives constitute a "more inclusive and deliberative platform for governance wherein different actors can claim ownership of the process, thereby taking their outcomes more seriously" (Tamo, 2015, p. 101).

In relation to Apple's production of the iPhone the company subscribed to the Fair Labour Association (FLA), a multi-stakeholder initiative. The FLA requires the adoption of its code of conduct and executes third party audits of all facilities where production takes place within five years of joining.[131] The summaries of the reports produced through these audits are publicly available. Moreover, the FLA selects the factories to be audited, picks the monitoring organisation, and does unannounced inspections. Apple and its subsidiaries are thereby under increased monitoring and public scrutiny due to the publicly available information to improve standards in the supply chain.

Given the voluntary nature of the governance mechanisms discussed here a legitimate question is why corporations join them. It should be noted that even though the majority of corporations now engage in non-financial disclosures it is only a minority that subscribes to the more extensive multi-stakeholder initiatives. Five reasons can be given for TNCs to go beyond what the law requires. Firstly, marketing reasons are dominant. It is good to be associated with doing good. If the appearance of doing good can be achieved at relatively low costs, i.e. a code of conduct, there is a strong business case for self-regulation. Secondly, recruitment in their home states improves as one can attract better employees when the corporation has a good reputation. Thirdly, employee relations generally improve when employees feel they contribute to something good which increases loyalty and motivation.

[129] See the Dodd-Frank section on conflict minerals at n120

[130] The European Union Timber Regulation (EUTR) aligns with the certification requirements of the FSC (Gavrilut, Halalisan, Giurca, & Sotirov, 2016). See https://ic.fsc.org/en/for-business/fsc-and-timber-regulation/eu-timber-regulation.

[131] See http://www.fairlabor.org/ for the requirements of joining the organisation.

Fourthly, it is increasingly shown that CSR has long term financial benefits. This is primarily because doing good increases the legitimacy of TNCs in local economies (Orlitzky, Schmidt, & Rynes, 2003). Fifthly, CSR can serve to keep the law at arms-length and to prevent state-regulation when TNCs can show they do a good job regulating themselves (Koenig-Archibugi, 2004).

Given the context in which Apple's supply chain and transnational supply chains more generally operate and are governed a number of indeterminacies exist similar to Big Data's ambivalence. This arguably adversely affects the achievement of good governance through a single unified approach. The need for good governance is clear. The lives of individuals and communities are adversely affected by transnational supply chains. Degrading working hours and conditions, a lack of health and safety measures, unequal distribution of generated wealth, and environmental degradation all call for increased scrutiny to be paid to these aspects of globalization. The governance context, however, problematizes good governance on both a practical and theoretical level. Practically because there is no single agent with authority to implement and enforce norms and standards upon transnational actors towards good governance. Theoretically because the responsibilities of the different actors are indeterminate. For instance, the degree of Apple's responsibility to ensure Chinese law, which abides by the general ILO norms, is abided by in its supplier factories is not necessarily clear-cut. For instance, should this not be the responsibility of the Chinese state? This complicates the determination of responsibilities towards the content of social sustainability, the proper governance mechanisms to institutionalise these responsibilities, and the roles that different actors have within such mechanisms.

4. Conclusion

Transnational private relationships are more powerful than ever and their direct and indirect influence on livelihoods across the globe continually increases. Moreover, the transnational context is inherently multi-polar and multi-layered. Multi-polar in reference to the different actors that act authoritatively in this context including states, international institutions, private actors, and non-governmental organisations. Multi-layered because the different multitude of levels in which these actors interact with each other. These interactions occur in the international, regional, national, and local contexts and each level shapes these interactions. Substantively the two cases paint a complex picture of transnational private relationships that both positively contribute to and negatively affect social sustainability. Though the subject-matter and practices of the two case studies diverge, their complexity converges around a set of indeterminacies that problematize the achievement of good governance. Together these aspects constitute a sufficient first des-

cription of the workings of transnational private relationships relevant to the development of good governance. Firstly, it has become clear from the cases that TNCs occupy positions of great power. With this great power comes the ability to positively contribute to societies' social sustainability and to undermine the ability of individuals to enjoy the content of their human rights and thereby the achievement of social sustainability. Both cases show that the governance of TNCs is key to achieve good governance of transnational private relationships. On the one hand because of their immense power and wealth. On the other because TNCs fall largely outside of contexts of regulatory control or are bound primarily through voluntary commitments. To great extent they are able to escape the closed jurisdictions of nation-states or have the power to influence state law. Moreover, outside of legal governance their regulation relies on primarily voluntary commitments to self-, sectoral-, or multi-stakeholder regulations.

Beyond the problematizing factor of TNCs' increasing power, the case studies converge in terms of the ambivalent contribution of transnational private relationships, opacity of governance mechanisms, and indeterminacy concerning the responsibilities of different actors towards good governance. The ambivalence of transnational private relationships lies in the great contributions they make to social sustainability while at the same time posing significant threats to it. Recall the advances in health-care made through big data analysis or the contribution to economic development transnational supply chains make in low-wage and developing countries. Contrast this with the detrimental working conditions of labourers in low-wage countries and the large-scale invasions to privacy and social engineering by technological corporations. The opacity of governance mechanisms lies in the inability to single out an actor capable to effectively govern these transnational processes, hence the multi-levelled nature of the transnational context. More generally this opacity lies with the many different and often non-committal governance mechanisms that govern the contexts in which these transnational private relationships operate. Lastly, and arguably at the core of these complicating factors, is an indeterminacy concerning the responsibilities of different actors. As the cases show it is not clear-cut which actor has the responsibility to mitigate the negative effects of transnational private relationships. For instance, to which extent Apple is responsible for the achievement of social sustainability vis-à-vis the responsibilities of its subsidiaries or the Chinese state cannot be easily determined. Concerning the construction of the good governance of transnational private relationships a way out of these indeterminacies should be found. In the next chapter the cases are analysed in light of the practice-independent conception of good governance to determine responsibilities, legitimacy, and accountability of different actors alongside the possibility of enforceable governance mechanisms. Recapitulating the structure of Chapter 5 is visualised on the next page.

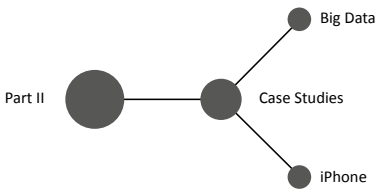

Figure 12 *Structure Chapter 5*

6 CASE ANALYSIS

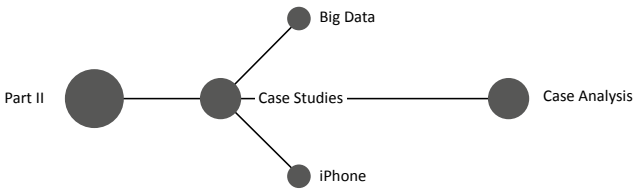

Figure 13 *Overview Chapter 6*

1. Transnational Private Relationships and Good Governance

The transnational context is multi-layered and multi-polar. At different levels (global, international, regional, local), a multitude of actors (public, private, for- and not-for-profit) interact with each other and coordinate their actions through varying mechanisms (contracts, self-regulation, international standards, public law) in diverging functional fields. These levels, actors, mechanisms, and functional fields are without overarching governance by a public authority (Bull, 1977).[132] Beyond this multi-layered and multi-polar constellation the case studies brought to the fore three additional aspects common to transnational private relationships and the difficulty in governing them: (1) Ambivalence concerning their negative effects and positive contributions; (2) Opacity of governance structures and mechanisms; (3) Indeterminacies regarding the responsibilities of different actors. A more general defining aspect of transnational private relationships is the increasing power of TNCs (Ruggie, 2017).[133] TNCs occupy a central place in relation to social sustainability by commanding transnational private relationships. These corporations are not confined to oversight by single jurisdictions but rather governed through different mechanisms in the multi-layered and multi-polar transnational constellation. Moreover, their monetary and regulatory powers exceed that of many states. They have great leverage on low-wage countries that rely on their presence for economic development and employment. In relation to our changing digital landscape, a small number of TNCs have great leverage on states in terms of their expertise and adaptability. Their increasing power requires effective checks in order to achieve good governance. Based on this empirical perspective, good governance hinges on the ability of mechanisms to steer the conduct of TNCs towards the achievement and protection of social sustainability. From the onset, however, it is clear that no easy solutions or silver bullets exist given the multi-layered and multi-polar nature of the transnational context and the relative replaceability of TNCs in transnational private relationships.[134]

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[132] In this regard Bull's (1977) typology of the transnational system as anarchical holds given that there is no transnational overarching public authority with the capacity to implement and enforce rules.

[133] Ruggie (2017) argues that TNCs power increases instrumentally, for instance through lobbying, structurally, for instance 'international' trade today is hardly trade between nations but rather trade within transnational private relationships, and discursively through persuasion and emulation.

[134] See Chapter 1 at p. 10. Though commanded by TNCs transnational private relationships exist independent of them. TNCs occupy positions of great power in commanding transnational private relationships and are therefore relevant as primary subjects of good governance mechanisms. However, their position is interchangeable as one TNC can be replaced with another in order to sustain the transnational private relationship it previously commanded

The case analysis of this chapter bridges the gap between the theoretical endeavour of Part I and the complex practices of the case studies that exemplified transnational private relationships. It does by bringing together the descriptive content of the case studies with the practice-independent conception of good governance constructed in Part I. The case studies are interpreted in light of the two components of practice-independent good governance. Thereby the analysis moves beyond disciplinary boundaries, isolated events and actions by specific actors. The analysis is integrative and ultimately aims at the conceptualisation of the practice-dependent good governance of transnational private relationships constructed in Part III.

The procedural component concerns the functioning of governance mechanisms to merit the adjective 'good' in practice: they should adequately respond to the problems of enforceability, legitimacy, and accountability. What constitutes an adequate response hinges on both the context that good governance is conceptualised for and the moral duties towards the realisation of social sustainability that different actors bear. The normative component concerns the moral grounds and aim of governance for it to be 'good': good governance should be oriented towards a normative goal and consequently allow for the evaluation of existing governance mechanisms as to their contribution to this goal. This normative goal of good governance is, as argued in Part I, the realisation of social sustainability interpreted through human rights.[135] The conception of human rights underpinning this normative goal focusses on the unity between right and duty establishing that the allocation of duties corresponding to rights is necessary towards the enjoyment of individual and group rights. Moreover, given the moral dimension of human rights these duties should be sufficiently grounded in moral theory. The normative goal of good governance thereby offers guidance in determining responsibilities for the realisation of social sustainability. By assessing which duties that moral theory specifies can be assigned to the actors constitutive of transnational private relationships a first step in determining the responsibilities of different actors can be made. For this reason, the chapter starts with the analysis of the case studies in light of the normative prior to the procedural component.

The analysis in light of the normative component informs the analysis of the procedural component, as throughout the case analysis findings will inform what follows it. Ultimately, the descriptive content of the case studies is analysed to determine the elements constitutive of practice-dependent good governance. This chapter proceeds in four sections. The next section analyses the cases in light of the normative component. It offers a first determination of the justifiable responsibilities of private actors

(Ruggie, 2017). This complicates the application of governance mechanisms absent overarching authority.

[135] See Chapter 4, section 3 at p. 96.

towards the realisation of social sustainability and transposes the arguments concerning private actors' moral duties to the content and form of possible good governance mechanisms. The third section concerns the analysis of the cases in light of the procedural component. Its sub-sections deal with one governance problem each and respectively formulate adequate answers to issues pertaining to the legitimacy, enforceability, and accountability of governance actors and mechanisms. The fourth section brings together the analysis of both components and concludes.

2. Transnational Private Relationships and the Normative Component: Human Rights Duties of Private Actors

The practice-independent conception of good governance constructed in Part I normatively grounds good governance in a conception of social sustainability based on human rights. This normative ground serves both as justificatory ground of good governance and as moral aim of its prescriptions and evaluations. It specifies the good of good governance. The conception of human rights grounding good governance focusses on the unity between right and duty. Chapter 4[136] argued that human rights are moral claims human beings make in virtue of their humanity rather than in virtue of being citizen of a state. The unity of rights and duties entails that human rights' source of bindingness requires justification in moral theory as opposed to law alone. Beyond these rights, their corresponding duties require normative justification in their assignment to specific actors. This normative justification specifies the duties of actors and thereby whether governance mechanisms including human rights mechanisms are justifiable. This section assesses to what extent the duties corresponding to human rights can be assigned to private actors in moral theory. It thereby offers a first step in determining their responsibilities towards the realisation of social sustainability and the possibility of the integration of private actors into positive human rights mechanisms. As such it offers a first step towards the operationalisation of good governance in practice as the nature of the duties actors bear directly informs the types of mechanisms that can constitute good governance.

Moral theory differentiates between universal, special and perfect, imperfect duties (Hazenberg, 2016; O'Neill, 1996).[137] Universal duties are duties held by all and owed to all and generally require an omission rather than positive action for their performance. Conversely, special duties are held by some and owed to all and require positive actions to be taken towards their adequate performance. Perfect duties specify what constitutes adequate

[136] Idem.

[137] For a more extensive exposé of the duties moral theory specifies see Chapter 4, section 3.2 at p. 99.

performance and ground rights whereas imperfect duties leave room for discretion and conversely ground virtues. As argued in Chapter 3 the moral duties corresponding to human rights are universal perfect- and special perfect duties. In human rights practice these are generally conceptualised as the universal perfect duty to avoid harming and the special perfect duties to protect and provide. The duty to avoid harming is necessarily universal in moral theory though in practice mitigated through states.[138] The special perfect duties to protect and provide fall on specified actors given the positive actions required for their adequate performance.

Arguably the most straightforward manner to achieve the good governance of transnational private relationships is to integrate TNCs as duty bearer into positive human rights law. Integrating TNCs into positive human rights law entails subjecting them to legal mechanisms that would directly govern them towards human rights compliance. This requires assigning the moral duties corresponding to human rights to them. TNCs are the most powerful actors in transnational private relationships and intuitively the primary focus of good governance mechanisms. Integrating them into the framework of international human rights law arguably enlarges the means available to govern their conduct directly towards the realisation of social sustainability. Good governance could then lie in the mechanisms enforcing these human rights duties and thereby directly contribute to the enjoyment of human rights by individuals and groups. In this vein there have been calls for a binding treaty for corporations and human rights (Cernic, 2010; Weschka, 2006). To a great extent calls for hard law originate from frustration with the soft nature of transnational governance, the ability of TNCs to escape national jurisdictions, leverage developing countries, and escape other types of regulation. Interpreting transnational private relationships in light of the normative component thus requires assessing whether assigning the duties to avoid harming, protect, and provide to TNCs can be justified within moral theory. In other words, whether these duties can be assigned to them in moral theory to provide the necessary source of bindingness for possible legal mechanisms. This interpretation in light of the normative component is a central part of the case analysis. However, it entails a primarily theoretical endeavour concerning the assignment of duties to private actors within moral theory. Below this endeavour is taken up and its conclusions transposed to practice.

[138] As explained this thesis concerns governance in the transnational context. Therefore, the manner in which these duties are mitigated within national governance contexts, including assigning human rights duties to private actors through national legislation through, for instance, direct and indirect horizontal application, is not considered. For a discussion on direct and indirect horizontal application see Chapter 4, section 3.3 at p.107.

2.1 Private Actors and Human Rights Duties[139]

States are centre stage in human rights practice as international human rights law isolates them as sole addressees. The universal perfect duty is, despite its universality, in practice mitigated through states. The special perfect duties to protect and provide fall on specified actors given the positive actions required for their adequate performance. The state is arguably the relevant actor to bear the special perfect duties corresponding to human rights and to mitigate the universal perfect duty in absence of a world sovereign. This section concerns the question whether the special perfect duties to protect and provide can be assigned to TNCs. Given the universality of the duty to avoid harming it is not considered whether TNCs bear this duty. It was previously argued that this duty falls on all actors.[140] Despite the centrality of the state in human rights practice there is nothing that necessarily excludes other actors from also bearing these duties.[141]

Within philosophical debates it has been argued that TNCs as private actors are relevant actors to assign special perfect duties to. Two different approaches propose to offer the necessary justification for assigning these duties to private actors in general and TNCs specifically. Thereby they justify, among other possible mechanisms, a binding treaty on human rights and corporations. A single criterion based on the unity of right and duty is established to assess these approaches. It prescribes that for TNCs to be relevant subjects of legal human rights mechanisms, they must bear the counterpart perfect duties in moral theory as the source of their bindingness. Therefore, *any duty assigned to TNCs must be a perfect duty with no discretion as to what constitutes adequate performance* (Hazenberg, 2016; Meckled-Garcia, 2008). The two approaches assessed are the capacity- and publicness approach.[142]

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[139] This argument bases itself on Hazenberg (2016, pp. 11–16).

[140] See Chapter 4, section 3 at p. 96.

[141] Philosophical conceptions of human rights often justify the primacy of the state as duty bearer with reference to its role as sovereign public actor. There is nothing, however, that necessarily excludes other agents as primary, or secondary, duty bearers, especially in light of the fact that in our non-ideal word states often do not live up to the ideal theory constructions of legal and political theory. Thus, while the state might be philosophically constructed and justified as representative of a 'general will' and thereby primary bearer of human rights duties, the fact that states in cases fail to perform these duties shows that in a non-ideal world they often fail to represent a 'general will' and thereby lose their justification as primary agent. See O'Neill (2004, pp. 246–258).

[142] Both approaches rely on conceptions of human rights that invoke the unity of right and duty similar to the conception proposed in Chapter 4. They both reject purely moral conceptions of human rights as manifesto rights (Feinberg, 1973) and positivist legal conceptions of human rights as rights we have in virtue of our state's ratification of international human rights declarations and treaties. Moreover, variations on this approach are central to recent efforts to transpose human rights based 'rights' to the private sphere as "interpersonal human rights" (Dagan & Dorfman, 2016) or "private law rights" (Thomas, 2015).

A view hinted at by Onora O'Neill (2001, 2004), Robert E. Goodin (1988), and advocated by Leif Wenar (2007), is best described as the 'capacity approach' (Karp, 2014, pp. 89–115; Miller, 2001).[143] This approach acknowledges that within the institutional framework of international law states are the primary addressees and therefore necessary to discharge the duties corresponding to human rights. However, many states fail to effectively perform their duties and therefore it is arbitrary to exclude all other actors as potential bearer of these duties. The capacity approach proposes a metric of assigning special perfect duties to non-state (private) actors. It argues that human rights duties fall on those actors with the capacity to protect and provide for human rights at not excessive costs (Meckled-Garcia, 2008; Wenar, 2007, p. 268).[144] As is often the case, one of its critics describes the approach most concisely:

> "whichever agent or agency B has the capacity most effectively to protect provide for X's human rights, at least cost to self relative to other agents, and can do so at a cost to self that is not excessive, has a *primary responsibility* to protect and provide for X's human rights" (Karp, 2014, p. 106, italics added).

This approach seeks to bridge an important governance gap in the transnational context. As the cases from the previous chapter indicated, infringements by TNCs upon the ability to enjoy the content of one's human rights often go in concert with a state who, as primary agent, fails to adequately perform its human rights duties. The inability or unwillingness of states is constitutive of the current 'impunity' of private actors' conducts that infringe upon the achievement of social sustainability. The capacity approach argues that in those instances, and in only these, secondary agents with the capacity to perform the special perfect duties to protect and provide without suffering excessive costs, such as TNCs, bear them. To exemplify imagine a corporation active in a remote section of an underdeveloped region where the state and its institutions have little influence. This corporation, as part of its employment agreement, provides basic health care to employees thereby providing for a human right. According to the capacity approach this corporation has the duty to protect and provide this basic human right without suffering excessive costs not just for its employees but to the extended community of this region. Transposed to one of our cases, the capacity approach would require, for instance, Apple to pay a living wage, i.e. a wage above Chinese labour law, to not just its own employees, but to negotiate and protect similar living wages

[143] A similar approach is discussed by Jean Thomas (2015, pp. 188–227) in relation to public rights and private relations described as approaches that focus on "power + proximity" in their assignment of duties to private actors.
[144] See also Jean Thomas (2015, pp. 188–227).

to be paid by all private actors in the region their subsidiaries operate given that it has the capacity to "do so at a cost to self that is not excessive" (Karp, 2014, p. 106).

Special perfect duties are demanding. The capacity approach takes this seriously by incorporating a cut-off point concerning excessive costs. However, it is this 'excessive-cost clause' that proves to have limited bearing in constructing TNCs as relevant duty bearer in moral theory.[145] It cannot mitigate all issues relating to the actual costs of the approach. Consequently, the capacity approach creates unequal outcomes and great discretion in discharging the perfect duties to protect and provide (Karp, 2014; Meckled-Garcia, 2008; Miller, 2001, pp. 108–115). Imagine two corporations operating in the cyber realm. One of these infringes upon basic human rights of individuals through violations of privacy and by trading personal information to actors threatening or capable of infringing upon human rights of individuals and groups through this information. According to the capacity approach, the actor capable to 'most effectively' protect and provide for basic human rights has a duty to do so without bearing excessive costs. However, it might be that a different corporation then the one infringing upon human rights has the capacity to most effectively protect these rights. The approach thereby, arguably, puts an excessive burden on this corporation given that it is not implicated in the human rights infringements. In fact, the capacity approach cannot distinguish between actors infringing upon rights and the relevant bearer of special perfect duties and thereby ignores responsibility.

Though the capacity approach provides a metric of assigning special perfect duties within moral theory it is problematic when applied to transnational private actors such as TNCs (Hazenberg, 2016).[146] The costs corresponding to the performance of the special perfect duties to protect and provide for human rights are high. The excessive cost clause intends to mitigate the burden of these costs. However, the fulfilment of special perfect duties hinges entirely on the assessment of these costs. This leaves the performance of perfect duties to the discretion of TNCs. For instance, the TNC not infringing upon human rights, but with the capacity to protect and provide, can reasonably argue that the performance of these duties amounts to excessive costs. Just as the corporation providing basic preventive health care can or the corporation unwilling to pay wages beyond what local laws require. The assessment of

[145] One might argue that the capacity approach fails to assign special perfect duties at all due to the excessive cost criterion. That this is not the case can be shown with reference to reality: no agent is capable of discharging all its duties perfectly. We need 'imperfect' institutions to regulate these duties, however these 'practical' duties must be grounded in moral perfect duties, otherwise there is no justification for their bindingness outside of positive law, and hence not of the imperfect institutions developed to regulate them.

[146] For a more extensive argument against the capacity approach see Hazenberg (2016, pp. 487–489) Meckled-Garcia (2008, pp. 259–276) and Thomas (2015, pp. 188–227).

excessive costs is not allocated outside of the private actor's judgement but left to its discretion. Consequently, this leaves the performance of the duties to protect and provide to the discretionary assessment of what amounts to excessive costs and thereby no perfect duty is assigned to a private actor.[147]

David Jason Karp (2014, p. 115) rejects the capacity approach as metric to assign perfect duties to private actors because it lacks "further explanation of which agents can legitimately bear the costs to self associated with human rights (…) and why". Rather than an approach that focussed on capacity, he advocates one that takes the publicness of TNCs conduct as starting point. This 'publicness approach' takes 'publicness' of private actors as metric to assign special perfect duties (Karp, 2014, pp. 116–151). It refers to the role a private actor plays in a specific context, and whether that role can be described as 'public' through, for instance, the delivery of basic goods to a community. If an actor is relevantly public, then duties to protect and provide can be assigned to him. Relevant publicness is constituted when an actor has both accepted and is "accepted as having authority to act on behalf of the collective as agents with a 'primary political role'" (Karp, 2014, p. 143). There are cases in which TNCs provide basic public goods to individuals in contexts of weak or unwilling governance. For instance, Foxconn offers housing, mining corporations provide policing, and many TNCs offer education and basic health care to employees and their immediate dependents. However, as Karp acknowledges, simply delivering public goods or performing a primary political duty, such as health-care delivery, is insufficient to render an actor relevantly public and thereby to assign to them the special perfect duty to deliver these public goods just as donating to a charity or handing out food to the homeless in itself is insufficient to assign a duty to do so to an actor. According to Karp the public to which these goods are delivered and the actor providing these goods must accept the primary political role. Thus, a TNCs must exercise a primary political role and the TNCs itself and the general public must accept the TNC having this role. Without this acceptance, it is possible for 'relevantly public' to be arbitrarily assigned to any actor that happens to deliver public goods.

[147] One might argue that the same argument undermines assigning human rights duties to states when applied to them, i.e. that the determination of what duties to discharge is left to the discretion of the state itself. That this is not the case hinges on the nature of states as sovereign public actor and source of law. States' primary task is to promote the public good and in promoting the most basic instances of this good, i.e. human rights, only costs above all available resources constitute 'excessiveness'. In other words, even if costs are 'excessive' for a state, this does not alleviate them from their duties but rather constitutes a (moral) obligation on the international community to assist. Moreover, this also grounds the common argument that human rights are, if anything else, a cap on sovereignty and justification of interference (Buchanan, 2010; D. Miller, 2001; Rawls, 1999; Shue, 1980). I would like to thank an anonymous reviewer of Human Rights Review for pressing me on this point.

At the surface the acceptance of being 'relevantly public' seems farfetched as metric to assign special perfect duties. However, recent years have seen a significant increase in private commitments to public goods through, for instance, codes of conduct, sustainability measures, and CSR. The social expectations the larger public has of TNCs has increased and TNCs have taken on these expectations, at least partially and at times reluctantly, by introducing the mentioned measures and programmes (United Nations Human Rights Council, 2011).[148] However, as Karp (2014, p. 145) states, the publicness approach "hinges primarily on the willingness of a particular actor, group, or institution to exercise political authority". Within practice, therefore, there remains great discretion as to what constitutes 'relevantly public' and whether an actor accepts a public role in the assignment of special perfect duties.

While the publicness approach overcomes the issue of excessive costs and the allocation thereof, it leaves the performance of the duties to protect and provide hinging on TNCs' acceptance. Karp acknowledges this caveat and argues that the publicness approach is capable of gaining results only in the long term while leaving rights of individuals under-fulfilled through non-performance of human rights duties. These rights remain under-fulfilled because of the likely withdrawal of "capable non-state agents from governance functions, in order to make space for the establishment of robustly 'public' institutions that accept the responsibility to protect and provide for rights in the medium to long term" (Karp, 2014, p. 151). It thereby appears that Karp focusses on the wrong actor; if publicness is the relevant criterion and the aim is to achieve the fulfilment of rights in the medium to long term the state, instead of TNCs, is the relevant actor. In sum, the publicness approach reconstructs private actors as public actors in order to assign them special perfect duties that are appropriate for public actors to bear. However, given the limited publicness of private actors and the necessary condition that they accept themselves as relevantly public, the approach fails both in constructing TNCs as relevantly public and in assigning them special perfect duties.[149]

2.2 Private Actor's Moral Duties and Governance Mechanisms.

Both the capacity approach and publicness approaches fail to assign special perfect duties to TNCs. Consequently, TNCs do not bear the necessary moral grounds for binding duties to protect and provide in moral theory, beyond the minimal negative but universal perfect duty to avoid harming.

[148] See Chapter 5, section 3.2.2. at p. 155.

[149] As with the capacity approach, one might question the status of this argument by applying the approach to states. Similar to the response to that objection, the 'publicness' of states is not questioned as they are the primary and sovereign public actors. Consequently, they bear these perfect duties because of this nature. What constitutes adequate performance is indeed left to states' discretion precisely because their nature as primary sovereign public actor. If, however, the performance of human rights duties is objectively and grossly inadequate this violation of human rights is a justification for the international community to interfere. See n147 above.

This conclusion has two profound consequences for the good governance of TNCs through direct human rights regulation. Firstly, TNCs, and other private actors, do no bear special perfect human rights duties. Therefore, mechanisms that seek to enforce these duties directly through law lack the necessary justification as these duties are insufficiently grounded in moral theory.[150] The failure to sufficiently justify assigning special perfect duties to private actors implies that the application of positive human rights law to private actors remains wanting in terms of good governance. Secondly, the special human rights duties that TNCs bear are imperfect and leave discretion as to what constitutes adequate performance. Good governance lies in the adequate performance of the duties that TNCs do bear. And while these duties are imperfect TNCs are not exempt from moral or possibly legal responsibilities as these duties require performance despite the discretion that duty-bearers can exercise.

The above allows for the determination of TNCs moral responsibilities towards the achievement of social sustainability. Firstly, TNCs primary moral responsibility is to avoid conducts that directly harm the enjoyment of human rights by individuals. While all actors bear the universal perfect duty to avoid harming within the transnational context concerning private relationships it is not necessarily clear what constitutes harm. Harm is generally understood as acting in such a manner that leaves individuals or groups worse-off as a consequence of that action than they would have been in case of non-performance of said action (Mill, 1859; James, 2012; Nagel, 2005). Beyond the 'easy' cases of forced labour, tax evasion, inflicting bodily

[150] The impossibility of assigning human rights duties to private actors is in line with the vertical nature of human rights. The conclusion that positive law is unjustified as mechanism enforcing the duties of private actors recognises this vertical nature. As Jean Thomas (2015) argues, the horizontal application of human rights gets the diagnosis of the problem wrong. There is, in fact, very little 'horizontal' about the relationship between a worker and a TNCs. Thomas argues that advocates of direct application fail to diagnose that the vertical relationships between the state and its subjects differs both conceptually and morally from the relationships between individuals and communities and powerful corporate actors. Thomas states that "if we accept that constitutional and human rights cannot apply only 'vertically' against the state, then the potential applicative scope of those rights begins to proliferate exponentially. Even when we restrict the application of rights to the state, as has been our convention, each right generates a number of duties (…). If we now accept the horizontality principle, then each right will potentially generate all those duties on all other agents all the time. There is, in other words, no principle limitation for the applicative scope of these rights once we make the move from vertical to horizontal application" (Thomas, 2015, p. 23). While outside of the scope of this research given its focus on governance rather than the law an answer within the scope of legal theory to this problem is that the integration of private actors into legal mechanisms concerned with human rights seems to require the development of new 'private law rights' rather than the horizontality of public human rights (Thomas, 2015). For a similar approach see Dagan & Dorfman (2016) on "interpersonal human rights" in the private sphere. This challenge is taken on by both Thomas and Dagan in a manner that cannot be attempted within the confines of this research.

harm, etc., it is not clear to what extent the negative effects of transnational private relationships as discussed in the case studies constitute harm. This is the case even though specific conducts might infringe upon individuals' ability to enjoy their human rights. For harm to be done individuals and groups must be left worse-off than they would be in case of non-performance of an action. In the context of the production of the iPhone, Apple's transnational supply chain contributes to economic development necessary to achieve social sustainability by providing employment and contribute to poverty relief. Despite dismal working conditions and wages, it is not clear-cut that the actions that cause these conditions and wages 'harm' the individuals and groups. Similarly, despite infringements of individual and group privacy the extent to which harm is done is not clear when one takes into account the contributions that TNCs monetising personal data make. Whether actions constitute the non-performance of the universal perfect duty to avoid harming should therefore be assessed succinctly on a case-by-case basis.

Secondly, TNCs bear imperfect duties to protect and provide for human rights. These imperfect special duties leave discretion as to what constitutes their adequate performance. However, this does not render these duties empty and TNCs free from responsibility. Rather it informs the construction of justifiable mechanisms constitutive of good governance. These mechanisms should leave discretion in relation to the imperfect duties. In other words, these should not be unilaterally imposed upon private actors through positive international human rights law. Instead mechanisms relating to the protection and provision of human rights should aim at limiting or minimalizing discretion of TNCs in discharging them. In moving from a practice-independent to a practice-dependent conception of good governance the nature of TNCs duties are a limiting factor. The central challenge for the good governance of transnational private relationships is to enforce the universal perfect duty of TNCs and curb their discretionary powers in relation to their imperfect duties. Imperfect duties constitute important virtues that many governance mechanisms and constellations rely upon. The moral duties that can be assigned to TNCs informs practice-dependent good governance: mechanisms that directly enforce duties that are insufficiently justified in reference to moral theory fail to constitute good governance.

The next section interprets the cases in light of the procedural component of good governance. The moral duties that TNCs bear, i.e. the universal perfect duty to avoid harming and imperfect duties to protect and provide, inform the analysis of the procedural component. In relation to the three governance problems the duties that TNCs bear inform what constitutes adequate responses to these problems. In relation to enforceability it is clear that a central component of an adequate response to this problem is the relation between the duties of TNCs and the legitimacy and enforceability

of policies. Specifically, policies relating to the universal perfect duty to avoid harming require evidence that transnational private relationships actually harm individuals and groups. Mechanisms relating to the imperfect duties to protect and provide require sufficient room for discretion as to what constitutes adequate performance. More generally, adequate responses to the governance problems should take into consideration the moral duties of TNCs and other private actors in the justification of policies towards the realisation of social sustainability. This aspect relates directly to the legitimacy of these policies but also to their (legitimate) enforceability and construction of possible accountability mechanisms. For instance, accountability mechanisms that hold TNCs accountable for conducts relating to duties they do not bear and are not in other ways responsible for are unjust.

3. Transnational Private Relationships and the Procedural Component: The Problems of Legitimacy, Enforceability, and Accountability in the Transnational Context

The interpretation of the case studies in light of the procedural component shifts focus from moral duties to the governance of transnational private relationships. It concerns the extent to which governance mechanisms in the transnational context are legitimate, enforceable, and accountable. In relation to the problem of legitimacy whether transnational governance actors operate on the basis of legitimacy is assessed. The problem of enforceability encompasses two aspects. Firstly, the possibility of 'governing governance' and, secondly, the desirability of enforceable mechanisms aimed at the direct achievement of social sustainability by public actors with the capacity to do so. The problem of accountability is responded to by assessing whether the actors comprising transnational private relationships are accountable for the negative effects of their conducts. Ultimately it will be argued that for reasons relating to the practices of the case studies that exemplify transnational private relationships and the transnational context in which these relationships operate the problems of legitimacy and enforceability bear little salience. Specifically, the argument shows that these problems have little bearing in the transnational context given the absence of legitimate overarching governance structures and the multiple legitimate claims different actors make to authority. With respect to the problem of accountability it is argued that the transnational context necessitates trade-offs. Actors involved in making these trade-offs should be accountable for their outcomes and the manner in which they are made, albeit without overstepping the boundaries of the moral duties actors bear. Achieving accountability is the central challenge for good governance of transnational private relationships towards the realisation of social sustainability.

3.1 *Legitimacy*

The problem of legitimacy relates to two aspects of governance: the actors governing and the mechanisms through which they do so. Substantively the problem of legitimacy relates to the democratic credentials of these aspects.[151] The problem is particularly pressing in national contexts where new modes of governance often lack a robust reliance on representative and democratic political structures (Van Kersbergen & Van Waarden, 2004). As discussed in Chapter 2 the problem of legitimacy relates primarily to the ability to achieve input legitimacy in increasingly horizontal governance structures.[152] Absent the political structures of the nation state, an adequate response to the problem of legitimacy should take three aspects of the transnational context into account. Firstly, whether legitimate overarching governance structures are possible within this context and whether mechanisms can be conceived that contribute to the input-legitimacy of governance. Secondly, as both transnational private relationships and the context in which they operate comprise different actors their legitimacy should be assessed. This is fundamental to the overall assessment of legitimacy in the transnational context in general and of transnational private relationships and the actions of the actors comprising them specifically. Thirdly, as argued in Chapter 2, legitimacy has a moral component. The legitimacy of both the actors and the mechanisms governing them should therefore conform to the moral duties private actors have towards the realisation of social sustainability. In what follows these three aspects will be assessed to formulate an adequate response the problem of legitimacy. It will be argued that in the transnational context there is no problem of legitimacy proper even though opportunities exist to increase the legitimacy of specific mechanisms and thereby contribute to good governance.

The problem of legitimacy is associated with the changing structures of policy-making. Especially at the state level the increasingly horizontal structures through which policies are drafted, implemented, and adhered to challenge the vertical structures of representative democracy (Van Kersbergen & Van Waarden, 2004). In other words, the problem of legitimacy hinges on the extent to which governance mechanisms are justified through democratic inputs. In relation to the transnational context in general and transnational private relationships specifically it should be noted that hierarchical structures similar to national or regional governance contexts of overarching democratic public policy-making are absent. The defining feature of the transnational context is its absence of overarching sovereign public authority. Transnational governance does not rely on the direct intervention of an overarching public authority. In contrast to many other governance contexts there are no

[151] See Chapter 2, section 4 at p. 37 for a discussion of the governance problems.
[152] See Chapter 2, section 4.1 at p. 38.

democratic public institutions with the capacity to directly intervene (Börzel, 2010; Börzel & Risse, 2010). Moreover, there are no convincing arguments for the conception over such overarching public governance structures. It is uncontroversial that the idea of a 'world state' or similar public authority at the global level would be illegitimate as democratic public policy is simply not conceivable at this scale and would dismantle existing structures of democratic representation. Direct democratic structures are not possible in the transnational context and the democratic legitimacy of possible multi-level structures would be significantly watered-down arriving at the transnational level. Concluding that no overarching governance structure exists does not, however, exhaust the problem of legitimacy.[153]

Marked by the absence of public sovereign authority three types of actors can be discerned that operate within the transnational vacuum. All three make claims to authority to govern within their respective spheres of conduct. Firstly, there are political actors comprising states and international institutions, including the UN and treaty regimes that govern specific aspects of transnational private relationships. Secondly, domestic and international NGOs, unions, consumer organisation, and labour organisations comprise a second group referred to as transnational civil society (Price, 2003). Thirdly, those actors with a primarily economic motivation can be grouped as economic actors and include TNCs and their subsidiaries, consumers and their organisations, and workers. These three groups of actors operate authoritatively within their respective spheres and together shape transnational private relationships and the governance thereof. The question in relation to the problem of legitimacy is whether they do so legitimately.

Political actors set the legal boundaries within their respective jurisdictions. States, as primary political actors, regulate the conduct of private actors within them. These spheres of application can overlap and conflict. For instance, when a developing state is limited in its ability to implement domestic economic regulations due to international treaty obligations (Rodrik, 1999) or when the legal requirements of private actors within a state affect their ability to operate across that specific state's border. NGOs and other transnational civil society actors protect the rights and interests of individuals and societal groups. Performing roles of oversight and representing single issues these actors often promote public interests and protect those underrepresented transnationally. Again, their interests might conflict when, for instance, trade-offs have to be made between environmental protection and employment

[153] One might object that an overarching structure does exists in the form of public international law and the international political organisations comprising the UN. Both, however, directly rely on sovereign states for their legitimacy and the enforcement of their policies and judgments. Thereby they do not 'govern' the transnational context as the legitimacy and enforcement of its mechanisms relies on states. Moreover, both concern, primarily, the governance of public actors and thereby govern the international rather than transnational context.

(Jacobs, 1999). Economic actors are the driving force behind transnational private relationships through the increased internationalisation of supply chains and transnational flows of capital, goods, and services. The interests of these different actors often align but can conflict in terms of market competition or through, for instance, conflicts between workers on one side of the world protesting treatment by a corporation on the other or between big data generators and big data brokers in cases where personal information is sold to authoritarian governments or malicious corporations (Dann & Haddow, 2008, p. 219). However, these actors make their claims to operate authoritatively within their respective functional fields on a basis of legitimacy.

These claims are legitimized bottom-up. The actors involved in transnational private relationships and the governance thereof base themselves on legitimacy within the national context, as is the case with commercial private actors and de-facto states, or the general acknowledgement by states and international institutions as representing the interests of minority groups, as is the case with NGOs. Transnationally legitimacy is best perceived as multilevel construct. States legitimately govern within their sovereign territories and through international institutions develop policies that extend across borders. Within their respective territories, governments have a great deal of discretion as to the policies they enact. As exemplified by the Apple case, China, for instance, is within a context of scarce material resources and economic development[154] legitimate in trading off non-material gains of its population in the short to middle run for material gains in realising social sustainability. The claim to legitimate authority of political actors is based on the principle of sovereignty.[155]

Economic actors like TNCs operate on a basis of legitimacy through their incorporation in, multiple, states. Moreover, TNCs legitimately use global markets and global supply chains to produce products most efficiently and at the lowest costs. Moreover, in line with the imperfect nature of TNCs special human rights duties TNCs are legitimate in exercising discretion in the performance of their duties and consequent responsibilities, especially vis-à-

[154] There is a material scarcity concerning social sustainability. The content of all human rights cannot be enjoyed by all human beings at present. Only through extensive levelling down of living standards in the developed world can a redistribution of resources necessary to fulfil the material human rights of everyone be achieved (James, 2012). As this process would arguably require the rights of individuals in developed countries to be infringed upon such a process cannot constitute good governance. This material scarcity does not, however, make bad working conditions, wages, and other infringements upon the ability to enjoy the content of human rights through transnational private relationships 'good'.

[155] States are sovereign in governing legitimately within their respective territories and in engaging in international cooperation through treaties or international political organisations. It is generally accepted that this principle of sovereignty can only be trumped, by other states, in cases where a delinquent state is involved in widespread violations of human rights that constitute crimes against humanity (Buchanan, 2010; Rawls, 1999; Shue, 1980). See also n.147 above.

vis other actors.[156] To exemplify this situation it can, for instance, be debated what responsibility Apple has towards the enforcement of Chinese labour law above and beyond the responsibility of the Chinese state to do so. Apple is legitimate in moving labour to countries where it is cheaper and standards lower and move research and development departments to countries with high social capital.[157] Or, as exemplified in the big data case, it is not necessarily clear who is legitimate in balancing the protections of privacy with advancements in health care delivery and other service provisions: states, big data generators or the TNCs operationalising data. In general, it should be concluded that transnationally these private actors too act on a basis of legitimacy.

Civil society actors, such as NGOs, base their legitimacy on the delegated authority of states and international institutions or on the acknowledged representation of minorities, individual rights, and public interests. Transnationally, NGOs and other civil society actors play a major public role that is often directly authorized by states through financial aid, treaty obligations, or by assigning the implementation and coordination of public policies to them. These three groups of actors are all legitimate in either taking advantage of the free market, operating as sovereign states, or representing public interests absent structures of overarching public authority.

It can therefore be argued that the problem of legitimacy loses its salience at the transnational level as all actors operate legitimately. As determined above, an adequate response to the problem of legitimacy should take into account (1) whether democratic structures are possible transnationally, (2) whether the actors comprising both transnational private relationships and the context in which they are governed act legitimately and (3) the moral duties of private actors towards the realisation of social sustainability. Regarding the first, overarching governance structures capable of achieving democratic input legitimacy are absent in the transnational context. In relation to the second component it was argued that the different groups of actors constitutive of the transnational context and those that comprise transnational private relationships act on a basis of legitimacy within their respective spheres of conduct. Moreover, the actions of the private actors comprising transnational private relationships are in general consistent with the nature of their moral duties towards the realisation of social sustainability even though actions can and do undermine the realisation of social sustainability. It can be concluded that within the transnational context there is no problem of legitimacy proper. This does not mean, however, that therefore good governance of transnational private relationships should not take into

[156] In relation to their universal duty to avoid harming it can be debated both what constitutes harm and which actor can enforce this duty. See section 2 above at pp. 159-160.

[157] The legitimacy of these standards can however be questioned. In fact, it can be argued that low labour standards are indicative of state's failure to discharge these their human rights duties adequately.

account a concern for legitimacy. Rather good governance mechanisms should acknowledge the legitimacy of the actors comprising transnational private relationships and those actors constitutive of the governance context. Beyond this, as discussed in Chapter 2[158] the dominant response within the governance literature to the problem of legitimacy revolves around different forms of deliberative democracy. Transnationally governance structures can enhance their legitimacy through deliberative governance. Given the multi-polar and multi-layered transnational constellation the actors comprising the transnational context formally operate on a level playing field. This implies that mechanisms that seek to integrate these legitimate actors into more deliberative governance structures enhances the legitimacy of transnational governance and are thereby constitutive of good governance.

3.2 Enforceability

The problem of enforceability also relates to both the governance actors and the governance mechanisms. It concerns the enforceability of governance mechanisms beyond the command and control structures of the state. As policy-making increasingly shifts from government to governance the reliance on hierarchical commands of the state and its institutions for the enforcement of policies diminishes. The problem of enforceability has two components. Firstly, it concerns the extent to which a specific context is subject to enforceable oversight, i.e. 'who governs governance?'. Secondly, it concerns whether governance actors are capable of enforcing the mechanisms through which they govern. The two aspects are distinct both from each other and from the problem of legitimacy in important ways. The distinction between enforceable oversight and the enforceability of governance mechanisms is that the former concerns the context within which a specific functional field or practice is governed while the latter relates to the enforceability of specific mechanisms. The problem of legitimacy and enforceability are distinct in their focus. Legitimacy concerns the justification of governance actors and mechanisms in relation to both moral and practical considerations.[159] Conversely, the problem of enforceability concerns the practical application of governance mechanisms and their enforcement.

Assessing the problem of enforceability in the transnational context towards the conceptualisation of good governance thus requires a different, more practical and consequentialist, mode of reasoning. An adequate response to the problem of enforceability takes the two aspects in consideration at two levels: whether enforceability is possible and whether enforceable governance mechanisms contribute to the realisation of social sustainability. In what

[158] Chapter 2, section 4.3 at p. 31.

[159] The moral considerations are discussed in section 2 above and the assessment of both the problem of legitimacy and of accountability in this section.

follows the possibility and desirability of both the 'governance of governance' and of enforceable mechanisms aimed at the direct realisation of social sustainability are assessed. Similar to the previous section it will be argued that enforceable governance mechanisms are either out of reach, in relation to the first aspect, or undesirable, in relation to the second. It is concluded that the problem of enforceability is thereby adequately responded to.

The two case studies exemplified that in the transnational context the mechanisms governing transnational private relationships are drafted and implemented by a wide variety of actors. These actors range from private corporations and states to NGOs and international institutions. Moreover, these governance mechanisms are to a large extent unenforceable through law or public commands. In responding to the problem of legitimacy two components of this governance context were identified that are relevant in relation to enforceability. Firstly, the transnational context is marked by the absence of an overarching public governance structure and, secondly, in this vacuum the different actors comprising the governance context operate legitimately. The first component of an adequate response to the problem of enforceability can thus be easily formulated. Transnationally no unitary structure is present through which the transnational context, and thereby transnational private relationships, can be governed. Nor is such a structure desirable. Beyond a single actor there neither is a unified structure governing the actors comprising the transnational context. Similarly, transnational private relationships are not governed through an authoritative legal order applicable to them.[160] Moreover, as argued in relation to the normative component the integration of private actors and their private relationships into an overarching legal order, for instance international human rights law remain wanting in terms of their moral justification.

The second component requiring adequate response concerns the actors and mechanisms capable of enforcing governance mechanisms towards the normative aim of good governance. In relation to good governance other enforceable mechanisms, i.e. those not aimed at the direct realisation of social sustainability, are not necessarily of concern as we saw that the different actors comprising the transnational governance context act on the basis of legitimate authority. Contractual relationships of private actors are, for instance, enforceable governance mechanisms that can affect social sustainability negatively. Conceptualising good governance, however, concerns the governance of these actors, their relationships, and the outcomes of their conduct. Formulating an adequate response to the problem of enforceability does, therefore, not concern whether these private actors are capable of enforcing for instance contractual obligations[161] but rather the broader

[160] There are only different legal orders that influence them such as domestic law and treaty law concerning international trade.

[161] For a discussion thereof see Tjon Soei Len (2017) Beckers (2015) and Collins (2014).

question whether enforceable mechanisms are available to public actors to govern the negative externalities of transnational private relationships and if so whether they are desirable.

Within the transnational context public actors can directly enforce governance mechanisms through hard law. Such public governance does not govern the entirety of transnational private relationships given their limited jurisdictional reach. States and supranational institutions like the EU can directly govern aspects of transnational private relationships that take place outside their respective jurisdictions through sanctionable law. Examples of such mechanisms and regulations are proposals for import restrictions[162], blanket trade bans[163], or linking human rights performance to the ability to form transnational private relationships[164]. Beyond appeals to bind private actors such as TNCs to human rights, these unilaterally enforceable mechanisms through public governance are, generally, welcomed (Cernic, 2010; Deva, 2014; Nolan, 2013; Williams, 2017). Unilaterally enforced governance mechanisms of this kind aim to directly counter infringements of social sustainability by transnational private relationships. However, they are also likely to adversely affect the realisation of social sustainability. Three examples will explain these approaches towards the governance of transnational private relationships and show how are likely to adversely affect the realisation of social sustainability.

Firstly, as evidenced from the big data case the actors constitutive of the private relationships that gather, analyse, and operationalise personal data arguably adversely affect the enjoyment of human rights by individuals in the West. It is predominantly their data that is collected through online click-streams, GPS tracking, and profiling.[165] Simultaneously these processes enable the world-wide expansion of digital technology enlarging the freedoms enjoyed by individuals in developing countries on top of the material gains achieved through big data analytics. These include better humanitarian aid, improved communication channels, more opportunities to associate, and advancements in service delivery ranging from consumer products to health care (Hazenberg & Zwitter, 2017; Zwitter, 2015). Mechanisms to govern transnational private relationships aimed at mitigating the infringements through enforceable means are likely to negatively affect the positive contributions to social sustainability that these same relationships make. The case study exemplified the ambivalence of TNCs contributions to social sustainability. Moreover, it was argued that this ambivalence is inherent to

[162] See discussion of the Dodd-Frank Mineral Provision at pp. 165-143 and p. 209.

[163] See, for instance, bans on trade of products produced sourcing child labour or a wide variety of health and safety related trade bans.

[164] See Barry and Reddy (2006) for a proposal to condition the ability of TNCs to trade internationally with their human rights performance.

[165] This is contingent and relates directly to the accessibility of services that collect data.

transnational private relationships and enforceable mechanisms directed at protecting social sustainability at one place can impede its achievement elsewhere. Further complicating the potential negative effects of enforceable mechanisms is that proposals are primarily directed at the protection of data generators, as is for instance the case with the European right to be forgotten. Data generators are primarily individuals in the industrialised world whereas the beneficiaries of data-led innovations in humanitarian aid, energy consumption, and health care are wider. As a consequence, enforceable mechanisms can harm the worst-off while protecting those individuals generally enjoying the content of their human rights.

Secondly, in relation to transnational supply chains proposals have been made to link human rights to international trade. These can be categorised as mechanisms curtailing the trade in goods produced under circumstances that infringe upon human rights. This would, arguably, incentivise TNCs to improve their own conduct and that of their subsidiaries (Barry & Reddy, 2006). The relevant question here is what effects such linkages have at those locations where the infringement of human rights takes place. In other words, do such mechanisms improve the social sustainability of the individuals whose rights are infringed upon? A growing body of empirical research suggests they do not despite the moral and practical appeal of such proposals. Doepke and Zilibotti (2010) show that bans on imports and other forms of trade sanctions do not achieve sustainable change in foreign economies or transnational supply chains. Jarafey and Lahiri (2002) studied the effects of trade sanction on working conditions and found that import bans do not reduce dismal working conditions. Instead they are likely to further degrade the conditions of workers even though they are no longer employed through transnational private relationships. Similarly, Basu and Zarghamee (2009) show that in many instances private, non-enforceable, initiatives such as product boycotts often cause the very thing they attempt to mitigate namely a worsening of the working environment and loss of market influence.[166]

As the economist Ardhendu Bardhan (2001) notes "for all the horror stories about (…) working conditions and wage levels that outrage consumers in rich countries" employment in transnational supply chains is "usually, though not always, an island of relative decent work (…) in an ocean of indecent and brutal conditions in the rest of the economy". Research has shown that in Dhaka, Bangladesh, women working in the garment industry employed in exporting factories incorporated in transnational supply chains enjoyed monthly incomes "nearly 86% above that of other wage workers living in the same slum neighbourhoods" (Bardhan, 2006a, p. 88). In relation to the iPhone

[166] It should be noted that this consequentialist response does not speak to the 'normative' force of such enforceable mechanisms in clarifying expectations and showing moral guidance. It does, however, consider such mechanisms debatable when their normative force comes at the cost of degrading the position of the worst-off.

case these supply chains have contributed to the extraordinary growth and poverty reduction and similar processes take place in developing countries that produce consumer goods such as Vietnam, Indonesia, Bangladesh, and India (Milanovic, 2016).

Most convincingly, however, the case against enforceable mechanisms has been made with reference to what arguably is the worst excess of production through transnational supply chains: child labour.[167] Child labour is a direct and grave violation of human rights, no society can rely on children in the workforce sustainably nor can it constitute social sustainability. The case for import bans of goods produced sourcing child labour is therefore compelling. Consequently, bans on the import of goods produced by child labour have been implemented in the United States under the Obama administration and have been put on the agenda of the European Commission by the European Parliament.[168] Davies and Voy (2009), however, show that externally imposed restrictions on child labour in exporting sectors, i.e. in transnational private relationships, is likely to crowd child labour out into domestic sectors of developing economies.[169] In these domestic sectors working conditions are often worse and wages lower (Bardhan, 2006a). Moreover, while child labour is crowded out of the transnational private relationships and their supply chains it places the individuals and groups affected beyond the reach of the transnational context surrendering them to the protection of often unwilling or incapable states. As Rodrik (2011, p. 223) argues it is intuitive to object child labour even though it is a consequence of poverty. Preventing young children from working in factories may end up doing more harm than good, if the most likely alternative is "not going to school but employment in domestic trades that are even more odious."

These adverse effects do not shield private actors that are incorporated into transnational private relationships or command transnational supply chains from responsibilities. Nor do they lead to the conclusion that the transnational private relationships in question necessarily contribute to social sustainability and therefore good governance is not required. Many extra steps are required to move from the adverse effects of enforceable mechanisms to the irrelevance of good governance. The adverse effects do, however, exemplify that improvements are more likely to occur through efforts other than mechanisms that seek to unilaterally enforce policies towards the realisation of social sustainability. Banning practices transnational private actors engage in is likely to be counter-productive in light of the aim of good governance

[167] The case made here is only relevant in relation to the transnational context. In different contexts, especially ones in which more material resources are available, different policies are appropriate towards the eradication of child labour. For an analysis of policies in the European context see Ferreira (2017).

[168] See Chapter 5, section 3.2 at p. 152.

[169] See also Milanovic (2016).

despite the clear infringements of the ability to enjoy human rights that take place. Ultimately, mechanisms that ban specific practices might motivate, primarily western, corporation to abandon transnational private relationships that negatively affect social sustainability. However, there is little evidence that these mechanisms actually contribute to the achievement of social sustainability.[170] Their desirability is therefore not evident.

Together these three examples make a compelling case against mechanisms that aim to directly achieve social sustainability through, primarily, public governance. It should be noted, however, that since the transnational context is considered here it does not follow from the present argument that states should withhold mechanisms governing the conduct of private actors and their relationships towards the realisation of social sustainability within their borders. In fact, the argument concerning the enforceability of governance in the transnational context has little bearing on the responsibilities of states to govern private corporate conduct within their jurisdictions. And it is uncontroversial to state that a majority of states gravely underperform in this regard.

As Hale and Held (2011, p. 11) state transnationally "enforcement has always been more tentative". Absent an overarching public governance structure that can, for instance, govern the conduct of TNCs and their transnational private relationships these actors can operate with relative freedom. Moreover, those actors capable of enforcing mechanisms aimed at the direct achievement of social sustainability are likely to produce unintended but adverse consequences. In formulating an adequate response to the problem of enforceability these aspects lead to the conclusion that, similar to the problem of legitimacy, enforceability does not constitute a governance problem in the transnational context. In other words, absent overarching governance structures enforceable mechanisms that aim to achieve social sustainability do not necessarily constitute good governance. Good governance therefore does not rely on the direct enforcement of mechanisms towards the realisation of social sustainability by public actors.

[170] In other words, while these mechanisms might effectively label TNCs as complicit in negatively affecting social sustainability they do not necessarily contribute to the realisation of social sustainability. Mechanisms of this kind are primarily advocated from a western perspective and it can be argued that they seek to eliminate western corporations from positions of potential complicity rather than motivate them to positively contribute to social sustainability. In relation to this the question should be asked which aspect of transnational private relationships that infringe upon the ability of individuals to enjoy the content of their human rights are relevant from a western perspective: that western corporations are complicit or that social sustainability is not achieved. In relation to the above discussed mechanisms a cynic would need little extra to argue for the former position that what is 'wrong' is the involvement of western corporations rather than the continued existence of socially unsustainable practices and thereby that clean hands matter more than better livelihoods.

3.3 Accountability

As introduced in Chapter 2, accountability is a relational concept specifying a relationship between an actor and a forum (Bovens, 2007).[171] An actor justifies actions to a forum capable of sanctioning this actor if she fails to performs this action adequately. Traditionally accountability is conceptualised in relation to public authority capable of sanctioning through a separation of powers. Such separations of power that demarcates clear boundaries between actors and forums are no longer present within horizontal and networked governance structures. Moreover, increased internationalisation of policy-making and economic production further complicate the development of clear relationships of accountability. As Rosenau (2000, p. 192) observed in reference to the problem of accountability in a globalising world "most collectives in globalized space are not accountable for their actions". In its simplest form the problem of accountability concerns which actors are accountable to whom, for what, and through which relationships and/or mechanisms. An adequate response to the problem in relation to transnational private relationships should thus specify whether transnational private relationships, and especially the TNCs commanding them, should be held accountable and if so to whom, for what, and through which mechanisms. It will be argued here that accountability takes a central position in conceptualising the good governance of transnational private relationships. This construction of transnational accountability mechanisms and conceptualisation of practice-dependent good governance is taken up in the final chapter.

The previous sections concluded, firstly, that TNCs beyond the universal duty to avoid harming do not bear special perfect duties to protect and provide for social sustainability. TNCs can therefore exercise a certain amount of discretion as to the performance of their moral duties relating to social sustainability. This leaves the content of their responsibilities towards the achievement and protection of social sustainability indeterminate. Secondly, in response to the problem of legitimacy it was concluded that the actors comprising the transnational context operate on a basis of legitimacy. Though legitimacy can be enhanced through deliberative structures that incorporate the actors constitutive of the transnational governance context and the private relationships that are under scrutiny here, there is no structural legitimacy deficiency transnationally. Thirdly, the response to the problem of enforceability brought to the fore that unilaterally enforceable mechanisms aimed at the direct achievement of social sustainability in the two case studies produce adverse effects undermining social sustainability itself. This rendered enforceable mechanisms undesirable. Together these aspects complicate good governance transnationally as they leave responsibilities, outcomes, and governance mechanisms indeterminate.

[171] See Chapter 2, section 4.2 at p. 40.

The transnational context in general and transnational private relationships specifically challenge the "standard model of public accountability" (Koenig-Archibugi, 2004, p. 6). Transnationally multiple actors legitimately make trade-offs and balance interests that pertain to and affect social sustainability. The interest of workers in wage increases and of corporations in profit maximisation are balanced by both TNCs and states. Privacy protections are traded-off for improvements in product development and service delivery by all actors constitutive of the transnational private relationships generating, collecting, and operationalising big data. States trade-off improvements in working conditions for the promotion of certain industries to achieve economic growth (Levi et al., 2013, p. 12). TNCs trade-off complete control of production processes for flexibility and cost reductions (Levi et al., 2013, p. 12). The ambivalence of the contributions that transnational private relationships make to the realisation of social sustainability further necessitate these trade-offs to be made. It is clear, however, that many things go wrong concerning these balancing acts evidenced by degrading working conditions, unsustainable wages, disputable corporate influence on social engineering, and large-scale infringements into the private lives of individuals. It can be argued that the adverse effects that transnational private relationships produce are the consequence of bad, or badly made, trade-offs. Moreover, the power imbalances present in the transnational context question the extent to which trade-offs are made through a fair process and to what extent actors perform due diligence and justify them. Degrading working conditions and infringements upon fundamental rights are continuously present in transnational private relationships. Private actors should be accountable for these outcomes and the processes that led to them. The legitimacy of actors in balancing interests and trading-off aspects pertaining to social sustainability, the undesirability of direct public enforcements in the transnational context, and the discretion of TNCs in discharging their duties do not imply that these actors should not be held accountable for both the outcomes of and process through which trade-offs are made

Holding private actors accountable for the outcomes of and process through which trade-offs are made is consistent with their moral duties and their legitimacy in the transnational context. Firstly, all actors comprising the transnational context bear the perfect universal duty to avoid harming the normative content of social sustainability. Any actor should be held accountable for outcomes or processes that harm the ability of individuals and groups to enjoy the content of their human rights. Beyond the perfect universal duty, private actors bear imperfect duties towards the protection and provision of social sustainability. These imperfect duties leave discretion as to what constitutes adequate performance. This discretion however, does not imply that anything goes despite indeterminacy concerning the substance of these duties. They still require performance. Their imperfect nature rather pertains to the mechanism through which actors can be legitimately held to account.

Thus, while transnational actors are legitimate in making trade-offs concerning the achievement of social sustainability, practice tells us that at times the 'wrong' trade-offs are made. The actors comprising transnational private relationships should be held accountable for these. The remaining questions towards accountability in and of transnational private relationships are to whom these actors should be accountable and through which mechanisms. In what follows these two questions are addressed briefly and the elements necessary to adequately respond to them isolated. Both are further developed as central element of practice-dependent good governance of transnational private relationships in the next chapter.

Traditionally the question to whom private actors are accountable is answered with reference to public forums enforcing either public standards or private law (Bovens, 2007). Both of these structures are absent in the transnational context. Therefore, the achievement of accountability hinges on the availability of a forum capable of holding private actors accountable. The challenge the transnational context poses to accountability lies primarily in the forum holding actors accountable and the mechanisms at their disposal. Such a forum should, at least, consist of representatives of the interests of individuals and groups adversely affected by transnational private relationships. In response to the problem of legitimacy it was concluded that the legitimacy of the governance of transnational private relationships would be increased by deliberative structures representing different interests.

Beyond a forum capable of holding actors accountable, the question which mechanisms are available and legitimate to achieve accountability in the transnational context should be answered. As argued, the indeterminacy concerning the adequate performance of private actor's duties relates to mechanisms of accountability rather than the legitimacy of accountability itself. For example, I have an imperfect duty not to lie but holding me accountable for lying to a friend through legal mechanisms would be unjust. My friend reprimanding me for lying, in case he finds out, and holding me accountable through my reputation would, however, be considered justifiable. The nature of private actors' duties thus informs the type of mechanisms through which the private actors constitutive of transnational private relationships should be held accountable. It was already concluded that international human rights law remains wanting given the nature of private actors' duties. Moreover, the availability of enforceable legal mechanisms aimed at the protection and realisation of social sustainability at the national and regional level are undesirable given their likely adverse effects. Alongside the legitimacy of the actors comprising the transnational context command-and-control accountability mechanisms are not available. However, as we have seen in the two case studies there are myriad of ways in which actors can be, and are, held accountable transnationally. One of which is, for instance, reputational accountability through naming and shaming (Gunningham & Grabosky, 1998; Narine, 2015).

4. Conclusion

This chapter analysed and interpreted the exemplifying cases of Chapter 5 in light of the practice-independent conception of good governance. The case studies exemplified the broad range of transnational private relationships and the myriad ways in which they negatively affect and positively contribute to social sustainability. The analysis in light of the normative component concluded that the special perfect duties corresponding to human rights cannot be assigned to TNCs. It thereby allowed for a first determination of the responsibilities TNCs have towards the good of good governance: social sustainability. These responsibilities remain indeterminate given the imperfect nature of private actors' perfect human rights duties and difficulty in determining the harm done by transnational private relationships. It was argued that this indeterminacy does not render transnational private relationships footloose. Contrarily, duties whose substantive performance allows for discretion do require performance and due diligence. Their imperfect nature rather informs the mechanisms available for good governance. The justification of integrating private actors into positive human rights law was argued to remain wanting as the (moral) duties corresponding to these rights cannot be assigned to these actors. The analysis in light of the normative component therefore points towards the necessity of soft-law mechanisms in conceptualising the practice-dependent conception of good governance of transnational private relationships.

Analysing the cases in light of the procedural component comprised formulating adequate answers to the problems of legitimacy, enforceability, and accountability. It was argued that legitimacy and enforceability do not constitute problems in the transnational context due to absent vertical structures of enforcement and adverse effects of public enforcement towards the realisation of social sustainability. Moreover, the claims the different actors comprising the transnational constellation make to authority rest on a basis of legitimacy. This legitimacy of the actors in the transnational context, the indeterminacies concerning the adequate performance of private actors' duties, and the undesirability of direct enforcement through public commands, puts accountability at the centre of good governance. It was therefore concluded that at present the crucial defunct of transnational governance lies not with the absence of hierarchical or legal governance mechanisms but rather in underdevelopment of accountability mechanisms. The actors constitutive of transnational private relationships can be legitimately held accountable through means other than legal command and control structures. Thereby the discretion of the imperfect duties private actors bear can be limited. What mechanisms are legitimate and most conducive of the realisation of social sustainability will be assessed in the next chapter. This assessment is informed by the conclusion of the case analysis

that accountability of transnational private relationships in the transnational context requires soft- rather than hard legal mechanisms and the integration of multiple actors into its mechanisms. Specifically, the next chapter addresses the role that the standard response to the problem of accountability outside vertical governance structures plays: transparency.

CONCLUSION PART II: THE PRACTICES OF TRANSNATIONAL PRIVATE RELATIONSHIPS

The two chapters comprising Part II turned focus to practice after the primarily theoretical endeavour of Part I. Chapter 5 comprised two case studies that exemplified transnational private relationships. The two cases offered two instances of the broad range of transnational private relationships and the many ways in which they affect social sustainability both positively and negatively. Transnational private relationships are increasingly powerful and affect the livelihoods of individuals and communities across the globe. The TNCs commanding the majority of these relationships are central to the task of achieving the good governance of transnational private relationships and social sustainability. Their monetary and political power renders them the primary subjects of governance mechanisms towards the realisation of social sustainability and thereby of good governance. The two cases exemplified the myriad ways in which transnational private relationships interact with the normative content of social sustainability. The first case study revolved around the rise of big data analytics in the cyber realm. More and more personal data is generated by individuals and collected, analysed, operationalised, and monetised by transnational private actors. This process threatens the private lives of individuals through large-scale infringements of privacy and impeding the ability of individuals and groups to exercise moral agency as consequence of social engineering. On the other hand, these processes contribute to the ability of individuals to associate themselves free from public interference, kick-starts great advancements in health care and service delivery thereby directly contributing to social sustainability. The second case studied the production of Apple's iPhone by Foxconn in China as exemplification of the many aspects of transnational supply chains that affect social sustainability. The example showed the excesses of dismal working conditions in productions facilities producing goods for global markets. The Foxconn suicides led to widespread outrage over the treatment of workers producing consumer goods. Extreme working hours, low wages, and bans on unionisation exist throughout transnational supply chains. Their detrimental effects are well known and documented. Simultaneously, however, these same transnational supply chains contribute to widespread poverty relief in developing and low-wage countries, provide employment, housing, and economic development.

From the case studies rose a complex and ambivalent picture of the transnational context and its governance as multi-polar and multi-layered. A set

of indeterminacies rose from the cases. Firstly, in this transnational context TNCs occupy positions of great power. Their governance is central to good governance. However, traditional governance mechanisms to a great extend fail to effective govern TNCs. TNCs are able to escape the closed jurisdictions of states or have the power to influence it. Their governance relies primarily on soft law and voluntary regulations. Secondly, transnational private relationships both positively contribute to and negative effect the normative goal of good governance. In constructing good governance mechanisms balancing and taking seriously this ambivalence is crucial. Thirdly, existing governance mechanisms are opaque because the sources and content of governance sprout from multiple sources. Fourthly, and arguably most importantly given the multi-layered and opaque nature of transnational governance, the responsibilities of different governance actors, including TNCs, remain indeterminate. As exemplified by the iPhone case it is not clear-cut what the responsibility of Apple vis-à-vis the Chinese state towards improved working conditions are.

Chapter 6 contained the analysis of the cases in light of the practice-independent conception of good governance from Part I. It thereby determined those aspects of the transnational context relevant to good governance and isolated the aspects necessary to conceptualise a practice-dependent conception of good governance. From this analysis of the cases in light of the normative and procedural component of good governance the following can be concluded. The interpretation in light of the normative component argued that TNCs and transnational private actors do not bear the perfect duties corresponding to human rights. Enforcement of these duties through hard law does thereby not constitute good governance. Rather governance mechanisms towards the normative goal embodied by social sustainability require soft-law mechanisms in line with the imperfect nature of private actor's moral duties.

In relation to the procedural component and the related governance problems it was argued that, firstly, in the transnational context legitimacy is not a governance problem proper as all actors make legitimate claims to authority. That there is no problem of legitimacy proper is in line with (1) the multiplicity of actors making legitimate claims towards authority and (2) the imperfect nature of private actors' duties towards the protection and provision of social sustainability. Legitimacy can, however, be enhanced by integrating the three groups of actors operating in the transnational context into governance structures in line with the imperfect duties of private actors. With regards to the problem of enforceability it was concluded that enforceable mechanisms are not necessarily constitutive of good governance. Moreover, the need for soft governance mechanisms rather than mechanisms reliant on authoritative commands and enforcement is in line with the duties that private actors bear. In relation to the normative component it was shown that

the moral duties necessary to sufficiently ground legal human rights duties cannot be assigned to private actors. These actors, including TNCs, thereby exercise discretion in discharging their special imperfect human rights duties. In assessing the problem of accountability it was argued that accountability is at the heart of conceptualising the good governance of transnational private relationships. This requires conceptualising and constructing relationships of accountability with the ability to employ mechanisms that are consistent with the duties private actors bear. These imperfect duties still require performance and blame is legitimately put on those that fail to do so. Through mechanisms of accountability, ultimately the indeterminacy in what constitutes adequate performance of these duties can be mitigated. Transnational governance structures constitutive of good governance aim at the development of accountability mechanisms that integrate multiple governance actors.

Despite the legitimacy of transnational actors, the unavailability and undesirability of enforceable mechanisms, and the imperfect nature of private actors' duties many things go wrong and transnational private relationships often impede the achievement of social sustainability. Their conduct can directly infringe upon the ability of individuals and groups to enjoy the content of their human rights. Within the transnational context trade-offs are made towards the achievement of social sustainability. The previous section concluded that the manner in which these trade-offs are made can constitute good, or for that matter bad, governance. Good governance requires the specification of mechanisms that provide direction in making these trade-offs, limiting the discretion of private actors in making them, specify the process of making trade-offs. Taken together good governance would constitute the accountability of the actors constitutive of transnational private relationships. Two more aspects of good governance can be retrieved from the previous analysis. Firstly, good governance requires soft-law mechanisms rather than enforceable commands in line with the likely negative effects of direct public enforcement and the imperfect nature of their moral duties. Secondly, such mechanisms should integrate multiple actors into deliberative structures to determine the proper responsibilities in specific cases. Representing all three groups (political, corporate, and civil society actors) of actors in governance mechanisms enhances their legitimacy and, moreover, takes into account all interests that are to be balanced and outcomes to be traded-off. Below the findings of Part II are visualised:

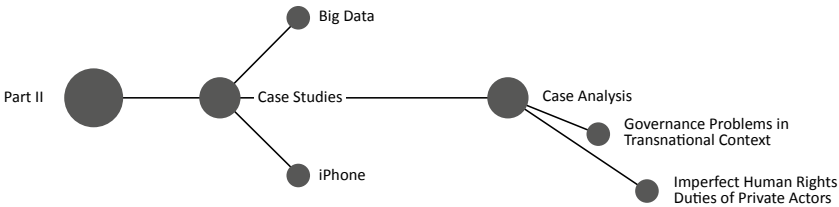

Figure 14 *Argumentive Structure Part II*

Part III

THE GOOD GOVERNANCE OF TRANSNATIONAL RELATIONSHIPS

INTRODUCTION TO PART III

Part III constructs the practice-dependent good governance of transnational private relationships. After the practice-independent conception offered in Part I and the study of transnational private relationships in Part II the two can be brought together towards a typology of mechanisms that constitute good governance of transnational private relationships. The practice-independent conception of good governance provided the normative grounding and orientation of governance mechanisms in social sustainability. This normative ground thereby plays a dual role. Firstly, it provides a specific moral conception of social sustainability that informs the operationalisation of mechanisms constituting good governance. Governance mechanisms should be justified with reference to this normative grounding. Secondly, it allows for the moral orientation of good governance. Rather than a 'shopping list' of 'good' things the normative grounding provides an aim to good governance. Achieving social sustainability constitutes this orientation. Thereby actions or mechanisms that either interfere with its achievement or do not consider this aim in their orientation fail to constitute good governance.

Chapter 6 analysed the cases in light of the practice-independent conception of good governance. The two cases at the centre of this analysis exemplify the broad and widening scope of transnational private relationships and the many ways in which they both negatively affect and positively contribute to social sustainability. The need for the good governance of these relationships, and especially the TNCs commanding them is clear. In relation to the normative component of good governance, the case analysis concluded that the most straightforward manner to achieve good governance, i.e. the integration of private actors in international human rights law by assigning legal human rights duties to them, does not necessarily constitute good governance. Beyond the universal duty to avoid harming private actors, and thereby TNCs, do not bear perfect human rights duties. Therefore, the framework of legal sanctions lacks the necessary justification towards the realisation of social sustainability. Instead TNCs bear imperfect duties to protect and provide for social sustainability. These imperfect duties inform the mechanisms that can constitute good governance. First and foremost, these imperfect duties leave discretion as to what constitute their adequate performance. Therefore, good governance requires soft-law mechanisms as these leave wiggle room for actors addressed by these mechanisms in their performance.

For what concerns the procedural component, i.e. the governance problems, the case analysis concluded that within the context of transnational private relationships the legitimacy and enforceability of governance mechanisms were irrelevant. Firstly, because all actors comprising the transnational context operate legitimately and, secondly, as enforceable mechanisms towards

the direct achievement of good governance's normative goal is likely to be counterproductive. The contribution transnational private relationships make is inherently ambivalent. These conclusions necessitate trade-offs to be made by all actors comprising the transnational context, including the private actors commanding transnational private relationships. Good governance, it was argued, lies in mechanisms that increase the accountability of private actors for the trade-offs they make and the manner in which they are made. To this end, Part III will conceptualise what good governance mechanisms require in the transnational context, offer a typology and locate a practice that closely approximates this practice-independent conception of good governance. Chapter 7 conceptualises the practice-dependent good governance of transnational private relationships. It has a twofold aim. Firstly, to conceptualise practice-dependent good governance of transnational private relationships based on the conclusion from Part II. Secondly, locating transnational governance practices that closely resemble the typology offered by the practice-dependent conception of good governance. It will argue that multi-stakeholder initiatives constitute the good governance of transnational private relationships and explores means towards their increased impact and regulatory standing. Chapter 8 concludes, summarises the main findings, and answer the research questions.

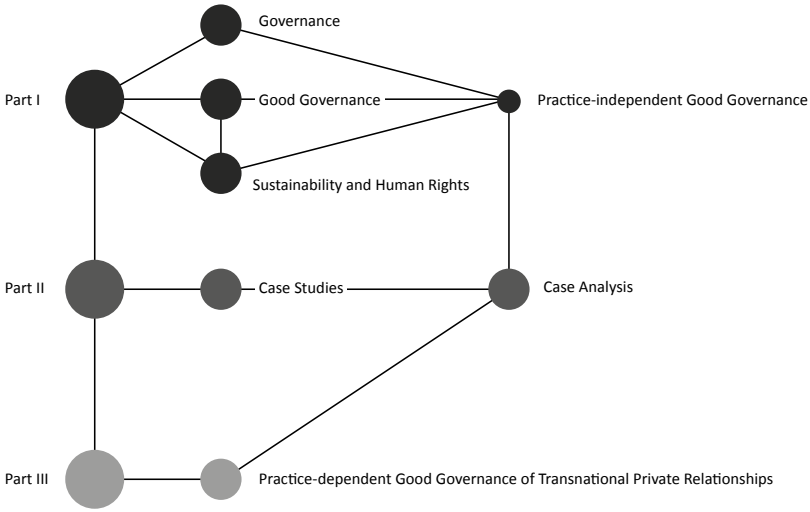

Figure 15 *Overview Part III*

7 GOOD GOVERNANCE OF TRANSNATIONAL PRIVATE RELATIONSHIPS TOWARDS SOCIAL SUSTAINABILITY

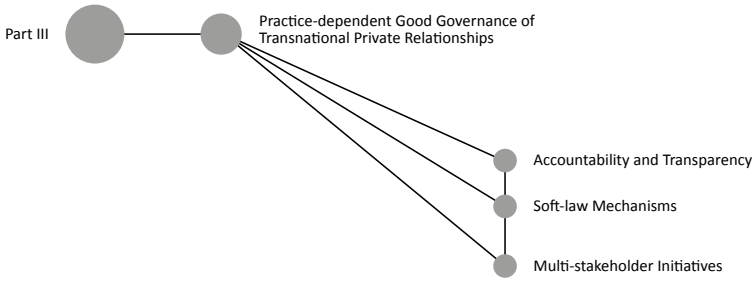

Figure 16 *Overview Chapter 7*

1. Introduction: Towards the Good Governance of Transnational Private Relationships

This chapter sets out the task of developing a typology of practice-dependent good governance of transnational private relationships and assesses avenues towards its realisation. From the two case studies and their analysis, it was concluded that the transnational context is multi-polar and multi-layered with different actors making legitimate claims to authority while bearing indeterminate responsibilities. It will be argued that good governance limits the indeterminacies concerning the responsibilities of different actors towards the realisation of social sustainability against a background of transnational private relationships' ambivalent contributions to social sustainability. In limiting these indeterminacies good governance mechanisms make private actors accountable for the trade-offs they make. The two case studies exemplified the diverse contributions and negative affects transnational private relationships have on social sustainability. Consequently, from the onset the good governance of transnational private relationships cannot be reasonably expected to reside in a one-size fits all regulatory solution. Therefore, the good governance of transnational private relationships is here perceived as the process through which regulatory mechanisms are developed and implemented. The practice-dependent conception of good governance thus offers a typology directly dependent on the practices analysed in Part II that guides the development and implementation of mechanisms constitutive of good governance. The conclusions from the case studies and analysis inform both the fundament on which good governance can be developed and the problems it should bring to solution. This fundament consists of the ambivalent nature of transnational private relationships' contributions to social sustainability, the imperfect duties of private actors to protect and provide for human rights and their consequent indeterminate responsibilities, and the need for governance mechanisms to achieve accountability through deliberative structures. The problems practice-dependent good governance should respond to are the dominance of TNCs vis-à-vis other actors in the transnational context, the opacity of governance mechanisms, and the impunity of TNCs.

Ultimately, it is argued that in multi-polar constellation of the transnational context good governance necessitates horizontal as opposed to hierarchical instruments towards the achievement of accountability. At the core of good governance is a specific interpretation of transparency, as instrumental to achieving accountability. Practice-dependent good governance thus relies on conceptualising accountability through transparency for trade-offs made by private actors through soft law and deliberative structures in the multi-polar transnational context. Good governance mechanisms thereby limit the discretion of private actors and make indeterminate responsibilities more

determinate. Furthermore, a close approximation of this practice-dependent conception of good governance is located within transnational practice and recommendations are offered towards its improvement and thereby achievement of good governance. This chapter proceeds in six sections. The next section will succinctly outline the limitations and problems from the case studies and their analysis. These inform the conceptualisation of practice-dependent good governance. The third section conceptualises accountability in the transnational context and offers a typology of practice-dependent good governance. It reiterates the aspects of transnational relationships that private actors should be accountable for towards the realisation of social sustainability, assesses the nature of the relationships between transparency and accountability, conceptualises the practice-dependent good governance of transnational private relationships, and exemplifies how this conception contributes to overcoming the problems that emerged from the case studies. The fourth section applies this conception of good governance by interpreting the different elements of the typology through transnational practice. It analyses multi-stakeholder initiatives in light of practice-dependent good governance and argues that they constitute a close approximation of good governance. The fifth section discusses the role of public authority in achieving good governance and offers guidance for policy-making. Finally, the sixth section reflects on the role of law in the good governance of transnational private relationships.

2. Background Conditions: Limitations and Problems

Before proposing a typology through which mechanisms constitutive of practice-dependent good governance of transnational private relationships can be constructed the manner in which the findings from the case studies inform this endeavour requires specification. The case studies and their analysis provide insights to conceptualising practice-dependent good governance of transnational private relationships. These insights inform the argument in two manners by, firstly, providing the limitations within which practice-dependent good governance should operate and, secondly, by specifying the problems good governance should solve.

The limitations stem from the analysis of the case studies in light of practice-independent good governance in Chapter VI. Firstly, both case studies exemplified the varying ways in which transnational private relationships both positively contribute to and negatively affect social sustainability. Transnational private relationships make significant contributions to the achievement of social sustainability in the form of economic growth, employment, income, innovation, and technological advancement while simultaneously negatively affecting social sustainability through worker exploitation, degrading wor-

king conditions, invasions of privacy, and social engineering. This background of ambivalence directly informs the conceptualisation of good governance mechanisms. Secondly, the interpretation of the case studies in light of the normative component of practice-independent good governance argued that the nature of private actors' duties towards the realisation of social sustainability limits the conceptualisation of good governance. It was argued that private actors do not bear perfect duties towards the realisation of social sustainability beyond the duty to avoid harming.[172] This imperfect nature of private actors' duties to protect and provide leaves discretion to the duty-bearer in their performance. This imperfect nature of private actor's duties alongside the absence of overarching transnational governance structures and ambivalent contributions of transnational private relationships to social sustainability has two consequences for the conceptualisation of good governance. First, that private actors are legitimate in trading-off elements of social sustainability by exercising their discretion. In other words, their responsibilities to achieve social sustainability remain indeterminate as, for instance, exemplified by the iPhone case concerning the implementation of Chinese labour law. Second, that good governance requires soft-law mechanisms consistent with the discretion private actors have in performing their imperfect duties.

Thirdly, the analysis of the case studies in light of the procedural component of practice-independent good governance found that accountability is the crucial governance defunct in the transnational context. The procedural component concerned the three governance problems of legitimacy, enforceability, and accountability. Legitimacy and enforceability are not problems proper in the transnational context due to the absence of overarching authority and likelihood of adverse effects caused by direct enforcement of enforceable governance mechanisms direct at the realisation of social sustainability by public actors. However, given that many things go wrong as the case studies exemplify, blame is justifiably put on those who fail to effective discharge their duties whether they are perfect or imperfect. Good governance mechanisms should hold private actors accountable for their negative effects on social sustainability. Accountability should be achieved through soft-law mechanisms that integrate multiple actors in deliberative structures to increase the legitimacy of good governance and respect the legitimate discretion performed by private actors in discharging their duties.

Beyond these limitations, the case studies of Chapter 5 excavated specific problems relating to the practices transnational private relationships and their governance. The practice-dependent conception of good governance should respond to these problems and offer practical guidance to their

[172] While it is unclear what constitutes harm in the transnational context, See Chapter 6, section 2 at p. 168.

solution within the above-mentioned limitations. Beyond the partly negative impact of transnational private relationships on the achievement of social sustainability, these problems are, first, the dominance of TNCs and second the opacity of governance mechanisms. Firstly, TNCs are dominant both within the transnational private relationships they command and vis-à-vis traditional governance actors. The big data case exemplified the dominance of a small number of large TNCs that dominate technological development and the direction in which it moves. The iPhone case exemplified the manner in which social sustainability is affected through transnational supply chains and showed that TNCs, such as Apple, can escape national jurisdictions through the supply chains they effectively command. Good governance mechanisms in this context should contribute to a better balance of power. Secondly, the cases both showed the opacity of existing governance mechanisms. In relation to big data it was argued that these private relationships are governed behind a veil of code through technologies produced and owned by TNCs themselves. Transnational supply chains, as exemplified by the iPhone case, are governed through a myriad of mechanisms ranging from sectoral self-regulation and multi-stakeholder initiatives to national law from both host- and home states. At present TNCs make trade-offs concerning social sustainability from a dominant position and remain relatively ineffectively governed. It can be questioned to what extent these trade-offs are made through fair processes and whether due diligence is performed given the many negative effects. This is arguably caused by the opacity of governance mechanisms and dominance of TNCs in the process of making trade-offs which ultimately leads to adverse effects.

In sum the challenge in constructing the practice-dependent good governance of transnational private relationships as informed by the cases requires making different private actors accountable for their conduct. Good governance relies on conceptualising accountability for trade-offs through soft-law mechanisms and deliberative structures in the multi-polar and multi-layered transnational constellation. The next section conceptualises accountability through a specific interpretation of transparency and develops a framework through which accountability can be achieved in the transnational context. This framework offers a typology of the practice-dependent good governance of transnational private relationships.

3. Practice-Dependent Good Governance: Accountability Through Transparency

This section conceptualises accountability in the transnational context. This conceptualisation culminates in a typology of good governance through accountability and outlines how its elements contribute to solving the problems

posed by transnational private relationships. At present accountability is the crucial defunct of transnational governance. Conceptualising practice-dependent good governance thus hinges on how to achieve accountability in the transnational context. The indeterminate responsibilities and imperfect duties of private actors comprising transnational private relationships does not imply that mechanisms through which to hold them to account for negative effects are unjust. The nature of their duties and responsibility informs the mechanisms through which actors should be held accountable. What private actors should be accountable for is central to conceptualising accountability and its achievement. Chapter 4 argued that in relation to the normative goal of good governance all actors bear a universal perfect duty to avoid harming. Any action that leaves others worse-off in relation to their human rights constitute a direct violation of that perfect duty that private actors should be accountable for. Though, as the case analysis showed, transnationally it is unclear whether the negative effects of transnational private relationships constitute harm in this sense and when harm is done this can often be traced back to unwilling governance by host states. For instance, as the iPhone case exemplified, the degrading working conditions in Apple's supply chain can be traced to ineffective implementation of Chinese labour law by the Chinese state. The extent to which it is the responsibility of Apple to enforce these laws in facilities they do not own is unclear and thereby it is indeterminate who is responsible for the harm done, i.e. who it is that harms workers. Beyond the universal perfect duty, private actors bear imperfect special duties to protect and provide for social sustainability. These duties leave discretion towards their adequate performance. The resulting necessity of trading off components of social sustainability primarily consists of balancing different interests, for instance between wage increases and profit maximisation or privacy protections and product improvement. Imperfect duties require performance and private actors should be accountable for both the outcomes of their trade-offs, i.e. do these outcomes constitute clear inadequate performance, and for the process through which the trade-offs are made, i.e. who makes them in what manner. Accountability mechanisms make these indeterminate imperfect duties more determinate. This section, firstly, analyses the concept of accountability and its relationships with transparency. It offers an interpretation of transparency through public reasoning that directly aides the ability to hold actors accountable. Secondly, it offers a typology of practice-dependent good governance based on this conception of accountability in the transnational context.

3.1 Transparency, Public Reasoning, and Accountability

Achieving accountability in absence of vertical structures of enforcement is a central challenge to good governance in general and especially in the transnational context. Chapter 2 already discussed that dominant responses to

the problem of accountability in relation to horizontal governance structures primarily consist of efforts to increase transparency (Fox, 2007; Gutmann & Thompson, 1996; Hood, 2010; Kosack & Fung, 2014; Naurin, 2006; Prat, 2006; J. Roberts, 2009). Understanding this relationship between accountability and transparency aids the conceptualisation of accountability for transnational private relationships. Within policy debates it is, on the one hand, assumed that being transparent leads to better performance, especially in relation to widely held and shared moral convictions, in and of itself. This assumption sees transparency as disinfectant to corrupt and immoral practices (O'Neill, 2006). On the other hand, it is assumed that being transparent enables other actors to exert pressure on others through the power of information. This assumption rests on the belief that information redistributes power from the actors providing information to those receiving it. It relies on to principal-agent reasoning (Mansbridge, 2009). Such reasoning states that there are always information asymmetries between agents (such as the state or corporations) and principals (such as citizens and consumers). Transparency can remedy the power asymmetry by providing the principal with equal information through mandatory transparency requirements for the agent.

However, it is not clear whether transparency does indeed increase accountability. Empirical studies do not confirm transparency's role as disinfectant (Bennis, 2008; De Fine Licht, 2014; Etzioni, 2010; Heald, 2006; Prat, 2005). Moreover, information only yields power if that information is relevant. The dominant arguments against transparency as mechanism towards accountability concern the costs of information. The costs of processing information can be high for certain actors. For instance, transparency is often heralded as a step towards responsible consumption. It allows consumers to make informed choices and thereby exert power in their purchasing decisions. However, consumers make multiple transactions on a daily basis and to review all available information and all possible consequences of every transaction is near impossible. Empirical research thus shows that the influence of the 'green' or 'ethical' consumer is relatively small as only a minor portion of purchasing decisions are made within an ethical framework and most fall outside of it (Keller et al., 1997). The specifics and technicalities of disclosed information require expertise in their assessment, without this expertise transparency does not contribute to accountability. In and of itself transparency is not conducive of accountability as the availability of information has no necessary connection to accountability.

To better understand the relationship between accountability and transparency an assessment of the former concept offers insight. Accountability is often treated as a case of 'we know it when we see it'. An actor that is held accountable *is* accountable. Thus, a corporation that is sanctioned in court for misconduct *is* accountable. However, in constructing accountability of transnational private relationships and how transparency can aid it, such

observations are insufficient. As introduced in chapter 2, accountability is a specific relationship between an actor and a forum (Bovens, 2007). This relationship comprises two components: explanation and sanction (Weale, 2011). An actor is accountable if she makes transparent and justifies her actions (explanation) to a forum with the ability to pass judgment and has the opportunity to change her conduct (sanction). Both steps of accountability, explanation and sanction, are crucial. This nature of accountability has two important implications relating to how transparency can aid it. Firstly, the disclosure of information does not necessarily constitute a relationship of accountability. Secondly, an actor that is not held to account is not necessarily unaccountable. An actor can be accountable independent of being held accountable.

The two-step nature of accountability clarifies the role transparency can play in achieving it. For transparency to enable accountability, information should compromise actions, their justifications and be directed at a specific forum. There is no necessary overlap between the principals (for instance workers) affected by an agent (for instance a TNC) and the principals that constitute the forum capable of judgment and action (for instance a judge, parliament, NGO, or media organisation). Transparency thus requires specific reasons to be given for actions by actors directed at a forum capable of passing judgement rather than simply making available information. The concept of public reasoning can help concretise transparency. Public reasoning requires two standards. Firstly, "public reasoning needs to be conducted in such a way that reasoning can be tested as to its intellectual robustness" (Weale, 2011, pp. 74–75). Secondly, the orientation of the reasoning process must be specified, i.e. to what end are reasons given (Weale, 2011). In this form, public reasons perform six functions. They (1) constitute a justification for action, (2) enable critique of reasons ,(3) enable critique of actions and the connection between reasons and actions, (4) limit the discretionary power by externalising the assessment of reasons, (5) coordinate action by anticipating responses to reasons given, and (6) reasons build acceptance by integrating the interests of others as reasoning necessarily requires assessing different perspectives (Westerman, 2013, p. 88).

Conceived as public reasoning transparency has a clear positive relationship with accountability as it gives requirements to the content of what is made public. Firstly, it requires not just the release of information but to do so in a manner that allows for constructive engagement. Public reasoning requires reasons to be given in relation to actions and convictions that can be tested. This includes those actions that pertain to the balancing of interests and trading off components of social sustainability in transnational private relationships. Such tests can be both intellectual, i.e. are the reasons provided sound and can they withstand critical scrutiny, and empirically, i.e. do these reasons live up to the outcomes of the actions they are said to justify. Secondly,

public reasoning necessitates the formulation of the goal specific actions aim to contribute to. At minimum, this requirement entails to motivate actions with reference to a future situation the actor seeks to achieve. These two aspects enable transparency to aid the six functions specified above, especially limiting discretionary power and coordinating actions. In relation to the achievement of good governance this second requirement entails assessment of actions and their effects on the normative goal of social sustainability alongside other motivations ranging from market expansion to profit maximisation.

The second implication of the relational conception of accountability is that actors can be accountable without being held to account. In the strict sense actors who comply with the requirement of public reasoning are accountable. This is the case independent of whether they are held to account by a forum. In conceptualising accountability, the crux is to locate or construct the appropriate forum with the capacity to pass judgment and change the conduct of an actor. Whether transnational private actors in transnational private relationships are accountable does not solely hinge on them factually being held accountable. Rather the construction of the appropriate forum capable of passing judgment, holding actors to account, and of setting standards of transparency constitutes accountability. The accountability of the actors constitutive of transnational private relationships thus hinges on whether there is a transnational forum and to which extent transnational actors can be motivated towards transparency and abide by standards of public reasoning.

3.2 Practice-Dependent Good Governance: Constructing Accountability

Based on the examined relationship between accountability and transparency conceived as public reasoning a typology of practice-dependent good governance can be offered. It integrates the necessary elements of good governance in the transnational context into an ideal type. Based on the findings from the case studies it was concluded that good governance of transnational private relationships lies in mechanisms toward their accountability. It was argued that transparency aids accountability, though not as commonly conceptualised through the disclosure of information. Conceived as public reasoning transparency requires private actors to give reasons for actions and to specify the orientation and goal of these actions. In relation to good governance in the orientation of these actions should at least include a concern for social sustainability. Given that accountability does not hinge on actors being held to account but rather on the capacity of a forum capable of doing so, the good governance of transnational private relationships can only be achieved by locating or constructing this forum in the transnational context. To increase legitimacy this forum should

aim at integrating actors representing all stakeholders consistent with the limitations from the case analysis. Through integrative and deliberative structures the legitimacy of governance mechanisms is increased. Absent vertical governance structures, given the indeterminacy in responsibilities, and adverse effects of direct enforcement through public hierarchies, the good governance of transnational private relationships lies in deliberative structures capable of assessing the public reasons for actions provided by the actors comprising transnational private relationships. This typology of practice-dependent good governance specifies the necessary components of governance mechanisms to constitute good governance and is visualised here. Specifically, good governance requires the specification of a forum, mechanisms that enable this forum to hold private actors commanding transnational private relationships accountable, and policies that motivate these actors to participate by engaging in public reasoning. As visualised this structure of good governance relies on transnational private relationships and especially the TNCs commanding them to be transparent conceived as engaging in public reasoning. This requires reasons to be given for actions and the integration of social sustainability as goal, among other possible goals, of these actions. This public reasoning is directed at a forum capable of assessing the reasons given and holding actors accountable in case reasons or actions remain wanting. This requires specific mechanisms that integrate multiple stakeholders that operate legitimately in the transnational context and are affected by transnational private relationships, thus including private actors. Through such deliberative structures accountability can be achieved. Within mechanisms that constitute good governance a specific role is to be played by public actors, especially states, in strengthening the capacities and extending the reach of the forum in holding the actors constitutive of transnational private relationships accountable (See figure 17).

Through the mechanisms outlined above the problems that emerged from the case studies can be overcome. Firstly, in relation to the dominance of TNCs both in terms of power vis-à-vis other actors including states and in relation to their position as commanding transnational private relationships the proposed typology creates counter-power. Within the forum a space for the contestation of transnational private relationships and the TNCs commanding them is excavated aided by public actors. Secondly, the clear relationships of accountability and the transparency requirements specify the responsibilities different governance actors have towards good governance. These deliberative and transparent relationships consolidate governance mechanisms and the roles specific actors play. Thereby the opacity of transnational governance is, at least partially, overcome. More generally, the central role of transparency and accountability through integrative and deliberative structures allow for constructive and open debate and assessment of the trade-offs private actors make in transnational private relationships. The

transparency of and consequent capacity to assess these trade-offs makes the actors comprising transnational privPate relationships accountable for their outcomes. Ultimately the mechanisms constitutive of good governance make the actors comprising transnational private relationships accountable for the negative consequences of their trade-offs in relation to social sustainability. The next section specifies this typology further based on transnational practice as studied in Part II to determine the appropriate forum and mechanisms to achieve transparency and hold the actors comprising transnational private relationships to account.

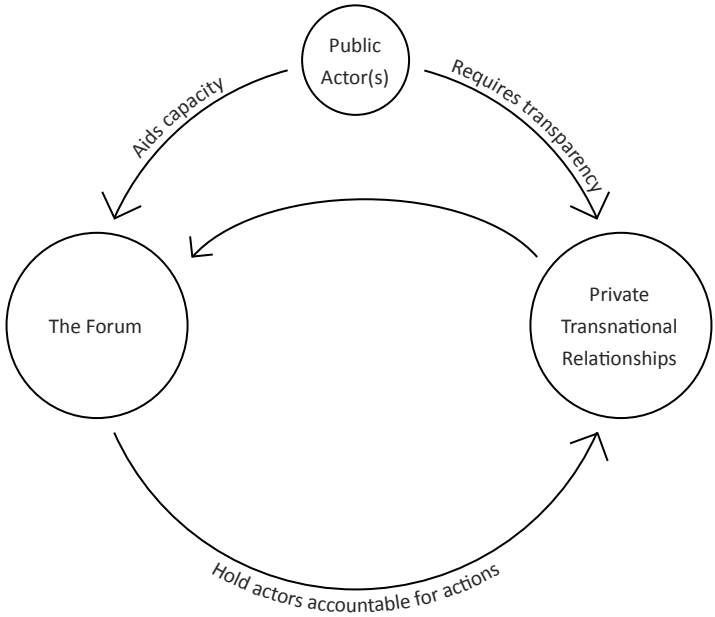

Figure 17 *Typology of the good governance of transnational private relationships*

4. Good Governance of Transnational Private Relationships

As Part II exemplified the transnational constellation as multi-polar and multi-layered with different actors making legitimate claims to act authoritatively. In the remainder of this chapter the different aspects of practice-dependent good governance are specified with reference to this transnational context. These different aspects concern the transnational forum capable of entering into relationships of accountability with the private actors comprising transnational private relationships, primarily TNCs. Beyond specifying this forum

within the transnational context, the mechanisms through which this forum can hold the actors comprising transnational private relationships to account are located in the transnational context. These mechanisms concern both those that require private actors to engage in public reasoning by making transparent reasons for action and those mechanisms enabling the forum to hold these actors to account. Ultimately, a close approximation of this typology of good governance is located in transnational practice in the form of multi-stakeholder initiatives. In conclusion avenues for public actors, especially states, to strengthen the development and reach of these initiatives are explored.

4.1 The Forum: Transnational Civil Society

To be accountable the actors comprising transnational private relationships must engage in public reasoning by disclosing their actions and the reasons for them. This transparency should be directed at a forum capable of passing judgment and altering conduct. That way transparency offers "the most promising path to holding TNCs accountable" (Miller, 2015, p. 435). Within the political structures of the state forums are constituted among others, by the legislature, judiciary, independent non-majoritarian institutions such as central banks, watchdogs, activists, and the media. The ultimate recourse of these forums are national parliaments and courts capable of implementing and enforcing legal sanctions, two institutions absent at the transnational level. Possible forums towards the accountability of the actors comprising transnational private relationships are national parliaments and (inter) national courts, or transnational civil society constituted by "networks of association" (Nash, 2007, p. 437).[173] As argued in the case analysis national legislatures and (inter)national courts are unable to achieve the good governance of transnational private relationships. Firstly, the negative effects of direct enforcement imply that direct regulation towards the realisation of social sustainability through hard law is likely to undermine its achievement and therefore cannot, at least on its own, constitute good governance. Secondly, TNCs, as core component of transnational private relationships, can relatively easily escape legal measures by moving business practices to other jurisdictions. Thirdly, beyond the state, international human rights law remains wanting in terms of enforcement mechanisms and even if it did not, its direct application to private actors lacks legitimacy given the imperfect

[173] Pure voluntary self-regulation is not considered as possible forum since accountability requires a separation of actor and forum. Voluntary self-regulation conflates forum and actor. Many corporations and organisations do have internal forums such as compliance and audit offices. These do not constitute relationships of accountability but rather due diligence. Similarly, 'media' is not considered a transnational forum as most media-outlets are nation-based and there is not a robust transnational public sphere. Their campaigns are, however, decisive and are an important part of transnational civil society by shaping the discourse.

nature of private actors' special duties. Transnational civil society thus reveals itself as the appropriate forum as it has the reach to cover the conduct and actors that comprise transnational private relationships in its entirety as evidenced by, for instance, the sustained media campaign and consequent regulatory steps taken within transnational civil society in the wake of the Foxconn suicides.

Transnational civil society is constituted by networks that go beyond political borders and expand "the parameters of political engagement for poor and marginal groups" (Nash, 2007, p. 437). These networks form a context of social control outside and beyond political structures. Actors within transnational civil society are "self-organised advocacy groups that undertake voluntary collective action across state borders in pursuit of what they deem the wider public interest" (Price, 2003, p. 580). Transnational civil society blends "state and market, public and private, and traditional and self-regulatory institutional structures, characterized by alliances" built among a variety of actors such as NGOs, transnational advocacy networks, international organisations, and global media organisations (Jackson, 2010, p. 73). Over the last decades this political space has grown increasingly influential in treaty negotiations, international and domestic agenda-setting, and regulating actors through reputational accountability (Burgerman, 2001; Clark, 2001; Florini, 2000; Higgot, Underhill, & Bieler, 2000; Khagram, Riker, & Sikkink, 2002). Absent the ultimate recourse to parliaments and courts, transnational civil society increasingly resembles the civil societies of developed countries. With regard to the case studies the actors constituting transnational civil society include NGOs, monitoring organisations such as the FLA, public international institutions such as the ILO and OECD, global media outlets, international research programmes, and advocacy groups such as the Partnerships on AI. Moreover, the increasing influence of transnational civil society on the conduct of multiple actors renders it appropriate as forum to achieve the accountability of the actors comprising transnational private relationships. This is especially the case as the actors that make up transnational civil society have shown the capability to gather and integrate the expertise necessary to judge and change the conduct of the actors comprising transnational private relationships, something absent within relatively closed institutions (Brammer et al., 2012, pp. 15–17). The actors constitutive of transnational civil society can move as freely across borders as the TNCs that command transnational private relationships. The potential of transnational civil society for effective oversight towards good governance in other words does not stop at the borders of states, availability of enforcement mechanisms, and jurisdictions of courts.

4.2 The Mechanism: Transnational Civil Regulations

It was already argued that the good governance of transnational private relationships requires soft-law mechanisms given the indeterminacy of responsibilities.[174] Moreover, the actors comprising the transnational context operate on a basis of legitimacy in trading off components of social sustainability. As concluded from the case studies TNCs are legitimate in trading off, for instance, wage increases beyond what is legally required for profit maximisation, states are legitimate in prioritising economic development over labour protections, and tech-corporations and states are legitimate in assessing the novel ways innovations can improve product development and service delivery while trading off privacy protections. The need for soft-law mechanisms alongside the legitimacy of actors in making trade-offs calls for an integrative governance approach within transnational civil society. Within transnational civil society responsibilities are to be assigned through mechanisms that involve and represent all actors in order to enhance the legitimacy and effectiveness of these mechanisms. Through these mechanisms indeterminate responsibilities are made more determinate and actors accountable for their performance by disclosing reasons for and orientation of actions. Such an integrative approach seeks to achieve the representation of all interests affected by transnational private relationships including those of the actors constituting and commanding them. Civil regulations rely on what is known as deliberative structures in which communicative rationality can be achieved (Habermas, 1998). Good governance is achieved by the ability of civil society to contest the trade-offs made in transnational private relationships and hold the responsible actors accountable for outcomes. These require the equal standing of parties, especially weaker parties, powers of oversight, and the capacity to assess the public reasons of TNCs for civil society actors over transnational private relationship. This process of publicity, contestation, and deliberation constitutes good governance of transnational private relationships. In absence of public authority and legitimate command-and-control governance, good governance is a process in which responsibilities are made determinate through deliberation and the accountability of actors involved within transnational civil society through public reasoning. Transnationally, good governance thus lies in the process of developing deliberative mechanisms towards the achievement of social sustainability.

As introduced in Chapter 5 transnational private relationships are within transnational civil society presently governed through self-regulation by TNCs, sectorial regulations, and civil regulations. Both self-regulation and

[174] Both due to the imperfect nature of private actors' special duties and to the indeterminacy in establishing harm concerning their universal perfect duty to avoid harming. See Chapter 6, section 2 at p. 168.

sectorial regulation remain wanting in relation to the accountability of private actors constitutive of transnational private relationships. Self-regulations leave the drafting, implementation, and enforcement of regulations to the regulatee. In other words, self-regulation fails to differentiate between actor and forum. For instance, the governance through code in relation to the collection and utilisation of big data constitutes a form of self-regulation where there arguably is no difference between actor and forum as the dominant tech-corporations are the authors of the code that governs their conduct. Sectorial regulations are primarily aimed at cost reductions and not necessarily at improving the social impacts of business conduct (Vogel, 2010, p. 70). Concerning sectoral regulations, it can also be argued that there is insufficient distance between actor and forum. For instance, within sectoral codes of conducts the forum that holds an agent to account is constituted by its peers creating an incentive to not hold them to account. Many sectoral regulation thus never 'punish' violations of the codes they implement (Haufler, 2001). Civil regulations, however, integrate multiple actors into the process of governance through deliberative structures and incorporate civil society actors into the forum. These regulations include public commitments by corporate signatories, including requirements to obey the law of host states, and are based on internationally agreed standards of organisations such as the ILO and UN (Vogel, 2010, p. 69). They "utilize private, nonstate, and market based regulatory regimes to govern" TNCs, their transnational supply chains, and wider business conduct and consequences thereof (Jackson, 2010, pp. 67–68). Civil regulations thereby differ from self- and sectoral regulation in that they require public commitments, are likely to become politicized, and often arise after activist pressure (Jackson, 2010, p. 70). Through such civil regulations, NGOs can improve working conditions by exerting pressure on employers and spread information concerning practices that undermine social sustainability by supplying transnational civil society with credible information on conditions in factories, technological innovations and threats, private standards, and by providing training and education to individuals (Levi et al., 2013, p. 24). Moreover, studies show that civil regulations produce better outcomes than state-led governance, command-and-control mechanisms, and self-regulatory mechanisms by bringing relevant actors together (Grant & Keohane, 2005; Marx & Wouters, 2016; Vogel, 2010, p. 80). Examples of such civil regulations are the Forest Stewardship Council (FSC), the FLA, and Partnership on AI that connect TNCs with civil society actors such as public research institutions and NGOs.

For civil regulations to be successful four criteria should be met (Williams, 2017). Firstly, the purpose of a specific regulation should be clear. Is the regulation directed at the improvement of working conditions, privacy protections, or environmental protection? This enables the effective assessment of the public reasons provided by corporate actors. Within

transnational civil society multiple standards have emerged that give structure to regulations. Four types of standards can be differentiated (Gilbert, Rasche, & Waddock, 2011). Principle-based standards offer guidelines and operate as starting point for dialogue, mutual learning, and best practices. Among these are the UNGC[175] and the OECD Guidelines for Multinational Corporations. Certification standards go a step further and verify, monitor, and certify products, corporations, or facilities on previously determined standards. These include the SA8000[176], Fair Labour Association, WRAP[177], and WRC[178]. Reporting standards, such as the Global Reporting Initiative's (GRI)[179] standards concerning the disclosure of information, offer private actors guidelines for non-financial disclosures. Finally, process standards, such as the ISO 26000 offer managerial guidance to improve corporate accountability.

Secondly, all relevant stakeholders should be involved in the process of drafting, implementing, and coordinating the regulations. Thus, without the involvement of corporations or worker representation civil regulations lack the legitimacy to effectively constitute good governance. The involvement of all actors can be achieved through public pressure on TNCs and other private actors to engage in the public reasoning required by these standards. Thirdly, an appropriate balance between power and responsibility must be struck. Given the indeterminacies surrounding responsibilities, equal standing between parties is necessary for the mechanisms to remain legitimate. Fourthly, all actors involved in specific civil regulations must be accountable to the other actors and the wider public. Civil regulations should therefore publicise standards their parties subscribe to. These four standards are advanced through transparency as public reasoning. The next section looks at the practice of multi-stakeholder initiatives and argues that these governance mechanisms constitute a close approximation of practice-dependent good governance of transnational private relationships specified.

4.3 Practice: Multi-Stakeholder Initiatives

Transnationally civil regulations primarily take the form of multi-stakeholder initiatives like the ones discussed in the iPhone case. Such multi-stakeholder initiatives already have a prominent place in the governance of transnational private relationships that negatively affect working conditions and the natural environment. The FLA and FSC are but two prominent examples. These initiatives bring together corporations, NGOs, international organisations,

[175] United Nations Global Compact

[176] The SA8000 is a workplace standard code of conduct and certification body of manufacturing facilities.

[177] The Worldwide Responsible Apparel Production audits and certifies factories in developing countries.

[178] Worker's Rights Consortium

[179] The GRI offers a standardised format for both financial and non-financial disclosures and assistance in the process of drafting and publicising these disclosures.

and political institutions towards the governance of transnational private actors through deliberative structures and soft-law mechanisms. They integrate regulators and regulatees alongside affected parties into governance mechanisms. In concert regulations are drafted and implemented with all actors acknowledging responsibilities. These multi-stakeholder initiatives are not uniform, as the governance landscape in relation to transnational production processes exemplified. Multi-stakeholder initiatives and their regulations take different forms ranging from certifications[180] and membership[181] to roundtable dialogues[182] and project facilitation[183] (Abbott & Snidal, 2009; Gereffi, Humphrey, & Sturgeon, 2005; Hendrickx, Marx, & Wouters, 2016; Marx, 2013; Marx & Wouters, 2016; Tamo, 2015; van Huitjstee, 2012). However, these varieties of multi-stakeholder initiatives share core features. These include a standard setting body tasked with setting standards that allow for assessment of conformity and ultimately the determination of measurement and sanctioning procedures (Marx & Wouters, 2016). The regulations employed in measuring compliance and sanctioning non-compliance differ across the board. The standards that multi-stakeholder initiatives rely upon substantively are often informed by public standards such as human rights declarations and ILO conventions thereby integrating the normative core of good governance into their governance mechanisms.

Multi-stakeholder initiatives meet the criteria for effective civil regulations. They are, firstly, primarily single-issue initiatives directed at specific types of corporate conduct and oriented towards a clear goal that often relates directly to the normative aim of good governance as specified in Part I. Initiatives such as the Kimberly Project and the FLA focus on the single issue-areas of conflict diamonds and fair labour respectively and base themselves on core human rights documents. Secondly, they integrate multiple actors in the governance process including the representation of affected parties and corporate actors themselves. To do so they base themselves on accepted international commitments and CSR policies by corporate actors, and organisations representing minority interests such as unions and local NGOs. Thirdly, multi-stakeholder initiatives integrate these actors on the basis of equal standing. Most multi-stakeholder initiatives have governing structures in which none of the different actors can dominate the outcomes of the initiative thereby necessitating dialogue. Fourthly, multi-stakeholder initiatives increase the accountability of actors involved in transnational private relationships both internally and externally towards the wider public.

[180] The Forest Stewardship Council (FCS) is a prominent example of a multi-stakeholder certification body.

[181] The Fair Wear Foundation is a membership-based multi-stakeholder initiative.

[182] See for instance The Dutch Coal Dialogue.

[183] The Initiative for Sustainable Trade is a multi-stakeholder initiative primarily concerned with project facilitation.

They do so by requiring the adoption of shared goals, monitoring progress, and publication of outcomes. These processes, in which all actors' legitimacy is confirmed, seek to govern specific aspects of, primarily, corporate behaviour towards shared goals through soft law. Their soft nature, however, does not imply multi-stakeholder initiatives are completely voluntary as participating in multi-stakeholder initiatives requires making clear commitments. Soft law can 'harden' over time, for instance many states require corporate ISO certifications, external pressure can make standards a prerequisite to corporate viability and consequently minimise the benefits of abandoning initiatives once joined, and ignoring standards can hurt stakeholder relations and undermine legitimacy (Gilbert et al., 2011).

As introduced in Chapter 5 multi-stakeholder initiatives are both heralded as third way and criticised for their voluntariness (Utting, 2002, p. 66). The previous sections provide an argument for civil regulations, and thereby multi-stakeholder initiatives, not as a 'third way' between public governance and self-regulation. It should be noted that the argument in favour of civil regulations and multi-stakeholder initiatives as constitutive of the good governance of transnational private relationships comes from a different perspective. The argument rests on the interpretation of the practice-independent conception of good governance in light of the case studies that exemplified transnational private relationships. From this interpretation and its specification in relation to the transnational context civil regulations emerge as the proper mechanisms to govern towards the realisation of social sustainability. The soft-law character of civil regulations is necessary given the indeterminacy of responsibilities that different actors have towards the normative goal of social sustainability. Their deliberative structure respects the legitimacy of all actors in balancing and trading off aspects of social sustainability in pursuit of their interests and enhances the legitimacy of the governance mechanisms themselves. Moreover, the incorporation of multiple interests through deliberative governance structures minimises the threat of adverse effects of unilateral enforcement of policies. Private actors thus are, through varying strategies, motivated and incentivised through deliberative structures of civil regulations rather commanded and sanctioned through public courts. Within practice multi-stakeholder initiatives constitute a close approximation of practice-dependent good governance of transnational private relationships because they make indeterminate responsibilities more determinate through soft-law mechanisms in which diverging interests are represented. Ultimately, they increase the accountability of private actors. Concerning their aim, multi-stakeholder initiatives are predominantly oriented towards the protection of human rights and thereby social sustainability.

Multi-stakeholder initiatives provide a "platform for governance wherein different actors can claim ownership of the process, thereby taking their outcomes more seriously" (Tamo, 2015, p. 101). As part of multi-stakeholder

initiatives private actors become accountable to this governance platform through transparency and monitoring requirements. Two examples will be discussed to exemplify the workings of multi-stakeholder initiatives, how they interact with civil society, the manner in which they constitute counter-power, and finally how they create relationships of accountability through transparency. Each example relates to one of the case studies exemplifying what good governance looks like in practice. It should be noted, however, that in virtually every sector where private actors and transnational private relationships negatively affect social sustainability multi-stakeholder initiatives exist though their forms and capacities differ greatly (Gilbert et al., 2011). Such differences in capacity can be attributed to varying levels of institutional support, willingness of private actors to participate, and presence of scandals or public pressure. These are interrelated and the final sections of this chapter will discuss mechanisms to extend the reach of multi-stakeholder initiatives through, primarily, transparency requirements. The two examples concern the FLA, a certification initiative, and the Web Transparency and Accountability Project, a principle-based initiative.

The FLA is a multi-stakeholder initiative directed at the sustainable improvement of working conditions in facilities producing goods for transnational supply chains. It rose from a meeting of TNCs and NGOs convened by then president Clinton in 1996. The FLA was formally established in 1999. Until recently its primary focus was with working conditions in the garment industry but corporations producing consumer electronics have since joined. The FLA is non-governmental and university based. It is governed through a board of directors consisting of six business representatives, six representatives from NGOs and labour organisations, and six representatives from universities. The FLA has developed a workplace code of conduct and principles for monitoring[184] that all participants must subscribe to and implement, monitor, and audit throughout their supply chains. The code of conduct details provisions concerning working hours, discrimination, worker representation, forced and child labour, and wages. These are all aspects that correspond to the normative ground of good governance. The FLA accredits monitors, reviews audits, and reports on audit results and remediation processes. The association promotes sustainable improvement within supply chains by pressuring corporations to improve working conditions rather than terminate relationships with underperforming facilities. Prior to 2002 the FLA required corporations to internally inspect 50% of its factories in the first year and all within the second year. Beyond these internal audits, corporations are required to hire external monitoring organisation to conduct audits in 30% of their factories in years 2-3 and 5% annually thereafter (O'Rourke, 2003, p. 11).

[184] See http://www.fairlabor.org/our-work/labor-standards and http://www.fairlabor.org/our-work/principles.

This process of monitoring and certifying factories was subject to widespread critique in its early years. NGOs and unions objected to the dominance of corporate interests within the process of monitoring and auditing factories. The majority of audits and inspections were commanded and monitored directly by corporations and other actors involved in the transnational private relationships in question. Corporations were free to choose auditors of their facilities and pay them directly. Critics argued that these relationships created perverse incentives for corporations and monitoring organisations (Benjamin, 1998; Maquila Solidarity Network, 2001). Moreover, corporations had a say in the selection of factories to be monitored, incentivising audits of those facilities that performed best and thus required least improvement. More generally, the FLAs monitoring only covered factories of the corporations themselves and not of subsidiaries and contractors.

In response to these criticisms the FLA significantly amended its monitoring processes. The board of directors agreed upon implementing a number of improvements. From 2002 onwards the whole supply chain of participating corporations became subject to the auditing and certification process rather than pre-selected facilities. FLA staff is now tasked with selecting the factories to be audited, the auditing organisations, schedules unannounced inspections, directly receives auditing reports from monitors rather than corporations, and conduct follow-up inspections (O'Rourke, 2003). After the critique levelled the FLA thereby cut the corporations largely out of the monitoring practice.

The FLA is an example of a multi-stakeholder initiative within which actors representing different interests set common goals, monitor, and certify corporations. This process further determines the responsibilities of TNCs both by the adoption of the workplace code of conduct and the representation of business in its board of directors. It increases transparency by publishing summarised reports of the audits ensuring that private actors engage in public reasoning. Moreover, the process through which the FLA amended its practices exemplifies the adaptability of multi-stakeholder initiatives to increase the accountability of all actors through publicity, critique, and deliberation including the accountability of the governance mechanism itself. Within the forum of transnational civil society, the availability of information concerning corporate conduct and practices of NGOs improves governance mechanisms and further determines the responsibilities of different actors. This process is evidenced by the iPhone case where after a scandal and subsequent public outrage Apple first established self-regulatory commitments through its supplier code of conduct and, second, joined the FLA. Thereby Apple subjects the facilities where its products are produced and assembled to external scrutiny and publicness. This process establishes a relationship of accountability between Apple and its supply chain and transnational civil society. One might object that this process has

not necessarily led to better working conditions as reports of unpaid and forced overtime show (Wakabayashi, 2014). In response, it must be noted that achieving social sustainability is a complex process given the indeterminacy of responsibilities, the legitimacy of different actors in the transnational context, and the positive contributions production- and assembly facilities make to social sustainability. The good governance of Apple in this case lies in making responsibilities more determinate, affirming the legitimacy of multiple actors, and taking into account the ambivalence of transnational private relationships' contributions to social sustainability. The increased transparency through the deliberative structures of the FLA enables this and is thereby constitutive of good governance even though its process and outcomes can be improved.[185]

In relation to the Big Data case a multi-stakeholder initiative approximating the good governance of transnational private relationships is The Web Transparency and Accountability Project[186] (WebTAP). WebTAP is a university- and research-based project that monitors big data analysis by corporate actors on discriminatory practices and infringements of privacy. Civil regulations and multi-stakeholder initiatives concerning big data analysis, storage, and brokerage are a relatively new phenomenon and thereby not as robust in their governance as similar initiatives in different sectors (O'Neil, 2016). This is primarily due to the recent developments in the field of big data. For instance, issues concerning working conditions in private relationships have been at the centre of public policy making and international regulation for over a century. The advent of big data is a comparatively recent development and regulatory responses to the big-data related transnational private relationships still underdeveloped. The necessity of civil regulations in the area of big data is, however, clear, especially given recent scandals concerning the widespread collection of data by governments complicating the involvement of public actors towards the achievement of social sustainability. WebTAP is a research initiative based at Princeton University in collaboration with the KU Leuven and financed by both public and private actors. WebTAP's goal is to monitor big data collection and analysis, expose discriminatory practices, social engineering, privacy infringements, make the practice of big data collection and analysis transparent, and educate individuals.

The primary tool WebTAP uses in its monitoring of big data collection and analysis is WebCensus, an algorithm that tracks the collection of data and profiling of individuals by 1 million websites every month. The algorithm impersonates different individuals from all walks of life and monitors differences in profiling. Through this process discriminatory practices and privacy violations can be detected when, for instance, certain offers are available to specific social groups based on ethnic traits or when profiles

[185] Avenues towards improvements are discussed in section 5 below.
[186] See www.webtap.princeton.com

include information beyond what is provided directly by the individual. These suggest linkages between data-sets in order to retrieve the personal identity of subscribers. WebTAP publishes this information and informs the public of these practices. Moreover, outcomes of WebCensus are shared with corporations in order for them to improve their algorithms and wider business practices. This process creates information to increase the oversight of big data practices and accountability by making public information that requires corporations to justify their actions. Standing at the beginning of such initiatives, similar ones are being developed at MIT and Carnegie Mellon[187], in the realm of big data the primary goal of these is to inform the public and engage with other actors to improve the oversight and, ultimately, accountability of private actors. WebTAP does so by explicitly inviting and encouraging other stakeholders to use the open-source software of their WebCensus tool. Because of increased public attention corporate actors are being motivated to explain their conduct to the wider public, including affected individuals.[188] Initiatives such as WebTAP contribute to public awareness and pressure on corporations to increase transparency concerning their conduct and the manner in which it affects fundamental rights. The multi-stakeholder initiatives in the realm of big data fall short of constituting good governance. At present, they are underdeveloped given their youth. To achieve good governance, the process of developing multi-stakeholder initiatives should be prioritised. First steps in this process can be transposed from the best practices of good governance in other sectors and should include the implementation of codes of conduct or standard setting directly relating to the effects big data has on social sustainability and the involvement of corporate actors in research-based initiatives such as WebTAP. Through these steps transnational civil society can be strengthened in performing roles of oversight and accountability to ultimately create counter-power.

Multi-stakeholder initiatives operate within the limitations of the transnational context. These limitations were constituted by the ambivalence of transnational private relationships' contributions to social sustainability, the need for soft-law mechanisms, and necessity of accountability for trade-offs. Multi-stakeholder initiatives take these limitations into account in two ways. Firstly, they are soft-law instruments that rely on publicity and reputational accountability to motivate and incentivise private actors towards socially sustainable conduct on the basis of equal standing and deliberation.

[187] Other examples of such initiatives are the Information Flow Experiments from Carnegie Mellon University (https://www.cs.cmu.edu/~mtschant/ife/) ; Xray from Colombia University (http://xray.cs.columbia.edu/). See also the MIT Enigma project aimed at the private and decentralized storage of private data (http://livinglab.mit.edu/enigma-dynamic-prefetching-of-data-tiles-for-interactive-visualization/).

[188] Both Google and Facebook do not allow their services to be used for data-research though both have showed interest in working with initiatives such as WebTAP (O'Neil, 2016).

These instruments acknowledge the imperfect nature of private actors' moral duties towards the normative goal of social sustainability and function outside of command-and-control enforcement structures. Secondly, multi-stakeholder initiatives constitute procedures of publicity and interaction rather than rules imposed upon actors. The actors comprising transnational private relationships are motivated and incentivised to improve their conduct, take responsibility for faults and improvements, and engage in dialogue with actors and organisation representing non-business interests. Through multi-stakeholder initiatives the transparency of transnational private relationships is increased aiding the assessment of trade-offs by civil society. These initiatives do so by providing relevant information and motivating private actors to engage in public reasoning, i.e. to explain and justify actions, within the appropriate forum: transnational civil society. Either by requiring private actors to adopt publicly available codes of conduct, subjecting them to public certification criteria, or establishing open dialogues concerning the social effects of corporate conduct, accountability is increased. In other words, multi-stakeholder initiatives can contribute to a virtuous cycle in which these initiatives hold TNCs to account through the information they publicise and enable wider civil society to engage with this information. Beyond the two examples discussed here similar initiatives are widespread.

Beyond operating within the limitations of the transnational context as emerged from the cases and their analysis, multi-stakeholder initiatives adequately respond to the problems of TNCs dominance and opacity of governance mechanisms in the transnational context. Multi-stakeholder initiatives create counter-power and challenge the dominance of TNCs. They do so by making TNCs actions public, educate the public about them, subject TNCs to external oversight, and by enabling new alliances between civil society actors. The problems of TNCs dominance and the opacity of governance mechanisms are interrelated as trade-offs are primarily made internally. Multi-stakeholder initiatives challenge this. The FLA requires Apple to subject their subsidiaries' facilities to external audits that Apple has to publicly respond to and has set out courses of actions towards improvement. This process challenges the dominance of Apple as commanding its transnational supply chain by making its actions public. Moreover, the public commitment of Apple by joining the FLA limits its dominance by subjecting its supply chain to external auditing procedures and possibly to other governance mechanisms. Through both processes, the increased transparency and auditing limit the discretion Apple can exercise. Similarly, initiatives such as WebTAP make the workings of previously hidden processes public. This publicity enables such initiatives to educate the general public by increasing the information available to civil society actors. Such educational purposes too create counter-power to the dominant TNCs as knowledge constitutes the necessary first step towards effective governance.

Beyond these processes of public reasoning, education, and external oversight multi-stakeholder initiatives allow for new alliances between civil society actors. The strengthening of transnational civil society through transparency creates a space for the contestation of transnational private relationships and their detrimental effects beyond the increased accountability of the actors comprising them. Within this space actors can join forces and align themselves towards the achievement of shared goals. Such alliances can be between for profit TNCs and civil society actors through multi-stakeholder initiatives or other alliances or between civil society actors. As discussed in relation to the big data case new actors are emerging in the transnational context. In the digital realm one might think of hacking collectives or citizen journalism and in relation to transnational supply chains of ethical consumers and investors. In new alliances, these actors can constitute vestiges of counter-power. For instance, NGOs might seek ethical hackers to contribute to privacy protection of individuals or investors can, and do, align themselves with sustainability commitments to pressure TNCs.

The creation of counter-power is a result of the engagement of private actors in public reasoning thereby strengthening civil society actors through information and the justification of actions. Similarly, this process of transparency through public reasoning challenges the opacity of the governance of transnational private relationships. Through the FLA the governance of Apple's supply chain is brought into public view and through WebTAP the workings of different tech-corporations' algorithms are brought to light. Even though the strengthening of transnational civil society and existence of large numbers of multi-stakeholder initiatives makes transnational governance a more crowded place the mechanisms through which civil society governs private actors contributes to the transparency of these mechanisms. These civil regulations require transnational private relationships and the TNCs commanding them to make public commitments, subject themselves to public audits, and engage in public discourse concerning the justifications of the choices and trade-offs they make.

Notwithstanding the close approximation of good governance that multi-stakeholder initiatives are, they are not without critique. Two lines of argument are frequently levelled at multi-stakeholder initiatives and other modes of civil regulation. The first concerns the diffuse nature of multi-stakeholder initiatives that opens the threat of regulatory capture. The second concerns the perceived voluntary nature of civil regulations and contends that even though multi-stakeholder initiatives increase the transparency and accountability of private actors they do so only voluntarily. In absence of sanctions and legal requirements their impact is wholly dependent on the willingness of the actors constituting transnational private relationships. Both lines of critique will be discussed here in light of practice-dependent good governance.

The first line of critique against civil regulations argues that their great variety allows for regulatory capture. Consequently, private actors can join those initiatives that are most benign. Nearly every negative effect that transnational private relationships cause appears to have its own or multiple multi-stakeholder initiative covering it. The multitude and specificity of these regulations increase the bargaining position of corporate actors who thereby escape effective regulation. Koenig-Archibugi (2004, pp. 256–257) summarises this critique. Conflicts can arise between multi-stakeholder initiatives operating within the same sector. This potentially leads to a race to the bottom concerning the requirements for private actors to join because multi-stakeholder initiatives require the participation of corporate actors. The threat is that this process appears to govern transnational private relationships but in practice constitute "an attempt to deceive the public into believing in the responsibility" of irresponsible actors (Braithwaite, 1993, p. 91).

Even though this critique is warranted, practice shows that the opposite process is taking place. Increasingly the requirements for private actors to participate in civil regulations, including multi-stakeholder initiatives, are converging around a core set of norms. Multi-stakeholder initiatives subscribe by internationally accepted standards rather than collapsing into ever minimal ones in a process of regulatory competition. The core ILO labour norms on working hours, forced and child labour, discrimination, and freedom of association and collective bargaining, the UNGP and other human rights documents constitute the basis of the majority of civil regulations (Catá Backer, 2013, 2015; Levi et al., 2013; Vogel, 2010; Williams, 2017). The last decade has witnessed both the growth of multi-stakeholder initiatives themselves and growing consensus on the norms that these initiatives based themselves on. Beyond growing consensus in transnational civil society, TNCs and other private actors increasingly specify similar, often aspirational, commitments in codes of conduct. Notwithstanding the voluntary nature of these codes of conduct and arguably minimal influence on business practices, their contents align with and base themselves on international standards by the UN and ILO (Aguilera & Cuervo-Cazurra, 2009; Jackson, 2010, pp. 67–68; O'Rourke, 2003, p. 7; Vogel, 2010, p. 69). Despite the increasingly diffuse nature of the civil regulatory landscape their content thus increasingly converges regarding the requirements the regulations impose upon its members. Moreover, multi-stakeholder initiatives are receptive to critique and consequently strengthen their regulatory capacity as the iPhone case exemplified with the changes the FLA enforced in its auditing practice.

The second line of criticism concerns the soft nature of multi-stakeholder initiatives. Their reach is limited and many companies choose not to participate (Koenig-Archibugi, 2004). Even though the practice of these initiatives contributes to socially responsible conduct by some corporate actors, increases deliberations through transparency requirements, and con-

stitutes the good governance of certain transnational private relationships there is no requirement for private actors to join and participate in them. Nor are transnational private actors required to engage in public reasoning in order to strengthen the capacity of transnational civil society to hold actors accountable. In other words, even though multi-stakeholder initiatives closely approximate good governance this is no guarantee that transnational private relationships will be subject to them as there is no requirement for the actors comprising such relationships to engage in the necessary public reasoning. TNCs and other private actors, however, have clear and specific reasons to participate in multi-stakeholder initiatives and other forms of civil regulation. Firstly, in absence of state action, the dominant motivating factor for TNCs to engage in those civil regulations that constitute good governance is reputational accountability (Gunningham & Grabosky, 1998). The weight of reputational accountability relies on the risks corporations face. Currently such reputational accountability is achieved through campaigns, media reporting, and boycotts (Graham & Woods, 2006). Most TNCs that participate in multi-stakeholder initiatives do so after being subject to scandals relating to working conditions. From the rise of such scandals in the public eye from 1990's cases of Nike and Levi's sourcing child labour (Doorey, 2011) until the recent example of the Apple case such scandals have triggered private actors to engage in dialogue and participate in multi-stakeholder initiatives. Similarly, recently we have seen an increased willingness by big data collectors and utilisers such as Google and Facebook to engage in public debate concerning their power and influence in societal and political processes after their platforms have been mentioned in relation to manipulative practices. Multi-stakeholder initiatives further determine the responsibilities of private actors and concretise their commitments beyond self-regulatory standards. Thereby TNCs and their transnational private relationships are less vulnerable to scandals because they are now part of the deliberative structures seeking to improve their conduct (Aguilera & Cuervo-Cazurra, 2004). Secondly, quantitative research shows that sound corporate responsibility practices create competitive advantages for corporations. 90% of the studies concerning the relation between CSR initiatives and business performance show that "sound sustainability standards lower firms' costs of capital" and 80% show that "stock price performance of companies is positively influenced by good sustainability practices" (Clark, Feiner, & Viehs, 2015; Williams, 2017, p. 29). However, for many TNCs CSR and multi-stakeholder initiatives are primarily a strategy to limit governmental regulations.

The soft-law nature of civil regulations can be explained by the absence of public authority in the transnational context and the indeterminacy of private actors' responsibilities. However, good governance does not require or necessitate voluntary mechanisms. And, as explained above, soft law is not necessarily voluntary just as imperfect duties are not fully discretionary as they

still require performance. Good governance requires soft-law mechanisms given the legitimacy and duties of private actors. This does not imply purely voluntary regulation. To strengthen these soft-law mechanisms, however, transparency as public reasoning should not be voluntarily engaged with. Transparency plays a reciprocal role in good governance and its requirements are central to good governance. On the one hand, multi-stakeholder initiatives require private actors to engage in public reasoning. Thereby they increase the relevant information available within transnational civil society to further determine responsibilities and develop more effective mechanisms towards the realisation of social sustainability. On the other hand, good governance in its practical application through multi-stakeholder initiatives is aided by increased transparency. Primarily through public scandals and costs to the reputation of actors commanding transnational private relationships, private actors are triggered to participate in transnational civil regulations. Good governance relies on the availability of relevant information in transnational civil society towards the accountability of the actors comprising transnational private relationships, the formation of new alliances, and the constitution of counter-power.

Multi-stakeholder initiatives constitute, as stated, a close approximation of good governance of transnational private relationships. This means that at present they fall short of performing the functions specified by the practice-dependent conception of good governance proposed. The previous, however, showed that multi-stakeholder initiatives have the capacity to perform these but that these are at present underdeveloped or weak. Especially the discretion private actors have in joining them and thereby participate in public reasoning remains wanting. In the next sections the role of states as transnational governance actors in strengthening the reach and capacity of multi-stakeholder initiatives is discussed especially through transparency requirements. Beyond the role of the state the role that the law as an instrument can play to this end is discussed and the legal mechanisms that can aid the achievement of good governance specified.

5. The Role of States in Strengthening Good Governance

States as primary public actors in the transnational context have a significant role to play in achieving the good governance of transnational private relationships. Specifically, this role consists of three courses of action relating to sanctioning violations of national laws, requiring TNCs to engage in public reasoning, and extending the reach of multi-stakeholder initiatives through new alliances, subsidies, and delegated authority. This section will specify these.

The practice-dependent conception of good governance presented here concerns good governance within the multi-polar and multi-layered transnational context. Within the domestic context, however, states have a role to play in relation to the duty to avoid harming by enforcing national laws relating to social sustainability. This role does not directly concern the practice-dependent good governance of transnational private relationships as proposed here but does require specification as it is fundamental to the realisation of social sustainability. As exemplified by the case studies many of the gravest infringements of social sustainability through transnational private relationships result from either the unwillingness or inability of states to enforce their laws. In the iPhone case, for instance, it was shown that the Chinese state fails to effectively enforce its own labour laws vis-à-vis facilities incorporated in transnational supply chains. The present vacuum allows for private actors to take advantage. In this case, the Chinese state should either enforce its law or change it to make its commitments public by, for instance, stressing the need for employment and thereby trading-off economic development for labour protections in the short term. Here it is contended that states are responsible for the enforcement of their local laws. In cases where this enforcement remains wanting governance within the transnational context should strive to minimize the ability of transnational private relationships to exploit these vacuums. This is however not the time or place to further assess these instances of public governance towards the realisation of social sustainability as the practice-dependent good governance of transnational private relationships within the transnational context is considered here.[189]

Beyond the role of states in directly enforcing laws relating to social sustainability within their borders they can strengthen the practice-dependent good governance of transnational private relationships in two additional ways: by requiring TNCs to engage in public reasoning and to forge new alliances and delegate authority to multi-stakeholder initiatives. Strengthening good governance by extending the reach of multi-stakeholder initiatives hinges on private actors' commitment to transparency as public reasoning. Many have argued that states can and should play a constructive role in this regard (Anner, 2017; LeBaron & Rühmkorf, 2017; Marx & Wouters, 2016). There are multiple strategies and examples from practice towards motivating transparency within transnational civil society. Regulatory mechanisms such as multi-stakeholder initiatives are necessarily limited as they rely on the, initial, willingness of private actors to participate. Even though this willingness of private actors is not entirely

[189] Many cases in which states fail to perform this role effectively exist however. One can think of insufficiently enforced tax rules, labour law, privacy protections and violations of privacy by the state and its agencies.

voluntary as, for instance, scandals trigger participation, this willingness is uncertain. Transnationally the preferred role of the state is "to create the necessary preconditions for" transnational civil society to "assume a greater share of the regulatory burden, rather than engaging in direct intervention" (Gunningham & Grabosky, 1998, p. 411). A necessary precondition for good governance is the availability of relevant information within transnational civil society. Through legally sanctioned mechanisms states can motivate and force TNCs towards transparency, i.e. to make their actions public, provide reasons for them, and specify the outcomes that these actions are directed at. Such requirements provide the necessary preconditions for transnational civil society to achieve good governance. Public actors, especially states and international institutions, can do so through hard law and a variety of indirect mechanisms relating to transparency legislation, comply-or-explain provisions, due diligence reporting, and liabilities (LeBaron & Rühmkorf, 2017). Examples will be briefly introduced.

Most states require due diligence to be performed and transparency from private actors in relation to certain aspects of their conduct in return for market access. Examples are legal requirements for corporations to publish both financial and social responsibility reports as necessary condition to be publicly traded. The role of the state in achieving transparency in transnational private relationships can be expanded through similar laws (Miller, 2015). Prominent examples are the mineral provision of the Dodd-Frank Act in the United States and mandatory sustainability reporting requirements present in many European countries. The Dodd-Frank mineral provision requires all corporations trading minerals from conflict areas to make their supply chains transparent prior to importing the minerals. The provision does not sanction corporations who import minerals from conflict areas, rather the requirement to publish the list of suppliers motivates private actors to perform due diligence while simultaneously making relevant information public thereby strengthening transnational civil regulations and public oversight. More specifically, "the law does not prohibit the use of conflict minerals. The law requires certain companies to obtain an independent, private sector, third party audit of its report of facilities used to process the conflict minerals" (Narine, 2015, p. 233). Similar provisions can be thought of in relation to transnational supply chains in the garment and technology sectors to make suppliers and sub-contractors public.[190] Such provision force private actors to engage in transnational deliberation by publicising actions and justifying them through publicly available audits. More broadly, states can complement non-financial disclosure regimes with "auditable disclosure

[190] The common argument against such a provision is that it undermines the competitive advantages of corporations with the most efficient supply chains. There is, however, no evidence that the publication of supplier names and locations harms corporations as the examples of Nike and Levi's, who have made this information available, shows (Doorey, 2011).

standards, based on human rights due diligence" (Narine, 2015, p. 221). Such provisions expand the reach of transnational civil regulations through the mandatory disclosure of information to the proper forum of transnational civil society.[191]

In relation to the case studies states could require external audits and the publication of their contents from TNCs commanding transnational supply chains with facilities in areas with frail labour standards. More robustly these TNCs could be required to join multi-stakeholder initiatives such as the FLA by national law similar to current requirements for social reporting through GRI or ISO standards. In the digital realm the required transparency can be achieved by forcing TNCs to make the categories of personal data they offer to advertisers transparent, disclose the organisations that purchase specific advertisements, or notify individuals when their personal data is linked and repurposed. In relation to social engineering states should require TNCs to subject their algorithms to external audits through, for instance, the WebTAP project or similar initiatives towards the creation of information available to transnational civil society.

Beyond such hard laws directed at transparency as public reasoning states can shape the "normative environment which is the condition for (…) forms of 'private' transnational governance" (Möllers, 2004, p. 333). It is uncontroversial that states influence normative practices "indirectly by shaping the context in which various actors (…) interact and bargain with one another" both within and beyond their borders (Black, 2001; Doorey, 2005, p. 357). States can strengthen multi-stakeholder initiatives and transnational civil society by seeking new alliances and delegate authority to transnational civil society actors. Thereby governments can facilitate the engagement of transnational civil society in "the regulatory process" (Gunningham & Grabosky, 1998, p. 101). Firstly, they can subsidise NGOs, research institutes, and multi-stakeholder initiatives or improve their legal standing. Such provisions enable transnational civil society actors to instigate possible crises or scandals for TNCs and their transnational private relationships. One such example is private litigation. Codes of conduct or other voluntary commitments by corporations can be interpreted as contractual obligations (Beckers, 2015; Collins, 2014; Hazenberg, 2016). Private litigation can lead to judicial decisions stating that breaches of codes of conduct constitute a breach of contractual obligations under consumer sales. This will create an incentive for TNCs to engage in good governance mechanisms. Another example is to subsidise or seek other forms of alliances with research projects directed at challenging TNC dominance. A recent example is the research by FacebookFactory in

[191] This constitutes what Habermas (1998) calls 'communicative rationality' that can be achieved in transnational civil society through a form of deliberative supranationalism.

which the algorithms Facebook employs are retrieved and made public.[192]

Secondly, states can seek alliances with new actors emerging in the transnational context and delegate authority to them through legal provisions or by delegating regulatory tasks to them. For instance, in the context of big data new potentially powerful actors capable of oversight and countering the power of TNCs are present in the form of hackers and hacking collectives. An example outside of the realm of private actors' regulation but relevant here is Anonymous' OpISIS in which the hacking collective coordinated with the CIA to disrupt ISIS' online propaganda (Hazenberg & Zwitter, 2017). Similarly, alliances with ethical hackers can be sought to retrieve information about the actions of TNCs and whistleblowing protections can be expanded to protect those who bring relevant information to the public domain. Two approaches to ethical hacking can constitute such alliances. Firstly, through hiring and organising hackers in public non-majoritarian organisations to develop new mechanisms for digital governance.[193] Secondly, through so-called 'open challenges' to hack public agencies. These open challenges incentivise hackers to contribute to the public good and lures them out of grey- and black-hat hacking.[194] Especially, the latter example bring the opportunity to create new platforms for civil engagement towards good governance.

By widening the available means of civil society protest, states can motivate TNCs to participate in multi-stakeholder initiatives by including forms of technological protest such as DDos attacks directed at increasingly powerful transnational private relationships to instigate scandals. Thirdly, states can seek new alliances with TNCs themselves towards their good governance in the transnational context through financial incentives. Tax cuts and subsidies for TNCs can motivate them to participate in multi-stakeholder initiatives. In relation to clean energy such tax cuts are widespread. Their extension to social aspects of sustainability improves the standing of transnational civil society to achieve good governance.

6. The Role of Law in Achieving Good Governance

This section shifts focus from the state to the law as regulatory instrument and the extent to which it can and should be employed in extending the reach of practice-dependent good governance of transnational private relationships. It will discuss the role of legal mechanisms beyond the state in towards the

[192] https://labs.rs/en/

[193] The German Interior Ministry has launched such an organisation. See http://m.dw.com/en/hacking-for-the-government-germany-opens-zitis-cyber-surveillance-agency/a-40511027

[194] See for instance the open challenge to hack the Pentagon at https://thehackernews.com/2016/03/hack-the-pentagon.html

realisation of good governance and the theoretical framework through which to interpret the role of law in this process. From a legal regulatory perspective two assumptions are frequented in the literature concerning the governance of transnational private relationships and the TNCs commanding them. Firstly, it is often assumed that the direct application of international legal norms, especially human rights norms, to private actors remains wanting. This indicates that ideally this should be otherwise. Secondly, it is assumed that the extraterritorial application of national law is highly selective. From a legal perspective many have therefore looked to international law in relation to the governance of TNCs and their transnational private relationships (Cernic, 2010; Deva, 2014; Weschka, 2006).

Following the two assumptions, a growing strand of literature on business and human rights advocates binding legal norms for TNCs. In the wake of the United Nations Guiding Principles on Business and Human Rights (UNGPs) significant debate rose concerning the status of such soft-law norms and a potential need for a binding treaty (Weschka, 2006). It was argued here that the inability to ground binding human rights duties to protect and provide in moral theory indicates that the codification of such duties in an international binding human rights treaty does not constitute their good governance given the moral dimension of human rights. A failure to ground such duties outside of positive international human rights law does not reflect the nature of human rights as rights that we have in virtue of our humanity instead of rights we have in virtue of the political community we are a part of or the state of which we are a citizen. Soft-law norms such as multi-stakeholder initiatives are best interpreted as grounded by the imperfect duties private actors bear. And, as we saw, the "wiggle room" that imperfect duties and soft-law norms leave in discharging responsibility can be limited through the transparency requirements and civil regulations other than (international) legal human rights provisions (Nolan, 2013, p. 160). Good governance towards the realisation of social sustainability is therefore not necessarily a first step towards "a treaty that holds MNEs and other business enterprises directly responsible under international law for human rights violations" because their moral grounding is imperfect (Weschka, 2006, p. 656). Rather they are an effort to achieve a morally better outcome given that TNCs do not bear special perfect duties. The previous sections constructed practice-dependent good governance and exemplified that these imperfect duties are not without weight and can justify extensive regulatory initiatives placed upon private actors.

The argument in favour of multi-stakeholder initiatives as close approximation of the practice-dependent conception of good governance of transnational private relationships presented here thus takes a radically different perspective. The argument ultimately is that the practice of multi-stakeholder initiatives is desirable because it closely approximates the conceptualisation of practice-dependent good governance as normatively

grounded in social sustainability. From that perspective, it concludes that the current practice of international accountability standards based on soft-law mechanisms that integrate multiple actors from the transnational context and those affected by transnational private relationships into forums based on public reasoning constitutes good governance. This practice is embodied in multi-stakeholder initiatives. This argument contrasts with similar ones that start from the perceived deficiencies concerning either the reach of international law or the application of national law to private actors. The imperfect nature of private actors' human rights duties and the consequent necessity of soft-law mechanisms suggest that "the value of international human rights law may (…) be as part of a larger system of countervailing power and oversight by networks of civil society" (Keck & Sikkink, 1988; Scott & Wai, 2004, p. 289). Transnationally the value of human rights law lies in other venues than that of enforceable hard law, possibly even outside a strict legal context. The practice-independent conception of good governance conceptualised in Part I allows for the migration of the moral standard that human rights provide to spheres of governance other than the law.

More generally the typology of the good governance of transnational private relationships towards the realisation of social sustainability is best interpreted through the lens of 'deliberative supranationalism' (Joerges & Neyer, 1997; Teubner, 1996). Transnational governance in general, and the conception of good governance proposed, operate through a "private law framework" (Möllers, 2004, p. 329). The production of norms in the transnational context is a process of coordination rather than authorised by a public sovereign. Within theories of transnational law this process is described as "decentred" (Blackett, 2001) "reflexive" (Doorey, 2005) or "autopoietic" (Teubner, 1993). In general, these conceptions argue that in absence of public governance law emerges from deliberative structure and spontaneous processes of coordination (Teubner, 1993, 1996; Trubek, Mosher, & Rothstein, 2000).[195] This process is especially prevalent in transnational civil society where "private networks of countervailing power to existing powerful economic interests" emerge through these processes of spontaneous coordination (Doorey, 2005, p. 371). The proposed practice-dependent good governance of transnational private relationships towards the realisation of social sustainability fits within these theories that "reject the idea that regulatory possibilities are confined to the binary choice between the national and the global" and that "across borders, deploying private rules, local practices, national laws, supranational forums" protection of weaker parties can be achieved (Trubek et al., 2000, p. 1193).

[195] Again, the present argument concerns the transnational context only. It is contended that these considerations might, and perhaps should, differ significantly in non-transnational contexts of legitimate public authority.

7. Conclusion

The conclusions of Mosley's (2011, pp. 237–249) extensive data-based study of the effects that the expanding reach of transnational private relationships through globalisation on labour protections have align with the argument for practice-dependent good governance of these relationships presented here. Their overlap is notable as their starting points lie in opposite directions. The two conclusions are that, firstly, the heterogeneity and ambivalence of transnational private relationships should be acknowledged by all actors integrated in structures that govern these relationships. This includes states, international organisations, and policymakers but also NGOs, activists, and the media. Certain aspects of transnational private relationships contribute greatly to the achievement of socially sustainable communities and societies (Mosley, 2011, p. 237). Foreign direct investment overall contributes positively to better protections of labour standards, technological innovations and the advent of big data and subsequent technological innovations enables developing countries to develop faster and more focussed on social aspects. Moreover, big data technologies enable the exercise of political rights in suppressive regimes. Conversely, other aspects of transnational private relationships undermine the achievement of social sustainability. Transnational supply chains in which suppliers and sub-contractors are placed at arm's length of a TNC do create degrading working conditions that undermine basic labour rights. Environmental degradation as consequence of production in developing countries undermines individuals' and communities' ability to live in a safe environment. New technologies, such as big data led innovations, infringe upon the right to a private life of billions of individuals across the globe. Moreover, they give private corporations great influence over social, economic, and political life without public oversight. The threats of social engineering are exemplary.

Secondly, the cases showed that many of the states where the negative effects of transnational private relationships take place fail to effectively perform their duties. States fail to effectively enforce, for instance, privacy laws or their labour law due to either unwillingness or inability to discharge their duties to protect and provide for human rights. In achieving the practice-dependent good governance of transnational private relationships it should therefore be acknowledged that many determinants relating to the achievement of the normative goal remain internal to states (Mosley, 2011, pp. 237–238). Even though public governance at the national level falls outside the scope of this research this acknowledgement is important. Many of the negative effects transnational private relationships have on the social sustainability of communities and societies can be, either directly or indirectly, attributed to unwilling or unable public governance. Democratic societies that enable economic growth through policy-making and thereby

expand the formal sector of the economy are better able to contribute to the achievement of social sustainability. However, unwillingness is not necessarily regionally distributed. As concluded states have an important role to play in enabling transnational good governance of private relationships. That they presently fall behind what can arguably be required of them is not a feature of undemocratic and repressive regimes. In fact, the proposals made towards the improvement of transnational good governance through state action are directed primarily at advanced Western democracies. That these policies are at present only sparsely implemented is due to an unwillingness on the part of these states. Domestic regulatory regimes remain the most important determinants in the realisation of social sustainability.

Both the ambivalence of transnational private relationships and the necessity of public actor involvement in extending the reach of good governance is at the core of the practice-dependent conception of good governance proposed here. However, as this research has shown many practices are outside states' or hard law's reach. In fact, it was argued that in many cases such direct regulation is not sufficiently justified or simply undesirable. Soft law as a tool for good governance conforms to the legitimacy of the actors comprising the transnational context and, moreover, is in line with the moral duties each of these has towards the goal of social sustainability.

To reiterate, the good governance of transnational private relationships towards the realisation of social sustainability requires soft-law mechanisms. It was argued that good governance is constituted by mechanisms that increase the accountability of TNCs through integrative and deliberative structures. Accountability requires a relationship between an actor and forum. An actor is required to justify specific actions to this forum while the forum possesses the capacity to change the conduct of this actor when the justification is deemed insufficient. Transnationally the appropriate forum is constituted by transnational civil society. Transparency, conceptualised as the requirement to engage in public reasoning aids the ability of this forum to assess the actions of the actors comprising transnational private relationships. The requirements of public reasoning entail giving reasons for and orientation of action. Within this context transparency as public reasoning is the glue that binds TNCs to accountability structures in transnational civil regulations. Multi-stakeholder initiatives were identified as close approximation of this typology of practice-dependent good governance centred around accountability and transparency. With reference to the case studies it was exemplified how multi-stakeholder initiatives create counter-power, accountability through public reasoning, and make governance mechanisms more transparent. It was argued that these adequately respond to the problems of TNCs dominance in the transnational context and the opaqueness of their governance.

The central challenge to strengthen good governance is to increase the reach of multi-stakeholder initiatives and thereby further level the playing

field between transnational civil society, TNCs, and their transnational private relationships. States and TNCs both have a major role to play in this process and clear incentives to do so. States have this incentive because good governance does not require overly interventionist actions that limit the opportunities of TNCs. Corporations are incentivised because they are constituted as legitimate actor in transnational civil society. Furthermore, it is acknowledged that they cannot be responsible for all conduct within the relationships they command nor can they alone achieve the normative goal of good governance. Instead, the procedural conception of practice-dependent good governance towards the realisation of social sustainability constitutes an incentive for TNCs to be more open about their conduct because it is acknowledged that they necessarily make trade-offs and that the manners in which these are made are under scrutiny.

As such there is a relative case for optimism as transnational civil regulations emerge as a normatively favourable and realistic path to achieve the good governance of transnational private relationships towards the realisation of social sustainability. They are normatively favourable given the legitimacy of multiple actors, the absence of hierarchical command-and-control structures of public authority, the adverse effects of unilateral enforcement, and the nature of private actors' duties. Thereby, many of the negative assumptions about soft law's unenforceability, the absence of hierarchical public governance in the global context, or the footloose nature of TNCs' position in the global economy are rendered unwarranted. In the form of multi-stakeholder initiatives these transnational civil regulations offer a realistic path to good governance as no systematic restructuring of the present transnational context is required. This means that good governance can be achieved within the confines of the multi-polar and multi-layered transnational constellation and that a close approximation of the good governance of transnational private relationships towards the realisation of social sustainability is already in practice.

8 CONCLUSION

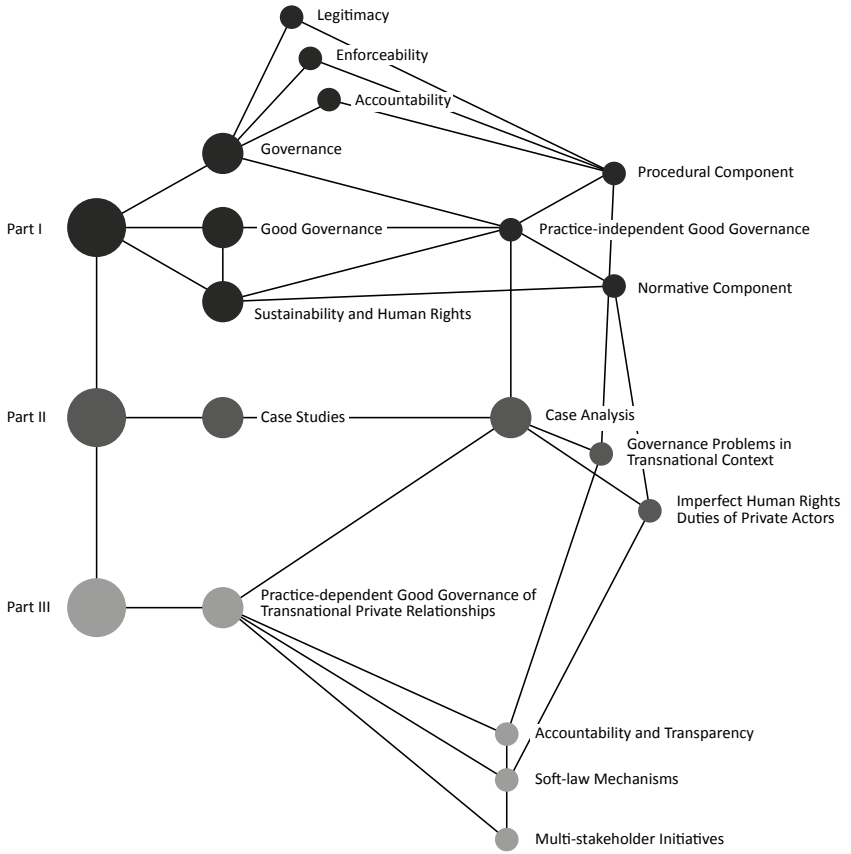

Figure 18 *Argumentive Structure Thesis*

1. The Problem of Transnational Private Relationships

This thesis started from the observation that transnational private relationships increasingly shape the livelihoods of millions of individuals and groups. Through myriad ways such as global supply chains, new technologies, and increasing leverage in terms of wealth and power they affect the lives of nearly all. These effects can be positive in terms of employment, economic development, and resilience through innovation. However, often their effects have severe negative consequences through exploitative labour relations, unregulated nudging by corporations, and invasions of privacy. In times of unprecedented functional differentiation, economic advancement, and globalisation their power is to be reckoned with and calls for their good governance. This thesis conceptualised the good governance of these transnational private relationships towards the realisation of social sustainability. The concept of good governance itself has risen to prominence in wide ranging policy-making discourses and thereby has a wide applicability. The necessity of good governance of transnational private relationships is relatively uncontroversial. On a daily basis one can read articles specifying negative effects of transnational private relationships that range from safety hazards in production facilities to the large-scale manipulation through data analysis and social media. More controversial, however, is the good that is embedded in the concept of good governance. This thesis assessed the possibility of the concept of social sustainability as informative of this good. Sustainability is a commonly accepted societal goal. Consequently, the main research question was formulated:

- *To what extent can the good governance of transnational private relationships be informed by concerns for social sustainability?*

The answer to this question ultimately formulated a conception of good governance that can be applied transnational private relationships and guide action in the formulation and implementation of mechanisms towards the realisation of social sustainability was formulated. In the next section the process and main findings are discussed in relation to the sub-questions and central research question. The third section offers recommendations to the primary transnational governance actors towards realising the good governance of transnational private relationships. Finally, the last section introduces additional avenues of research opened up or to be conducted to further substantiate and improve our understanding of the good governance of transnational private relationships and the road towards the realisation of social sustainability.

2. Outcomes and Findings

Assessing the extent to which a concern for social sustainability can inform the good governance of transnational private relationships required three types of additional questions to be asked. This thesis sought to answer the research question by proposing a conception of good governance that integrates a concern for social sustainability and is directly applicable to the practice of transnational private relationships as exemplified by two case studies. The three types of additional questions concerned, firstly, the concepts central in this research: governance, good governance, and (social) sustainability. Secondly, questions concerning the practices and governance of transnational private relationships and their negative and positive contributions to the livelihoods of individuals and groups. Thirdly, questions concerning the relationship between these concepts and practice, and ultimately mechanisms constitutive of good governance. In addressing these questions two conceptions of good governance were formulated. Firstly, a practice-independent conception of good governance informed by social sustainability and human rights based on the conceptual analyses. This conception is practice-independent in the sense that its contents relate only to the general practice of governance and is informed by a conception of the 'good' that good governance encompasses. Secondly, a conception of good governance was formulated dependent specifically on the practices of transnational private relationships.

The first two sub-questions relate to the central concepts of the research question:

- *1.1 What are the dominant meanings and usages attached to the concepts of governance, good governance, and (social) sustainability within those disciplines and discourses relevant for the good governance of transnational private relationships?*

- *1.2 How should these concepts inform each other in the specification of the content of good governance?*

Part I addressed these questions. Chapters 2, 3 and 4 embarked on a conceptual analysis of governance, good governance, and sustainability respectively and argued for a specific conception of social sustainability as normative grounding for the 'good' of good governance. The resulting practice-independent conception of good governance integrated the conceptual analyses and how the concepts should inform each other. **Chapter 2** introduced the concept of governance as descriptive conception signifying changes in policy-making processes. It adds to the study of policy-making a birds-eye-view by incorporating wide ranging perspectives and bringing multiple actors into policy analysis. The dominant meaning and use of the

concept of governance refers to it as policy-making with and without the state and with and without politics (Kazacigil 1998). Its operationalisation as descriptive concept signifying change provides an overview of policy-making processes to which normative and prescriptive arguments are applied. Substantively this description of the changes that governance signifies pertain to the increasing horizontalisation of policy-making processes. As opposed to clear top-down public governance a wider range of actors, both public and private, are integrated into the policy-making process. The decreased relevance of vertical governing structures affects three aspects of policy-making: its legitimacy, enforceability, and accountability. These three governance problems are relevant to the conceptualisation of good governance and constitute its procedural component. For governance to be good, it was argued, its mechanisms should adequately respond to problems of legitimacy, enforceability, and accountability. What constitutes adequate responses to these problems, it was moreover argued, depends on the practice that good governance is conceptualised for.

Moving beyond the concept of governance as signifier of change, Chapters 3 and 4 analysed good governance and sustainability. There it was argued that good governance lacks a normative basis of the good and that a specific interpretation of social sustainability can provide this. Good governance is thereby informed by social sustainability by normatively grounding the good. The conceptual analysis of **Chapter 3** analysed conceptions of good governance from the dominant disciplines and discourses: international relations and developmental studies, public administration and administrative law, and business administration and corporate governance. The conceptual analysis concluded that the dominant good governance conceptions offer indeterminate, output-biased, and contradictory components. In general, it was argued that these conceptions good governance lack a normative grounding that specifies the good which undermines its prescriptive and evaluative applicability. Good governance is across different disciplines and discourses primarily presented as listed principles. These principles, again within different disciplines and discourses, are often indeterminate and contradictory undermining their ability to guide action. In response, an argument was presented that these indeterminacies and contractions should be overcome by normatively grounding the 'good' of good governance. Such normative grounding overcomes indeterminacies and contradictions by providing a clear standard that governance can be evaluated by and actions be guided towards. Two requirements for such a normative grounding were formulated: it should be liberally neutral and applicable to a wide range of contexts. The requirement of liberal neutrality implied that the process through which the normative grounding of good governance is constructed should not favour a specific type of practice. The wide applicability was necessitated both by the wide range of policy-making practice the concept

of governance refers to and the widespread usages of good governance across disciplines and functional fields.

Chapter 4 argued for anchoring the normative ground of good governance in social sustainability interpreted through human rights. Both social sustainability and human rights are widely shared normative goals, especially in relation to policy-making processes, and employed in wide-ranging discourses. Moreover, the institutional embedding of both concepts speaks to its liberal neutrality as institutions, states, and peoples from different backgrounds and conceptions of the good explicitly subscribe to the good specified by them. Conceptualising the normative grounds of good governance in terms of social sustainability by way of human rights remedies the deficiencies of good governance. Because human rights have a clear institutional and moral nature they bridge the necessity of normative grounding with the practical applicability of good governance. Moreover, human rights can rely on a pluralistic justification concerning their content aiding the wide acceptance of their normative content. Finally, the conception of human rights proposed bases itself on the unity of right and duty and thereby directly informs policy prescriptions. The differentiation between the moral duties necessary to ground human rights offers a first step in determining the responsibilities towards good governance aiding its wide applicability. This normative grounding of good governance constitutes its normative component that counters the indeterminacy, output-bias, and contradictions of dominant conceptions.

Together the chapters that comprise Part I offered a practice-independent conception of good governance. This conception is practice-independent because the content of the conception does not depend on the specific practice it is applied to. What good governance thus entails in practice hinges on the context, actors, and relationships it is applied to. Distinguishing between a practice-independent and practice-dependent conception of good governance allows for the normative grounding of good governance that current conceptions of good governance lack. What achieving social sustainability in specific practices or functional fields necessitates in terms of governance depends on the context, actors, and relationships constitutive of these practices. It is logical that what constitutes the good governance of transnational private relationships differs from the good governance of public administration or, for instance, diplomatic affairs. The aim and normative grounding of good governance across these practices and functional fields, however, remains the same. Part I thereby answered sub-questions *1.1* and *1.2* by excavating the dominant meanings of governance, good governance, and sustainability and integrating the latter into a practice-independent conception of good governance. This conception answers question *1.2* by specifying how social sustainability informs the normative ground of good governance.

Part II changed focus from the abstract to the specific in answering the sub-questions that concern the practices of transnational private relationship:

- *2.1 How do transnational private relationships negatively affect and positively contribute to social sustainability in ways relevant to their governance?*

- *2.2 Which forms of governance presently apply to transnational private relationships in the transnational context?*

- *3.1 How do the findings from the conceptual analysis relate to the practice of transnational private relationships as studied in the cases?*

Answering these questions requires adequate understanding of transnational private relationships and their governance context. In doing so this thesis moves from the practice-independent to a practice-dependent conception of good governance. Chapter 5 answered questions *2.1* and *2.2* through two case studies. These cases exemplified, albeit in a non-exhaustive manner, the broad range of transnational private relationships and the many ways in which they affect social sustainability both positively and negatively. Chapter 6 analysed these cases in light of the practice-independent conception of good governance and thereby contains the answer to question *3.1.*

Chapter 5 comprised two case studies. The first case concerned the rise of big data analytics and the increasing power of big data collectors and utilisers. The second delved into the production of Apple's iPhone by Foxconn in China as exemplification of transnational supply chains producing consumer goods for global markets. These cases painted a complex picture of ambivalent contributions that private actors make to social sustainability and indeterminacy concerning their responsibilities towards its achievement. Moreover, the transnational governance landscape, it was argued, is opaque with varying actors and mechanisms involved in the regulation of transnational private relationships. For instance, states govern TNCs within their territories through national law, TNCs govern themselves through self-regulatory mechanisms such as codes of conduct, NGOs govern TNCs by performing oversight and motivating private actors towards more sustainable behaviour, and TNCs govern other actors both through their power and knowledge.

From these case studies four general conclusions were drawn that answer questions *2.1* and *2.2.* Firstly, TNCs occupy positions of great power in the transnational context while traditional governance mechanisms fail to effectively govern them. TNCs are therefore singled out as most powerful actors in transnational private relationships and thereby relevant subjects of primary focus in conceptualising practice-dependent good governance. Secondly, transnational private relationships both positively contribute to social sustainability greatly while simultaneously impeding it. They

contribute, for instance, greatly to development through employment and enabling economic growth but impede social sustainability through dismal and exploitative working conditions. Similarly, innovative technologies contribute to disease prevention, health care, and ability of individuals and groups to freely communicate while simultaneously putting the private lives of these individuals and groups at risk through large scale data collection and social manipulation. Thirdly, the myriad ways in which transnational private relationships are currently governed are opaque and roles spread across multiple actors. Fourthly, given this multi-polar and multi-layered nature of the transnational context the responsibilities of different actors remain indeterminate as different actors operate legitimately within their respective spheres of authority and negative effects are primarily caused by spill-overs between them. This combination of legitimacy and negative externalities renders the responsibilities to remedy these and realise social sustainability indeterminate.

In answering question *3.1* **Chapter 6** analysed the conclusions from these case studies in light of the two components of practice-independent good governance. The normative component specified the conception of human rights based on the unity of right and duty. Analysing this component required assessing which moral duties can be assigned to private actors towards the realisation of social sustainability in order to determine legitimate mechanisms that constitute good governance. The analysis in light of the normative component argued that TNCs do not bear the special perfect duties necessary to ground positive human rights mechanisms. The imperfect nature of their duties leaves discretion as to their adequate performance. It was therefore concluded that the integration of private actors into international human rights law does not necessarily constitute good governance. Rather good governance requires soft-law mechanisms that leave room to these actors to exercise an amount of discretion.

The procedural component required adequate responses to be given to the governance problems of legitimacy, enforceability, and accountability. It was argued that legitimacy is not necessarily a problem in the transnational context given the legitimate claims to authority transnational actors make. Governance mechanisms that integrate all stakeholders into their regulatory process do, however, increase the legitimacy of these mechanisms. Similarly, with reference to the problem of enforceability it was argued that absent overarching structures of legitimate public enforcement, enforceability does not constitute a problem proper. Moreover, those actors capable of directly enforcing mechanisms towards the achievement of social sustainability, i.e. states and supranational institutions, are likely to adversely affect social sustainability itself. These conclusions reinforce the necessity of soft-law mechanisms. In relation to the third governance problem it was concluded that accountability is the central defect of the current transnational gover-

nance constellation. Within the transnational context trade-offs are made towards to achievement of social sustainability by all actors. The negative effects of transnational private relationships result from bad trade-offs. Consequently, good governance is directed at the outcomes of these trade-offs the manner in which they are made. More specifically, actors making these trade-offs should be accountable for the outcomes of trade-offs and the process through which they are made. This process constitutes good governance towards the realisation of social sustainability.

The remaining sub-question is answered **in Chapter 7** of **Part III.**

- *3.2 Through which mechanisms can the good governance of transnational private relationships towards the realisation of social sustainability be achieved?*

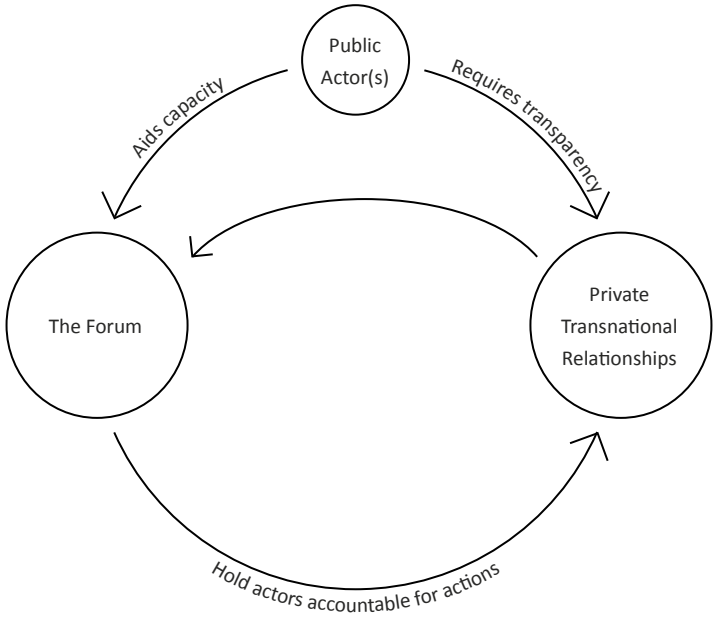

Figure 19 *Typology of the good governance of transnational private relationships*

This question was answered through the development of a practice-dependent conception of good governance. From this conception, a typology (see figure 19) was constructed that guides the development of good governance mechanisms in transnational practice. Moreover, a close approximation of this typology was located in transnational practice in the form of multi-stakeholder initiatives. The practice-dependent conception of good governance together with the typology offer a framework for the development and implementation of mechanisms constitutive of the good

governance of transnational private relationships in the transnational context. This framework conceptualises the workings of good governance mechanisms in the transnational context thereby offering guidance in the development of good governance mechanisms. The framework specifies the roles of the most prominent actors in the transnational context and contains two central elements: transparency and accountability. The good governance of transnational private relationships requires transnational private actors, especially TNCs, to be accountable for the consequences of their trade-offs and for the deficiencies in the process through which these were made. Accountability, it was argued, is a relationship between an actor and a forum (Bovens, 2007). Accountability requires the existence or establishment of a forum capable of passing judgement concerning the conduct of actors and holding those actors accountable. The availability of information is therefore necessary towards the achievement of good governance as it enables a forum to make judgements concerning the conduct of an actor. Moreover, this relational conception of accountability does not necessitate the sanctioning of an actor in order for that actor to be considered accountable. Rather the question whether an actor is held to account is separated from the question whether an actor is accountable. Thereby, the framework is open to a wide range of accountability mechanisms, such as reputational accountability, beyond the notoriously difficult top-down sanctions in the transnational context. Transnationally accountability is aided by transparency conceived as the requirement for private actors to engage in public reasoning. Public reasoning entails that actors, firstly, give reasons for actions and, secondly, specify the end an action is meant to contribute.

It was argued that in the transnational context the appropriate forum to achieve accountability is transnational civil society and the actors subject to their oversight are primarily TNCs given their dominance in commanding transnational private relationships. To achieve accountability actors within transnational civil society can assess the reasons and orientation TNCs give for actions and hold them accountable through soft-law and reputational mechanisms when these public reasons are deemed unsatisfactory. The good governance of transnational private relationships requires soft-law mechanisms because of the imperfect duties of private actors towards the realisation of social sustainability and the negative effects of unilaterally imposed hard law by states. Soft-law mechanisms that increase the transparency of transnational private relationships and thereby facilitate the accountability of TNCs to a specific forum that is capable of holding them to account thus constitutes their good governance. Within transnational practice it was argued that multi-stakeholder initiatives closely approximate this typology of good governance. Multi-stakeholder initiatives provide a platform for the accountability of private actors by requiring these actors to subscribe to standards and subjecting them to monitoring. Through this process multi-stakeholder initiatives aid

the transparency of transnational private relationships and establish clear relationships of, primarily, reputational accountability. The challenge ahead to further advance good governance thereby lies in extending the reach and impact of transnational multi-stakeholder initiatives. It was argued that states have a prominent role to play in this effort by requiring transnational private actors to engage in the public reasoning required to achieve good governance.

Together the answers to the sub-questions provide an answer to the central research question:

- *To what extent can the good governance of transnational private relationships be informed by concerns for social sustainability?*

In general, it can be concluded that the concepts dominant in the formulation of governance goals, i.e. good governance and social sustainability, are vague and indeterminate. In response, this thesis has sought to reinterpret these concepts towards their mutual reinforcement. Social sustainability was specified through a conception of human rights in Chapter 4. It was then demonstrated that this conception can normatively ground good governance. This normative ground in turn allows for the assessment of responsibilities towards the realisation of social sustainability in specific practices. This thesis thereby ultimately argued that social sustainability interpreted through human rights should inform good governance by specifying the normative goal good governance strives for. In the transnational context and applied to the transnational private relationships it was argued that multi-stakeholder initiatives closely approximate practice-dependent good governance as normatively grounded in social sustainability.

Prior to moving to recommendations for the primary governance actors in the transnational context one limitation posed by the main research question is to be explicated. Given the nature of the main research question as concerned with the extent to which concerns for social sustainability can inform the good governance of transnational private relationships a uniform answer is not given. Rather the answer to the main research question specified a way in which concerns for social sustainability can inform good governance both conceptually and in relation to transnational private relationships. It did so through conceptual analysis to clarify the dominant concepts, assessment of practices of transnational private relationships, and the relationship between these. This thesis thus specified one, hopefully convincing, way in which a concern for social sustainability can inform the good governance of transnational private relationships. It approached this through a theoretical perspective that sought to clarify the often vague and contested concepts formulated in relation to societal goals, such as good governance and sustainability. However, it does thereby not exclude other manners in which this question can be approach or how a concern for social sustainability can inform good governance.

3. Recommendations

Chapter 7 specified the role of states towards the realisation of social sustainability. Moreover, it outlined what courses of actions states can, and should, pursue to strengthen the good governance of transnational private relationships. States are, however, not the only relevant governance actors in the transnational context. This section specifies practical recommendation to specific governance actors in order to further strengthen the good governance of transnational private relationships. These actors are international lawyers, corporate actors and TNCs, states, and NGOs respectively.

3.1 Recommendations to International Lawyers

International law plays a growing role in developing regulatory mechanisms directed at private actors. Especially within the framework of human rights much work is being done towards the integration of private actors through either soft-law or hard-law mechanisms. An example of soft-law integration is exemplified by the UNGPs. The UNGPs are soft-law instruments that seek to offer guidance to corporate actors to improve their human rights impacts. They specify responsibilities of corporations without making them legally responsible for the protection and provision of these rights. Some have argued that the wiggle-room such soft-law instruments leave for corporate actors necessitates a legally binding treaty on business and human rights (Cernic, 2010; Deva, 2014; Weschka, 2006). In this thesis, it was argued that the perfect duties to protect and provide corresponding to human rights cannot be assigned to private actors. Instead, private actors bear imperfect duties towards the protection and provision of human rights that leave discretion to the duty-bearer as to their adequate performance. Consequently, integrating private actors into the framework of binding international human rights law cannot necessarily constitute their good governance as the duties such law would assign to them lack the necessary justification in moral theory. Rather, soft-law approaches such as the UNGPs are in line with private actors' imperfect duties. From this thesis, the recommendation can thus be made that international lawyers ought to focus on the development of soft-law mechanisms that create transparency and aid the establishment of effective civil regulations. Such mechanisms limit the discretion that private actors have in performing their duties. In the digital domain, this need is particularly pressing as relatively little civil regulatory instruments exist. Recent controversies surrounding, for instance, the role of technological corporations in determining free speech and Facebook's role in the US elections necessitates instruments that effectively limit the discretion of these actors.

3.2. Recommendations to Corporate Actors

Corporate actors stand to benefit from their own good governance. As explained in Chapter 6 and 7 there is a good business case for socially sustainable behaviour by corporate agents, especially transnational ones. Moreover, good governance conceived as civil regulation within transnational civil societies allows for constructive debate concerning the responsibilities of corporate actors. Absent such deliberative structures corporate actors are increasingly susceptible to scandals and negative publicity regardless of both their legal and moral responsibilities in such cases. Increased transparency through multi-stakeholder initiatives benefits corporations directly by externalising the assessment of responsibilities to a group the corporate actor itself is part. As we saw in the iPhone case the responsibilities of Apple regarding the working conditions of individuals employed in their supply chain are indeterminate. In relation to the cyber realm corporations increasingly find themselves in positions in where they are confronted with the performance of public functions. The civil regulations constitutive of good governance instigate constructive deliberations concerning these responsibilities. Hence private actors have an incentive to participate in them beyond the business case. From this thesis, it can thus be recommended to private actors to join multi-stakeholder initiatives and increase transparency[196] to publicly commit to social sustainability and an increased determination of responsibility.

3.3 Recommendations to States

Section 5 of Chapter 7[197] discussed the role of states in strengthening the good governance of transnational private relationships. The recommendation distilled from this section might seem straightforward. However, taken together these recommendations strengthen good governance and extend the reach of transnational civil regulations such as multi-stakeholder initiatives. Their straightforwardness does not imply meaninglessness.

Firstly, it is recommended that states increase the efforts to implement national law internally and to pressure those states unwilling and assist those unable to do so in the international community. As concluded from the case studies many determinants to the achievement of social sustainability and

[196] One might argue that increased transparency increases the likelihood of scandals directed at the transparent corporations. Two responses should be made to this. Firstly, there is no evidence that this is actually the case as, for instance, exemplified by the absence of renewed scandals after the increased transparency of Nike and Levi's after scandals hit them (Doorey, 2011). Secondly, increased transparency aids public deliberation through information. Through the requirement of public reasoning corporations can inform the public of their trade-offs, the indeterminacies concerning their responsibilities, and resulting ethical dilemmas. Thereby the likelihood of scandals can actually decrease as they become part of the narrative concerned with realisation of social sustainability.

[197] See p. 229

the effects of transnational private relationships upon this endeavour remain internal to states. The negative effects of transnational private relationships can often be traced back to unwillingness or inability of states to adequately perform their duties. Unwillingness is exemplified, for instance, by the Chinese state's failure to effectively enforce their labour code or other states' unwillingness to enforce privacy protection as the latter non-enforcement enables their intelligence community to gather more information. Inability is, for instance, prominent in the digital domain where public actors lack the expertise to effectively regulate technical processes alongside problems associated with the time-consuming path from the development to implementation of law. Inability is, however, also present in relation to transnational supply chains where, for instance, a developing country is unable to conform to ILO norms due to its economic incapacity to provide for better wages.

Beyond the internal determinants to transnational private relationships' negative effects on social sustainability there are two ways in which states can strengthen and extend the reach of the transnational civil regulation constitutive of good governance. From the typology of good governance two recommendations can be distilled. Firstly, that states should require TNCs to engage in public reasoning. There are numerous ways to do this ranging from transparency requirements concerning business conduct that relates to social sustainability to requiring TNCs to join multi-stakeholder initiatives. Given the flexibility of TNCs indirect measures appear most effective. Such measures can be transparency requirements that increase the possibility of scandals and consequently motivate private actors to join transnational civil regulations. Similarly, comply or explain mechanisms present in many corporate governance codes can be extended to conduct relating to social sustainability and thereby require TNCs to motivate their conduct and specify their orientation. These measures strengthen the reach of transnational civil regulations such as multi-stakeholder initiatives by increasing the availability of information in transnational civil society as relevant governance level in determining good governance mechanisms.

The third recommendation for states lies in extending the reach of transnational civil regulations through alliances and subsidies. States have a prominent role in strengthening transnational civil relationships and multi-stakeholder initiatives in two ways. Firstly, new alliances with transnational civil actors should be sought to strengthen the regulatory power of the latter. One can think of strengthening the legal standing of civil society actors or delegating regulatory authority to transnational actors and work together with these actors to develop standards for corporate conduct. For instance, NGOs in the field of privacy protection or even hacking collectives can be incentivised by states to develop regulatory mechanisms by delegating regulatory power to them in new alliances. Secondly, states can through

monetary incentives strengthen transnational civil regulation both through the supply and demand side. Through the 'supply' side transnational civil actors should be funded to adequately perform their regulatory role such as audits and publication of results. At the 'demand' side states can incentivise TNCs to join transnational civil regulation by giving financial incentives through tax law.

3.4 Recommendations to NGOs

NGOs are arguably the most important actors in and comprise most of transnational civil society. Multi-stakeholder initiatives and other transnational civil regulations are led by NGOs whose governing bodies in general consist of representatives from multiple stakeholders, including corporations, unions, and activists. Therefore, NGOs have a particularly prominent role as the actors behind the development and implementation of the good governance of transnational private relationships. However, making specific recommendations here is difficult given the great diversity that exists in NGOs. This is the case primarily because the relatively ungoverned structure of transnational civil society allows for the freedom and creativity of transnational civil actors necessary to develop novel ways to regulate corporate actors. Moreover, in Chapter 7 it was argued that the diversity of multi-stakeholder initiatives does not lead to a race to the bottom of their regulatory standards. Instead in transnational civil society a convergence around internationally accepted norms based on the ILO conventions and human rights treaties can be witnessed. To strengthen good governance, it is recommended that these transnational actors widen the sphere of transnational deliberation. This can be done by the sharing of best practices between initiatives constitutive of good governance, educational efforts and training of third parties such as auditors, corporate employees, and civil servants. Especially in relation to the big data case a concerted effort by NGOs to develop multi-stakeholder initiatives and learn from the best practices from different fields is needed.

4. Future Research

The subject-matter of this thesis is broad and approachable from multiple perspective. This thesis thereby does not claim exhaustiveness. Instead from the onset it was explicated that the broadness of the subject-matter and theoretical approach limits its practical applicability. Thereby multiple avenues of future research remain open and are opened up by this thesis. At the end of the second section of this chapter it was already argued that this thesis offered a way to answer the question to what extent the good governance of transnational private relationships can be informed by a concern for

social sustainability. Consequently, future research is much welcomed that approaches this question from different perspectives to establish a robust body of literature directed at the integrative effort of achieving good governance. Beyond this general avenue of research three further avenues can be distilled from this thesis.

Firstly, the practice-independent conception of good governance requires further specification both concerning its content and its wide applicability. With regard to its content valuable research can be performed from disciplines ranging from law and theoretical economics, sociology and systems theory, to moral philosophy, international human rights law, and complexity theory. Each of these disciplines can contribute valuable insights to both the conceptualisations of practice-independent and practice-dependent good governance. Practice-independent good governance, moreover, rests on its wide applicability. This applicability should be tested through further case studies. The assumption that the conception of good governance proposed in Part I can be interpreted through, and applied to, a wide range of practices should be made more robust by considering additional case studies. Further research is needed that applies the practice-independent conception of good governance to different practices that represent different governance levels and involve different actors. Thereby the assumption this conception rests on can and should be further tested.

Secondly, the two cases of Part II cover diverging practices of transnational private relationships but not all wide-ranging ways in which these relationships affect social sustainability. More cases are necessary to further construct the good governance of transnational private relationships and the role of different actors. For instance, one can think of international tax issues and the related question of what constitutes good governance in cases where private actors can escape their duties to abide by national laws. Additionally, cases from the extractive sector can further inform conceptualising the specific ways in which transnational private relationships affect social sustainability. Similarly, corporations increasingly invest in sustainability goals[198] and the effects of such private actions on social sustainability require assessment.

Thirdly, great research has already been conducted in the field of global governance and private standards (Marx & Wouters, 2016; Marx et al., 2012). More research however remains to be done to systematically assess the working of transnational civil society, transnational civil regulations, and multi-stakeholder initiatives. The typology of practice-dependent good governance offered here is closely approximated by multi-stakeholder initiatives. This close approximation is primarily based on a theoretical conception of practice-independent good governance: more research is

[198] For instance, Mars recently announced a 1 billion dollar investment in establishing more sustainable supply chains, see http://www.mars.com/global/sustainable-in-a-generation.

required to assess the extent to which such multi-stakeholder initiatives contribute to social sustainability in practice in the middle- to long-term. Additionally, the different types of accountability and their effectiveness that good governance relies upon require further empirical research.

9 APPENDICES

- *BIBLIOGRAPHY*
- *NEDERLANDSE SAMENVATTING*
- *ACKNOWLEDGEMENTS*

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NEDERLANDSE SAMENVATTING

Transnationale private relaties spelen een steeds grotere rol in de levens van individuen en groepen. In tijden van ongekende globalisering, economische ontwikkeling, en functionele differentiatie vormen deze transnationale private relaties een macht om rekening mee te houden. Hoewel hun bijdrages positief kunnen zijn, en dat vaak zijn in termen van werkgelegenheid, economische ontwikkeling, en weerbaarheid door middel van innovaties hebben deze bijdragen vaak ernstige negatieve consequenties. Er is een noodzaak om tot goed bestuur van deze transnationale private relaties te komen: good governance[1] van transnationale private relaties. Dit proefschrift construeert het good governance van deze transnationale private relaties om tot sociale duurzaamheid te komen. Het concept good governance is steeds prominenter in verschillende beleidsdiscoursen en heeft daarmee een brede toepassing. Het is echter niet duidelijk wat het 'good' is dat het concept omschrijft. In dit proefschrift is de mogelijkheid onderzocht om dit 'good' te laten informeren door sociale duurzaamheid. De centrale onderzoeksvraag is dan ook als volgt geformuleerd:

- *In hoeverre kan het 'good governance' van transnationale private relaties worden geïnformeerd door sociale duurzaamheid.*

Het beantwoorden van deze onderzoeksvraag is opgedeeld in deelvragen die grofweg corresponderen met de drie delen van dit proefschrift. De eerste twee deelvragen van dit proefschrift betreffen de concepten die centraal staan: governance, good governance, en (sociale) duurzaamheid.

- *1.1 Wat zijn de dominante betekenissen en gebruiken van de concepten governance, good governance, en duurzaamheid binnen de disciplines en discourses relevant voor het vormgeven van het good governance van transnationale private relaties*

- *1.2 Op welke manier zouden deze concepten elkaar moeten informeren in het specificeren van de inhoud van good governance?*

[1] Twee van de kernconcepten in dit proefschrift zijn 'governance' en 'good governance'. Gebruikelijk is deze termen te vertalen als 'bestuur' en 'goed bestuur'. Voor deze Nederlandse samenvatting is echter gekozen de Engelse termen aan te houden. Niet vanwege een hang naar anglicismen maar omdat de termen 'bestuur' en 'goed bestuur' een connotatie hebben met het openbaar, publiek, bestuur. Dit proefschrift gaat echter over het goede bestuur van private relaties in een context waar het openbaar bestuur slechts beperkt invloed heeft en daarom zal hier worden gesproken over 'governance' en 'good governance'.

Na het inleidende **Hoofdstuk 1** beantwoord **Deel I** beantwoord deze vragen. **Hoofdstukken 2, 3,** en **4** omvatten de conceptuele analyse van governance, good governance, en (sociale) duurzaamheid. Gezamenlijk vormen ze een argument voor een specifieke conceptie van sociale duurzaamheid als normatieve grond van good governance. Dit argument culmineert in een praktijk-onafhankelijke conceptie van good governance. **Hoofdstuk 2** introduceerde governance als een beschrijvende conceptie van de veranderingen die het beleidsproces de afgelopen decennia heeft ondergaan. Het concept governance voegt een helikopterview toe aan de bestudering van beleidsprocessen door de integratie van verschillende perspectieven en actoren die hierbij betrokken zijn. De veranderingen die het concept duidt zijn de toegenomen horizontalisering van beleidsprocessen. In tegenstelling tot klassieke noties van de top-down ontwikkeling, implementatie, en handhaving van beleid zijn tegenwoordig een breder scala van zowel publieke als private actoren betrokken. Governance wordt dan ook wel omschreven als het maken van beleid binnen en buiten de staat en met of zonder politiek (Kazacigil 1998). De afgenomen relevantie van verticale bestuursstructuren beïnvloed drie fundamentele aspecten van beleidsvorming: haar legitimiteit, afdwingbaarheid, en aansprakelijkheid[2]. Deze vormen drie governance-problemen die relevant zijn voor het conceptualiseren van good governance. Zij vormen de procedurele component van good governance. Het is beargumenteerd dat voor governance om 'good' te zijn adequate responses moeten worden geformuleerd op deze drie problemen. Daarnaast werd beargumenteerd dat waaruit een adequaat antwoord bestaat afhankelijk is van de praktijk waar good governance voor geconstrueerd wordt.

Hoofdstukken 3 en 4 analyseren good governance en (sociale) duurzaamheid respectievelijk. In deze hoofdstukken wordt geargumenteerd dat good governance een normatieve en morele basis mist van het 'good' dat ze voorschrijft en dat een specifieke interpretatie van sociale duurzaamheid deze grond kan leveren. Hoofdstuk 3 omvat de analyse van het good governance concept zoals gebruikt in de dominante disciplines en discourses: internationale betrekkingen en ontwikkelingsstudies, bestuurskunde en bestuursrecht, en bedrijfskunde en 'corporate governance'. Deze analyse concludeerde dat good governance begrippen onduidelijke, output gerichte, en tegenstrijdige componenten bevatten. In het algemeen is het argument dat good governance een normatieve grond mist hetgeen haar prescriptieve en evaluerende functies ondermijnt. Een normatieve grond komt deze onduidelijkheden en contradicties te boven door het bepalen van een

[2] Aansprakelijkheid is hier gebruikt als vertaling van 'accountability' in plaats van het vaak gebruikte 'verantwoordelijkheid'. Dit proefschrift maakt een duidelijk onderscheidt tussen 'accountability' en 'responsibility' en deze termen zijn hier respectievelijk vertaalt als 'aansprakelijkheid' en 'verantwoordelijkheid'.

duidelijke standaard waarlangs governance geëvalueerd kan worden en beleid richting aan kan worden gegeven. Twee vereisten voor deze standaard zijn opgesteld: liberale neutraliteit en brede toepasbaarheid. Liberale neutraliteit betekent dat het proces waarmee deze normatieve grond is vastgesteld geen voorkeur moet hebben voor specifieke waarden en praktijken. De wijde toepasbaarheid is noodzakelijk gezien de zeer diverse beleidsgebieden waar good governance op wordt toegepast.

Hoofdstuk 4 bevat een argument voor deze normatieve grond op basis van sociale duurzaamheid geïnterpreteerd door de lens van mensenrechten. Zowel sociale duurzaamheid als mensenrechten zijn algemeen geaccepteerde en gedeelde normatieve doelen, in het speciaal in relatie tot beleidsprocessen. Daarnaast hebben beide concepten een sterke institutionele inbedding waaruit een liberale neutraliteit spreekt gezien instituten, staten, en volken met verschillende achtergronden en visies sociale duurzaamheid en mensenrechten onderschrijven. De conceptualisering van de normatieve grond van good governance in termen van sociale duurzaamheid en mensenrechten lost de tekortkomingen van good governance op. Omdat mensenrechten een duidelijke institutioneel en moreel karakter hebben vormen zij een brug tussen de noodzaak van een normatieve basis en praktische toepasbaarheid van good governance. Daarnaast baseert de voorgestelde conceptie van mensenrechten zich op de eenheid tussen recht en plicht en heeft daarmee een directe relatie tot het vormgeven van beleidsprocessen. Het onderscheid tussen de morele plichten die mensenrechten rechtvaardigen dient als eerste stap in het vaststellen van verantwoordelijkheid voor deze rechten. In andere woorden, door uit te gaan van de prioriteit van plichten en de morele component van mensenrechten kan een eerste stap worden gezet in het bepalen van verantwoordelijkheid voor rechten door te onderzoeken welke plichten aan welke actoren kunnen worden toegekend.

Tezamen vormen de hoofdstukken van **Deel 1** een praktijk-onafhankelijke conceptie van good governance. Praktijk-onafhankelijk houdt in dat de inhoud van de conceptie niet afhankelijk is van een specifieke praktijk waar het op toegepast wordt. Het onderscheid tussen een praktijk-onafhankelijke en afhankelijke conceptie van good governance schept ruimte voor de normatieve basis die huidige concepties missen. Wat good governance betekent in de praktijk is daarmee dus afhankelijk van de context, actoren, en de relaties van de praktijk waar het op toegepast wordt. Het is logisch dat wat good governance is voor transnationale private relaties verschilt van het good governance van openbaar bestuur. Het doel en de normatieve basis van good governance blijft echter dezelfde: sociale duurzaamheid gebaseerd op mensenrechten. Daarmee beantwoord **Deel 1** de eerste twee deelvragen.

De volgende drie deelvragen hebben betrekking op de context en praktijk van transnationale private relaties. De manieren waarop deze relaties opereren en welke positieve en negatieve bijdragen zij leveren staat hierin centraal:

- *2.1 Op welke manieren die relevant zijn van hun governance hebben transnationale private relaties zowel positieve en negatieve effecten op sociale duurzaamheid?*

- *2.2 Aan welke governance mechanismen zijn transnationale private relaties op dit moment onderhevig?*

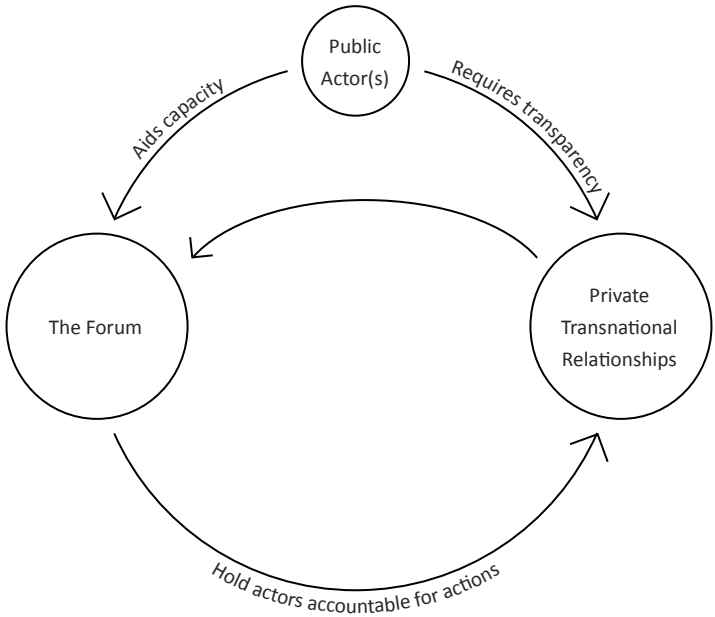
- *3.1 Hoe verhouden de bevindingen van de conceptuele analyses zich tot de praktijk van transnationale private relaties?*

Deel II van dit proefschrift beantwoord deze vragen middels twee casestudies en hun analyse en komt zo van een praktijk-onafhankelijke tot een praktijk-afhankelijke conceptie van good governance. Hoofdstuk *5* beantwoord vragen *2.1* en *2.2* en bestaat uit twee casestudies. Deze cases dienen als voorbeeld van de variëteit van transnationale private relaties en de manieren waarop deze sociale duurzaamheid beïnvloeden. De eerste case betreft de opkomst van big data analyse en de groeiende macht van de transnationale private relaties die deze data verzamelen en gebruiken. De tweede case betreft de productie van Apple's iPhone in Foxconn fabrieken in China als voorbeeld van transnationale productieketens. Vier conclusies van deze cases beantwoorden vragen *2.1* en *2.2.* Ten eerste, de conclusie dat transnationale corporaties (TNCs) zeer machtig zijn in de transnationale context en dat traditionele governance mechanismen hen niet effectief kunnen reguleren. Gezien de macht van TNCs zijn ze relevant als primaire subjecten in het conceptualiseren van praktijk-afhankelijk good governance. Ten tweede dragen transnationale private relaties op zowel positieve als negatieve manier bij aan sociale duurzaamheid. Transnationale private relaties ondersteunen sociale duurzaamheid door het verschaffen van werk, aanjagen van economische groei maar belemmeren het door middel van uitbuiting van arbeiders en onveilige arbeidsomstandigheden. Op eenzelfde manier dragen technologische innovaties en de transnationale private relaties die ze bezitten en exploiteren bij aan ziektepreventie, zorg, en de mogelijkheid van individuen en groepen om te communiceren terwijl deze tegelijkertijd de privélevens van deze individuen en groepen bedreigen door de grootschalige vergaring van persoonlijk data en sociale manipulatie middels technologie. Ten derde zijn de verschillende manieren waarop transnationale private relaties op dit moment onderworpen zijn aan regels en toezicht ondoorzichtig en zijn verschillende governance-rollen verspreid over meerdere actoren. Ten vierde zijn in deze multipolaire transnationale context de verantwoordelijkheden van verschillende actoren onzeker omdat verschillende publieke en private actoren op basis van legitimiteit opereren. De combinatie van legitimiteit en negatieve effecten zorgt voor onzekerheid in het vaststellen van verantwoordelijkheden om tot sociale duurzaamheid te komen.

In **Hoofdstuk 6** wordt het antwoord gegeven op deelvraag *3.1* door de analyse van de cases in licht van de praktijk-onafhankelijke conceptie van good governance. Deze conceptie van good governance heeft, zoals gezegd, twee componenten: een normatieve en procedurele. De normatieve component specificeert de conceptie van sociale duurzaamheid die ten grondslag licht aan good governance. De analyse van de cases in het licht van deze component omhelst het vaststellen welke morele plichten private actoren hebben om mensenrechten te beschermen en vervullen. Deze analyse is noodzakelijk om legitieme mechanismen te ontwikkelen die good governance realiseren. Deze analyse concludeert dat private actoren in het algemeen, en TNCs specifiek, geen perfecte morele plichten hebben en dat deze daarmee niet juridisch afdwingbaar zijn gezien de status van mensenrechten als rechten die we hebben bij gratie van ons mens-zijn. TNCs hebben imperfecte morele mensenrechten plichten en deze vormen onvoldoende grond voor het rechtvaardigen van positieve juridische plichten om mensenrechten te beschermen en vervullen. Deze imperfecte morele plichten laten ruimte voor de plichthouder om vast te stellen wat een adequate uitvoering van deze plicht is. De integratie van private actors in het internationale mensenrecht constitueert daarmee geen good governance. Good governance van transnationale private relaties behoeft softe mechanismen die de ruimte van private actors respecteren in het vervullen van hun morele plichten. De procedurele component bestond uit het formuleren van adequate antwoorden op de problemen van legitimiteit, afdwingbaarheid, en aansprakelijkheid van governance actoren en mechanismen. Het werd betoogd dat legitimiteit in relatie tot transnationale private relaties en de transnationale context niet noodzakelijk een probleem is gezien de legitieme claims die verschillende transnationale actoren maken. Echter versterken mechanismen die alle belanghebbende integreren in het governance proces de legitimiteit. Op een soortgelijke manier is het probleem van afdwingbaarheid in de transnationale context niet noodzakelijk een probleem door de afwezigheid van overkoepelend publiek bestuur met de capaciteit om regels af te dwingen. Daarnaast leiden afdwingbare mechanismen door actoren met deze capaciteit, i.e. staten en internationale publieke instituten, tot negatieve effecten in het realiseren van sociale duurzaamheid. Deze conclusies versterken de noodzaak van softe mechanismen als basis van good governance in de transnationale context. In relatie tot het probleem van aansprakelijkheid concludeert hoofdstuk 6 dat dit het centrale defect is van de huidige transnationale governance constellatie. In deze transnationale context maken de actoren waaruit transnationale private relaties bestaan trade-offs die effect hebben op de realisatie van sociale duurzaamheid. Het is beargumenteerd dat good governance betrekking heeft op de manier waarop deze trade-offs worden gemaakt. Specifiek zouden de actoren die deze trade-offs maken, e.g. TNCs, aansprakelijk moeten zijn voor hun uitkomsten en het proces waarin ze gemaakt worden.

De laatste deelvraag betreft het conceptualiseren van het good governance van transnationale private relaties:

- *3.2 Door middel van welke mechanismen kan het good governance van transnationale private relaties tot de realisatie van sociale duurzaamheid worden gerealiseerd?*



Figuur 1 *Good governance in de transnationale context*

Deel III van dit proefschrift behandeld deze vraag in **Hoofdstuk 7.** Dit hoofdstuk bevat de conceptualisatie van praktijk-afhankelijke good governance van transnationale private relaties. Uit deze conceptie is een typologie gedistilleerd (zie figuur 1). Deze typologie geeft richting aan het ontwikkelingen van good governance mechanismen. Daarnaast is een dichte benadering van deze typologie gelokaliseerd in de transnationale context in de vorm van multi-stakeholder initiatieven. De praktijk-afhankelijke conceptie van good governance vormt tezamen met de typologie een kader waarbinnen mechanismen kunnen worden ontwikkeld en geïmplementeerd die het good governance van transnationale private relaties vormen. De rollen van de meest prominente governance actoren worden gespecificeerd in dit kader en rust op twee centrale elementen: transparantie en verantwoordelijkheid. Good governance vereist de aansprakelijkheid van private actors, met name TNCs, voor de consequenties van hun trade-offs die betrekking hebben op

de realisatie van sociale duurzaamheid en de manier waarop deze worden gemaakt. Aansprakelijkheid is een relatie tussen een actor en een forum (Bovens 2007). Daarmee vereist aansprakelijkheid het bestaan van een forum met de capaciteit om een oordeel te geven over de gedragingen van actoren en deze hiervoor aansprakelijk te houden. De beschikbaarheid van informatie is noodzakelijk in de realisatie van good governance omdat het een forum in gelegenheid brengt een oordeel te vellen. Daarnaast is het voor dit relationele concept van aansprakelijkheid niet noodzakelijk dat een actor verantwoordelijk wordt gehouden om vast te stellen dat deze actor ook aansprakelijk is in bredere zin. De vraag of een actor verantwoordelijk wordt gehouden staat los van de vraag of een actor aansprakelijk is. Zodoende kunnen binnen het geformuleerde kader verschillende mechanismen worden ontwikkeld die voorbij traditionele top-down sanctionering gaan. In de transnationale context is met name aansprakelijkheid op basis van reputatie relevant in het realiseren van good governance. In de transnationale context is aansprakelijkheid geholpen door transparantie. Transparantie wordt hier gezien als deelnemen aan 'public reasoning'. Dit betekent dat actoren redenen geven voor hun acties en het uiteindelijke doel van de actie specificeren.

In de transnationale context is de transnationale 'civil society' het geschikte forum om tot good governance te komen. Om de aansprakelijkheid van TNCs te realiseren kunnen de actoren die deze transnationale 'civil society' opmaken de redenen voor en oriëntatie van gedragingen van TNCs beoordelen en hen verantwoordelijk houden door middel van softe en op reputatie gebaseerde mechanismen. In de transnationale context vormen multi-stakeholder initiatieven een dichte benadering van dit proces. Deze initiatieven bestaan uit platformen die de aansprakelijkheid van private actoren vormgeven door deze actoren te verplichten standaarden te onderschrijven en zich aan monitoring te onderwerpen. Door dit proces vergroten multi-stakeholder initiatieven de transparantie van private actoren en constitueren ze duidelijke lijnen van aansprakelijkheid door het openbaar maken van standaarden en de uitkomsten van controles. De uitdaging is om good governance robuuster te maken ligt in het vergroten van het bereik en impact van multi-stakeholder initiatieven. Hierin hebben staten een prominente rol te spelen door het verplichte van TNCs en andere transnationale private actors deel te nemen aan 'public reasoning' en zo good governance mogelijk te maken. **Hoofdstuk 8** vormt de conclusies en bevat naast een overzicht van het centrale argument verschillende aanbevelingen aan prominente transnationale governance actoren: internationale juristen, staten, TNCs, en NGOs.

Tezamen beantwoorden de sub-vragen de centrale onderzoeksvraag:

- *In hoeverre kan het 'good governance' van transnationale private relaties worden geïnformeerd door sociale duurzaamheid*

In het algemeen van worden geconcludeerd dat de concepten die dominant zijn in het formuleren van governance doelen, i.e. good governance en sociale duurzaamheid, vaag en onduidelijk zijn. In reactie hierop zijn deze concepten hier geherinterpreteerd en complementair aan elkaar gemaakt. Uiteindelijk argumenteert dit proefschrift dat sociale duurzaamheid geïnterpreteerd door middel van mensenrechten good governance informeert door haar normatieve gronden te leveren. In de transnationale context en toegepast op transnationale private relaties benaderen multi-stakeholder initiatieven het good governance van transnationale private relaties tot de realisatie van sociale duurzaamheid.

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